

**THE VIOLENCE OF LANGUAGE:
CONTEMPORARY HATE SPEECH AND THE SUITABILITY
OF LEGAL MEASURES REGULATING HATE SPEECH IN
SOUTH AFRICA.**

A thesis submitted in fulfilment of the requirements of the degree of

MASTER OF LAWS

of

RHODES UNIVERSITY

by

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FEBRUARY 2013

ABSTRACT

This thesis unites law and social science so as to give a comprehensive account of the phenomenon of racial hate speech in South Africa as an obstacle to transformation. Hate speech is presented as a form of violent language and an affront to the constitutional rights of freedom of speech, equality and dignity. To establish the nature of hate speech, the fluid quality of language is explored so as to show how language can be manipulated, on the one hand, as a means to harm, and employed, on the other hand, as a tool to heal and reconcile. This double gesture is illustrated through the South African linguistic experience of past hate and segregation and the current transformation agenda. It is through this prism that hate speech regulation is discussed as an uneasy fit in a country where freedom of expression is constitutionally protected and where language plays an important role in bringing about reconciliation, and yet words are still being employed to divide and dehumanise. This reality necessitates a clearly articulated stance on the regulation of language. The thesis accordingly interrogates the current legal standards in relation to hate speech with reference to international law that binds South Africa and the constitutional standard set for the regulation of language and the prohibition of hate speech. Thereafter, the current and proposed legislative prohibitions on hate speech, the residual common law provisions governing expression and the regulation of language in the media are outlined and analysed. These legal frameworks are explored in terms of their content and their application in various fora so as to ascertain what the South African approach to hate speech prohibition is, whether it is consistent and, ultimately if it is indeed suitable to the South African experience and the realities of language. This thesis concludes that contemporary hate speech measures lack a coherent understanding of what hate speech entails and a general inconsistency in approach as well as application is found in the treatment of hate speech complaints in South Africa. This is explained through the fallibility of language as a medium to regulate expression and solutions are offered to not only taper current and proposed hate speech provisions but to also consider alternative forms of resolving hate speech complaints.

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ACKNOWLEDGEMENTS

I would like to extend my heartfelt thanks to my mentor and supervisor, Dr Rósaan Krüger: your wisdom and encouragement have guided me more than I can possibly express. Thank you for your tireless commitment to this thesis and for your understanding, precision and inquiring mind that has forced me to take this project further than I had envisaged. I have truly learned a great deal from working with you and I thank you for your time and wisdom that you have so generously shared with me.

To Matthew Burke: thank you for your insight into the world of language and for sharing your astounding grasp of it with me. Thank you for inspiring me and for your constant support.

I would also like to thank all those at Rhodes University who have played a part in shaping this thesis. In particular, I would like to thank the Law Faculty for their encouragement and assistance and Professor Mike Marais of the English Department for his faith and generosity in sharing his work and knowledge with me.

Finally, I would like to thank my family for believing in this project and for supporting me emotionally, as well as financially, in this endeavour and throughout all my years of legal study. I deeply appreciate the opportunity I have been given to research and contribute to this field and I sincerely hope that this thesis is a true reflection of the strong foundation Rhodes University has given me and serves as an indication of the lawyer I hope to become.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

Hate speech is a term used to denote expression that targets groups and isolates them for discrimination, denigration, abuse, vilification and “similar evilly-tainted emotions,” solely based on their socially assigned markers of race, colour, descent or religion.¹ The nature of hate speech is that it goes beyond insult and is distinguished by three main indicators: it identifies and targets a traditionally oppressed group; it attributes inferiority to the group; and it employs persecutory, hateful and degrading content directed at the group.² The effect of this three-pronged assault is compounded by the fact that hate speech is often accompanied by violence, psychological stigma and trauma; all as a result of a single unchangeable feature of one’s identity that is singled out for derision and odium.³ It is for this reason that hate speech is not only socially denounced but also legally condemned in many countries that prize the rights to equality and human dignity. However, the zeal that fuels society’s denouncement of hate speech is meaningless if the concept of hate speech is not faithfully conveyed. What is more, when legal systems conflate hate speech with notions of insult or discrimination, they cannot adequately protect against hate speech, or put measures in place that are able to address, resolve and deter instances of hate speech, let alone provide the means to achieve national reconciliation and transformation.⁴

¹ “Hate speech” is notoriously difficult to delineate and the above definition exists as an amalgamation of the explanation given by Slagle in M Slagle “An Ethical Exploration of Free Speech and the Problem of Hate Speech” (2009) 24 *Journal of Mass Media Ethics* 238 and Louw “Introduction” in J Duncan (ed) *Between Speech and Silence: Hate Speech, Pornography and the New South Africa* (1995) Freedom of Expression Institute and IDASA: Cape Town and Braamfontein.

² M Matsuda in E Neisser “Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence” (1994) 5 *Constitutional Law Journal* 103 at 104-105.

³ Neisser 1994 *Constitutional Law Journal* 108-109.

⁴ As is the South African mandate, espoused in the Preamble of the Constitution of the Republic of South Africa, 1996.

There is a popular misconstruing of the term to include all manner of insensitive language under the umbrella of “hate speech” but hate speech is in fact something different. Hate speech goes beyond unfavourable sentiment and aversion and has a much wider effect on the individual targeted as well as on society at large. The “dynamics of hating”⁵ are to such an extent that we do not hate as individuals but rather as part of a larger group,⁶ injuring whole racial and ethnic groups, rather than individual members in isolated events. As a volatile and irrational emotion, hatred can be crafted to design, inflict and influence aggression,⁷ creating a climate ripe for violence.⁸ This aggressive *milieu* is dangerous as it is founded on persuading people through raw emotion rather than reasoned argument.⁹ It is thus a carefully engineered process of persuasion that unites people with shared grievances against a common enemy, drawing on their pain and anger to blame a particular group for misfortune and ill-will.¹⁰ In targeting a particular group, emotions are being fuelled and hate is produced, generating hate speech in turn.¹¹ Therefore, what is encapsulated in the term “hate speech,” as opposed to mere offensive words, is the dissemination of hate to harmful,¹² even violent, ends, where hate speech becomes a “symbolic code” for violence.¹³

While the prejudice that proliferates as a result of hate speech based on external markers, such as race or sex, is signalled as the sole criterion for derision, racism or sexism are not to be conflated with hate speech either.¹⁴ Racism, like sexism, is a bias and, though at the root of discrimination, it is not necessarily a product of hate but more likely the result of ignorance or favouritism.¹⁵ Hate speech may encompass racist or sexist designs but there is an element of harm and threat that is present in instances of hate speech that is lacking in mere discrimination in denying benefits or opportunities or prejudice.¹⁶ It is therefore not mere offense, annoyance, insult nor discrimination that the term “hate speech” encapsulates. It is,

⁵ S Opatow and SI McClelland “The Intensification of Hating: A Theory” (2007) 20 *Social Justice Research* 84.

⁶ D Moss (ed) *Introduction: Hating in the First Person Plural: Psychoanalytic Essays on Racism, Homophobia, Misogyny and Terror* (2003) Other Press: New York.

⁷ DE Whillock “Symbolism and the Representation of Hate in Visual Discourse” in Whillock and Slayden *Hate Speech* 136.

⁸ JK Muir “Hating for Life: Rhetorical Extremism and Abortion Clinic Violence” in Whillock and Slayden *Hate Speech* 178.

⁹ RK Whillock “The Use of Hate as a Stratagem for Achieving Political and Social Goals” in Whillock and Slayden *Hate Speech* 32.

¹⁰ *Ibid.*

¹¹ DT Goldberg “Afterword: Hate, or Power?” in Whillock and Slayden *Hate Speech* 269.

¹² See 4.3.2.1 on the effects of the harm in hate speech.

¹³ Whillock in Whillock and Slayden *Hate Speech* 32.

¹⁴ DT Goldberg “Hate, or Power?” in RK Whillock and D Slayden (eds) *Hate Speech* (1995) 268.

¹⁵ Goldberg in Whillock and Slayden *Hate Speech* 269.

¹⁶ *Ibid.*

rather, the idea of spreading unrestrained hatred in order to isolate a target group, totally degrade them, terrorise them and diminish their humanity that society and the law must deem unacceptable.

As explored in an earlier paragraph, it is the dynamics of hating in a group and infecting others that is a chief concern in outlawing hate speech. It is with this in mind that we fear the spreading of hate as a medium for propaganda. Hate can be wielded as an effective tool as it persists and reproduces,¹⁷ converting one dissident individual's sentiments into an angry and hateful mob. The cycle of hate is perpetuated through the fact that hate is learned and imitated through reliance on cultural and historic stereotypes.¹⁸ Racial hate is thus socially acquired with discourse as the primary vessel for its dissemination and reproduction.¹⁹ Ironically, the concept of race is a social marker and not a scientific reality,²⁰ making hatred based on race alone a purely superficial and arbitrary form of hate, yet it has destroyed societies since time immemorial. Hence, protections against racist hate speech are necessary for a meaningful commitment to human dignity and equality in a democratic state. The very fact that the term "hate speech" exists in the contemporary vernacular is testament to the realisation of the fact that there is a deep moral issue with spreading such hate in everyday speech and of the need to differentiate between lesser forms of insult or hurtful messages and hate speech. The very use of the term "hate speech," as opposed to mere "speech," is a conceptual rejection of messages of odium and abhorrence for the damage that it ultimately inflicts. The harm caused by hate speech is thus that target groups are denied their basic human dignity and the right to be treated equally that results in either physical, psychological or another tangible form of disadvantage.²¹ Victims are debased, excluded, dehumanised and ultimately silenced by the fact that their import and worth is no longer acknowledged.²² It is

¹⁷ Whillock in Whillock and Slayden *Hate Speech* 33.

¹⁸ G Baines "Racist Hate Speech in South Africa's Fragile Democracy: the Case of Ngema's 'AmaNdiya'" in M Drewett and M Cloonan (eds) *Popular Music Censorship in Africa* (2006) 63; Whillock in Whillock and Slayden *Hate Speech* 33-36.

¹⁹ TA Van Wijk "Elite Discourse and the Reproduction of Racism" in Whillock and Slayden *Hate Speech* 3.

²⁰ A Smedley and BD Smedley "Race as Biology Is Fiction, Racism as a Social Problem Is Real – Anthropological and Historical Perspectives on the Social Construction of Race" (January 2005) Vol 60 No1 *American Psychologist* 16.

²¹ Van Wyk includes physical violence, financial and emotional harm in her assessment of the term. C Van Wyk "Hate Speech in South Africa" The XV1th Congress of the International Academy of Comparative Law, Brisbane, 14-20 July 2002. Accessed on 14 March 2012 at: <http://www.stopracism.ca/content/hate-speech-south-africa>. See 4.3.2.1 for a further discussion on the harm cause by hate speech.

²² Neisser 1994 *Constitutional Law Journal* 109-110; See N Haslam "Dehumanization: An Integrative Review" (2006) 10.3 *Personality and Social Psychology Review* 252 generally on hate as a force for dehumanisation; See S Opatow and SI McClelland "The Intensification of Hating: A Theory" (2007) 20 *Social Justice Research* 84 on the dynamics of group hating.

this degradation that cannot be tolerated in an open and democratic society. Moreover, any contemporary penchant for political correctness has not diminished hate speech discourse nor the proliferation of it;²³ rather, it has only driven it underground, relegating it to the realm of hushed tones, double-entendres and the creation of endless new racial slurs.²⁴

With the rise of human rights discourse in the latter half of the twentieth century, there has been a strong move worldwide for countries to distance themselves from past discrimination and to move towards more equal societies, fluent in the language of fundamental rights and not propagators of violence and hate. Damaging and hateful language flies in the face of the right to free expression in a democratic society and it is a flagrant abuse of this right.²⁵ The continued importance and relevance of guarding against hate speech cannot be overstated given the global War on Terror which is, in essence, premised on animosity and ill will between races and religion. Considerations of hate speech and its propagation are extremely relevant, especially given the rise of the age of technology and its offshoot, the “viral age.”²⁶ We find ourselves in an era where information and ideas can be disseminated at unprecedented speeds to countless recipients, allowing hate messages reach global and immeasurable scales. Now, not only can a person’s hate be widely dispersed but it can also be fed by unlimited and uncensored audio, video and text uploaded to public spaces within seconds and accessed just as instantaneously.

Hate speech is no stranger in the South African experience and is accordingly provided no legal safe harbour, given the pivotal role the Constitution²⁷ plays in reshaping South African society from the horror of the apartheid regime and the legacy of racial hatred and inequality that colonialism left in its wake. South Africa has borne witness to how the use, or rather abuse, of language can be implemented to design and uphold racial oppression and segregation. The Constitution now demands a polar shift towards language that is

²³ Editor’s Introduction to Whillock “Symbolism and the Representation of Hate in Visual Discourse” in Whillock and Slayden *Hate Speech* 122.

²⁴ On a personal note, I overheard one of the most outrageous instances of creating new racial slurs to attempt to mask racial speech in early 2012 with a young white woman using the term “marmites” in a misguided hope of surreptitiously disguising the fact that she was speaking about black people.

²⁵ See 4.3.2 on why the South African approach rejects hate speech as a manifestation of free expression and how hate speech is outlawed in the Constitution.

²⁶ Z Zewei “Racial and Religious Hate Speech in Singapore: Management, Democracy and the Victim’s Perspective” (2009) 27 *Singaporean Law Review* 13 at 13. Zewei identifies the rise of fundamentalist Islam and the technology age as relevant for the multicultural nation of Singapore and its stance on hate speech, yet these two considerations can also be said to be globally relevant, given the War on Terror and the facility and ease of potential “techno-terrorism.”

²⁷ The Constitution of the Republic of South Africa, 1996. (“The Constitution,” unless otherwise indicated.)

reconciliatory and cognisant of human rights, in sharp contrast to a past tainted and characterised by racially abusive, violent and oppressive discourse.²⁸ There is a considerable tension that emerges in how language is meant to be used and how it is has historically been employed, in that racist hate speech must now be rejected in favour of that which heals and reunites. What is therefore relevant is how the country now protects against language such as hate speech and to what extent the legal measures are relevant and appropriate to the national context and experience.

1.2 Research Question

This thesis seeks to answer the pertinent question: “Are the legal responses to hate speech in South Africa suitable to our context, given the historical implication of language in violence, and language’s reconciliatory use post-1994?”

1.3 Scope of Research

The title of this thesis is “The violence of language: contemporary hate speech and the suitability of legal measures regulating hate speech in South Africa.” It considers the socio-legal phenomenon of racial hate speech against the background of the South African Constitution²⁹ and the legal prohibition of hate speech flowing from the Constitution. It is true that hate and hate speech manifest in various other agendas, such as homophobic hatred and oppression, which is deeply problematic in this country and globally but this thesis is confined to an analysis of racial hate speech only, given the central historical entrenchment of race and racial identity in this country. The South African experience presents a unique social

²⁸ A survey of South African newspaper headlines in 2012-2013 demonstrate that racial slurs and hate speech are still a part of the South African vernacular. This list is by no means comprehensive, but it gives an indication of the problem that persists and the reluctance to transform that is still very much present in South Africa. IOL “Woman jailed for racist slur at gym – report” (9 March 2012) *IOL News*; L Manning “SA Model’s racist tweets go global” (7 May 2012) *Pretoria News*; R Dixon “Tweets recall South Africa’s shameful past” (9 May 2012) *Sydney Morning Herald*; News24 “Man in tears after boss calls him ‘a baboon’” *News24*; News24 “Expats vent racist outrage over Mandela” (27 June 2012) *News24*; SAPA “Magistrate drops baboon appeal” (11 September 2012) *Times Live*; PTI “South African teacher in racism row for remarks over Hindu thread” (14 October 2013) *Times of India*; SAPA “DA Youth lay complaints against SASCO for ‘they must die like cockroaches!!!’ tweet” (5 November 2012) *Times Live*; L Gedye “Is South African rugby racist?” (22 November 2012) *Mail & Guardian*; L Nthongoa “South Africa is still too black and white to see grey” (30 January 2013) *Times Live*.

²⁹ The Constitution of the Republic of South Africa, 1996.

climate that provoked and entrenched racial separation and hatred, which justifies a consideration thereof.

An analysis of racial hate speech regulation requires an examination of the nature of hate speech as a social and legal problem, and consequently, the responses to hate speech in the law and the implementation of these provisions. Examining the nature of hate speech in South Africa will necessitate considerations of socio-linguistics, philosophy and politics, so as to give a comprehensive as well as uncharted³⁰ and novel perspective on this topical and important area of law. In doing so, it will enable a better understanding of hate speech, which is vital to understanding and evaluating legal responses to hate speech prevalent and to determine whether they are adequate or not. This thesis will seek to investigate how the law attempts to provide a much-needed balance between the social phenomenon of hate and the South African linguistic experience.

An exposition of the use of language as a tool of violence will be used as foundational base. This framework will then be exemplified through the South African experience of the language in apartheid South Africa. Juxtaposed with the negotiated revolution and the subsequent reconciliatory dialogue mandated after 1994, the dual role language now occupies in South African society will be showcased. This conflicting dichotomy will be used as the requirement hate speech provisions need to consider and meet so as to be viable and suitable legal solutions for a deep-rooted and systemic problem such as hate speech.

Accordingly, the provisions in the Constitution, the legislation, the media industry Codes of Conduct and the common law will each be explored and evaluated for their suitability to the South African context and international law stipulations on the subject. Consistence in approach in the various legal framework consulted will be of particular significance in determining whether a standard approach to hate speech exists in South African law.

³⁰ Within the South African sphere of legal writing, there has been no link established between the language and violence in fueling apartheid through hate speech. Database searches on HeinOnline, WesLaw, ISAP, SabinetLaw, SAE Publications have been consulted in this regard, as well as Current and Complete Research. The nexus between language and violence has been established in the social sciences and explored and many writers have gone a step further to link language to atrocities and genocide, such as Steiner to the Holocaust (G Steiner *Language and Silence – Essays 1958-1966* (1967) Faber and Faber: London) and Donohue to Rwanda (WA Donohue “The Identity Trap: The Language of Genocide” (2012) 31 *Journal of Language and Social Psychology* 13). At the start of writing this thesis, I could find no attempt to link hateful and violent language to apartheid and to fostering a tradition of hate speech in this country in any discipline.

This work will not rehash the timeworn international jurisprudential debate on whether hate speech regulation should be banned as it has been widely accepted in South Africa that hate speech regulation is necessary,³¹ with the provisions articulated in section 16(2) of the Constitution. What this thesis will rather scrutinize is how our current and proposed measures work, or fail to work, in our unique social, political and linguistic context.

1.4 Structure and Methodology

As an introduction, Chapter 1 is an exposition of hate speech as a concept and the relevance of its regulation in South Africa. Accordingly, the research question that underlies this thesis is set out and the parameters are established for the scope this enquiry will take.

Chapter 2 is key in laying the theoretical foundation of this thesis in law and language. It is an exploration into hate speech as a socio-linguistic phenomenon that the law must contend with. As such, hate speech is defined as violent language, in consonance with contemporary writing on the power of language. The ability of language to convey much more than mere names but messages enables it to play an active role in denigrating and even dehumanising. This is how hate speech harms individuals as well as groups in society and why legal measures are needed to curb certain expression. The South African experience is depicted as a society of institutionalised racism, violence, division and hate speech during apartheid that is at odds with the contemporary use of language as a means of reconciliation and healing. As such, the importance of appropriate hate speech provisions in South African law is necessary.

Chapter 3 canvasses the international norms on hate speech and the various covenants that bind South Africa to develop as a nation committed to human dignity and equality. This overarching standard is the measure with which to determine the integrity of South African hate speech provisions.

Chapter 4 sets out the constitutional stance, guided by pertinent case law, on hate speech as an affront to the right to free expression, human dignity and equality and the respective measures in place to safeguard against the ills hate speech imports into society.

³¹ L Johannessen “A Critical View of the Constitutional Hate Speech Provision” (1997) 13 *SAJHR* 135 at 135.

Chapter 5 explores the various subsidiary statutes and proposed legislation that fall within the ambit of hate speech prohibition, and the jurisprudence that flows from these measures.

Chapter 6 marks a deviation from formal law and case law to the sphere of the media industry and the codes of conduct that govern this realm insofar as hate speech is concerned. The framework of the Broadcasting Codes and the Press Code and the complaints of hate speech that are adjudicated upon provide a useful marker as to the expanse of regulations needed to regulate hate speech in South Africa as well as the varying approaches taken in the formal court structures and the informal tribunals.

Chapter 7 examines the longstanding common law protections against violent, harmful and hateful language and, in particular, the relation these provisions have to contemporary hate speech measures. The pertinent question as to whether there is any duplication in the law is addressed and explored.

Chapter 8 ties the preceding enquiries together. The various legal frameworks that govern hate speech in South Africa as discussed in Chapters 3-7 are assessed for their efficacy and suitability to the South African experience, with regard to the nature of language as laid out in Chapter 2. This analysis serves to determine whether there is a consistent approach to hate speech in South Africa and whether it is suitable. Practical and theoretical hurdles to language regulation are also explored so as to give a comprehensive of all the challenges facing the prohibition of hate speech in South Africa.

In conclusion, Chapter 9 demonstrates the lack in a clear and consistent approach in South African hate speech prohibition. Furthermore, certain current and proposed legislative measures indicate a fundamental misunderstanding of the nature of hate speech and provide broad and ambiguous measures that severely curtail free expression that extend beyond the bounds of acceptable hate speech regulation.

CHAPTER 2

THE DICHOTOMY OF LANGUAGE AS A CHALLENGE FOR HATE SPEECH PROVISIONS

2.1 Introduction

This chapter explores the nature of language as a powerful and malleable force that shapes human behaviour and relations. As such, the use and abuse of language to violent ends has been an effective tool in propaganda against identifiable groups in society and in genocides. In the local context, the discourse of hate and the violent language of apartheid is juxtaposed with the subsequent employment of language to reconcile and affirm democracy post-1994. The constitutionally mandated transformation process therefore presents a challenge for how language is perceived and used in South Africa since 1994: what was once used to hurt, must now be used to heal. This dual quality that marks the South African linguistic experience creates tension in how expression is to be used and regulated in the new dispensation, as well as how it can justifiably be limited. How this reinvention of the use of language has been achieved, given the inherent clash between promoting free expression and curtailing hateful expression in South Africa, is what guides this study.

2.2 The Malleability of Language

“If thought corrupts language, language can also corrupt thought.”³²

At the risk of over-citing this truism to the point of cliché, Orwell’s prophetic postulation in his landmark essay, “Politics and the English Language,” still never ceases to ring true. In 1946, he gave a thoughtful, albeit scathing, account of how the English language has become characterised by carelessness and vagueness and as such, has been wielded as a means of indoctrination and political subterfuge. Orwell states how the political language in Germany,

³² G Orwell “Politics and the English Language” (1946) eBook published by University of Adelaide in 2005. Accessed on 28 May 2012 at: <http://ebooks.adelaide.edu.au/o/orwell/george/o79p/>

Russia and the United States has bred mindless followers, thus permitting the atrocities perpetrated in these countries.³³ Orwell accounts for this in his statement above, which speaks to the inherent nature of language and its propensity toward existing as a malleable implement to further our own nefarious ends on a simple individual level, as well as on a state-wide scale. Thus, the power of language is considerable in shaping individual and societal conscience to do unspeakable wrongs that may seem morally reprehensible at first, but with carefully worded persuasion, human morality can be corrupted. This is where violence ensues.

Orwell's hypothesis proves itself over and over due to the fact that language does not simply denote or label but it constructs and attaches values and perceptions to that which it describes.³⁴ The school of thought premised on the works of French linguist, Ferdinand de Saussure, believes that it would be amiss, even insufficient, to think of language being mere nomenclature.³⁵ They write that a linguistic sign (the letters and sounds combined to make the word) does not link the thing with its name, but rather with a concept.³⁶ The linguistic sign, in Saussurean terms, is therefore utterly random when compared to the mental image it conjures.³⁷ It is, rather, this impression that encloses the meaning of the word. As a result, Saussurean philosophy explains commonplace ambiguities such as heteronyms, where a word such as "record," can be used as both a noun and verb, sharing identical spelling yet divergent meaning and pronunciation. Conversely, it also accounts for the fact that words sharing similar meaning do not share comparable spelling or phonetics from one language to another; for instance, "potlood," "crayon," "lápiz" and "pencil" all signify an implement for writing or drawing made of graphite, yet these words could not have more dissimilar orthography. A shared meaning, or "common logic,"³⁸ unites the implication known by the individual with the wider, societal understanding of concepts through the words we employ in speech or writing. It is this shared appreciation that unites the arbitrariness and allows us to be mutually

³³ *Ibid.*

³⁴ M Marais "Violence, Postcolonial Fiction, and the Limits of Sympathy" (Spring 2011) 43.1 *Studies in the Novel* 94 at 96.

³⁵ S Weber "Saussure and the Apparition of language: The Critical Perspective" (Oct 1976) 91.5 *Modern Literature Notes* 913 at 919.

³⁶ F de Saussure *Course in General Linguistics* (1959) 66 in S Weber "Saussure and the Apparition of language: The Critical Perspective" (Oct 1976) 91.5 *Modern Literature Notes* 913 at 919.

³⁷ Weber 1976 *Modern Literature Notes* 919.

³⁸ M Läähtenmäki "On Dynamics and Stability: Saussure, Voloshinov and Bakhtin" in M Läähtenmäki and H Dufva (eds) *Dialogues on Bakhtin: Interdisciplinary Readings* (1998) 64.

intelligible through a shared single speaking conscious,³⁹ or even across into other languages through translation.⁴⁰

If the wider understanding of a word only relies on the general meaning assigned to it by speakers, this presupposes that one can revise and alter meanings over time. This natural phenomenon of language can be exemplified simply using the contemporary understandings of the word “sick.” Modern and popular culture usage of this adjective is understood to connote a positive or awe-inspiring experience, rather than simply its traditional association with ill-health only. For instance, death defying stunts, intricate choreography or a powerful vocal performance could all be described as “sick” in modern discourse understood with a positive and admiring connotation. The adjective additionally lends itself to a description of an act or mental disposal to the cruel, deranged and even perverse in the context of a “sick joke” or “sick mind,” respectively. Another use of the term exists as a synonym to feeling nauseous, where one would be “about to be sick.” This is perhaps the closest approximate to the more traditional and, perhaps most literal, utilisation of the term to describe ailing health or disease, found in phrases such as “(to be) feeling sick lately.” Semantic evolution and growth is a normal,⁴¹ even healthy, occurrence but it becomes problematic where a shared meaning is intentionally skewed to nefarious ends. Any perversion of language to further hateful agendas is not only a cause for concern, but a powerful tool in act of oppression and violence.

The ambivalent property of language has been demonstrated in trivial examples above, but its significance is considerable when the shared meaning of a word evolves for the purpose of fostering a culture of prejudice, hate and denigration. This almost “metamorphic”⁴² affinity that language possesses enables words to be easily understood and accepted into everyday discourse, even when they echo vastly untrue or exaggerated generalisations. “Mob mentality” and “tabloid thinking” are exploited to perpetuate and sustain prejudicial racial oversimplifications.⁴³ “Jew,” for example, is no longer understood to solely represent the Jewish faith or culture. The term has developed longstanding associations with “rapacious

³⁹ MM Bakhtin *Speech genres and other late essays* (1986) 106 in Lähteenmäki and Dufka (eds) *Dialogues* 64.

⁴⁰ *Ibid.*

⁴¹ G Steiner *Language and Silence – Essays 1958-1966* (1967) 117.

⁴² Marais 2011 *Studies in the Novel* 96.

⁴³ MD Birnbaum “On the Language of Prejudice” (Oct 1971) 30.4 *Western Folklore* 247 at 247-8.

bargaining,”⁴⁴ thieving and greed and continues to do so with contemporary expressions such as “to Jew someone,” meaning to cheat or swindle. Connotations of extortion and thievery certainly promote prejudice and hatred, but it is those that perpetuate hatred with violence, and finally mass murder, that are more ominous. The label “Jew” signified “a racial monster”⁴⁵ and “the Antichrist” in Nazi Germany rather than simply religious or cultural nomenclature,⁴⁶ as in its literal understanding. Similarly “Tutsi,” during the Rwandan Genocide became synonymous with “cockroach,”⁴⁷ “deceit,” and “menace.”⁴⁸ It is in this way that the terms “Jews” or “Tutsis” transformed from their primary association and became what was necessary to facilitate the genocide of these two races. After all, the significance of likening humans to “germs,” “maggots,” “parasites” and “vermin” is that it facilitates the link and justification in exterminating them, preying on the normal human responses to such pests.⁴⁹ The words “Jew” or “Tutsi” mean nothing in the manner in which the letters and sounds are organised to form these words, but attain meaning and significance through assigning a specific connotation to them. Similarly, the pairing of seemingly benign words to produce the terms “ethnic cleansing” and “evacuation and resettlement” have a harrowing, “nightmarish definitions”⁵⁰ when used in the contexts of the War in the Balkans and concentration camps, respectively. They still encode connotations of genocide and suffering and will undoubtedly do so for generations to come.

2.2.1 Language as a Means of Violence

A common thread in these illustrations reveals an institutional assault on language by manipulating and distorting its ordinary meaning to create “a new perception”⁵¹ parallel to the prevalent political agenda. Words are weapons in the arsenal of those in power and are

⁴⁴ P Bernat Bennett “ ‘The Negro never knew:’ Emily Dickinson and Racial Typology in the Nineteenth Century Author(s)” (2002) 19.1 *Legacy* 53 at 56.

⁴⁵ M Blain “Group Defamation in the Holocaust” in MH Freedman and EM Freedman (eds) *Group Defamation and Freedom of Speech – The Relationship Between Language and Violence* (1995) 55.

⁴⁶ Marais 2011 *Studies in the Novel* 96.

⁴⁷ L Praeg *The Geometry of Violence* (2007) 43.

⁴⁸ WA Donohue “The Identity Trap: The Language of Genocide” (2012) 31 *Journal of Language and Social Psychology* 13 at 24.

⁴⁹ See J Gibbons *Forensic Linguistics : An Introduction to Language in the Justice System* (2003) generally for an account of how language works in the law and why it is regulated.

⁵⁰ Steiner *Language* 122.

⁵¹ H Berghoff “ ‘Times Change and We Change with Them:’ The German Advertising Industry in the Third Reich – Between Professional Self-Interest and Political Oppression” (2003) 45.1 *Business History* 128 at 140.

tactically discharged to instigate destruction, murder and mutilation of millions of people.⁵² Political agendas and criminal acts are cloaked in a violent language that masks their true intention⁵³ and rather offers a new reality based in myth and stereotype to a new myth⁵⁴ to subscribe to. In Orwellian terms, thought had certainly corrupted language in the Nazi agenda, and the rhetoric of the regime in turn corrupted the people. Central to this achieving an agenda of hate and extermination is, however, fostering an intense and emotional reaction to those targeted. This is most effectively done through implanting emotive and violent language in the psyche of people.

Language is the ideal tool as it can be surgically applied to reduce a person or group to only its discernable, identifiable, external features. It has been said that “language is the first and greatest divider”⁵⁵ and Žižek illustrates this thought with the example of how neighbours can “live on the same street, yet live worlds apart.”⁵⁶ Hateful words “dismember”⁵⁷ the person and treat them as offensive, identifiable parts rather than as a whole human being.⁵⁸ The target is no longer thought of as a human, but only as a label, be it race, religion or ethnicity. Accordingly, a linguistic tool is applied to distort the person or group targeted. The use of hateful language is an effective means to divide societies as it makes it easier to banish a “Jew” to a ghetto or exile “a black” to a Bantustan, rather than to physically remove a person from their home. The act of using hate to divide people along racial lines in terms of not only geography, but also humanity, is a way in which language becomes violent. Its violent use shows language to be a system of differences⁵⁹ that we can create and perpetuate at will, preaching a classification of superiority that is cutting and debasing.⁶⁰ This hierarchy is established through creating a “social climate”⁶¹ of hatred and dehumanisation that only leads to physical violence. The oppressor constructs the “dominant story (and) master narrative” and disseminates it through abusing the public platform it has at its disposal.⁶² A parallel can easily be drawn in Nazi Germany and apartheid South Africa where both regimes were

⁵² Blain “Group Defamation and the Holocaust” in Freedman and Freedman (eds) *Group Defamation* 46.

⁵³ *Ibid.*

⁵⁴ Fergenson “From Language to Thought to Action” in Freedman and Freedman (eds) *Group Defamation* 75.

⁵⁵ S Žižek *Violence – Six Sideways Reflections* (2008) 66.

⁵⁶ Žižek *Violence* 66.

⁵⁷ Žižek *Violence* 61.

⁵⁸ *Ibid.*

⁵⁹ J Hassard and D Pym *The Theory and Philosophy of Organisations: Critical Issues and New Perspectives* (1990) 175.

⁶⁰ M Matsuda in Neisser 1994 *Constitutional Law Journal* 104.

⁶¹ Donohue 2012 *Journal of Language and Social Psychology* 13.

⁶² T Godwin Phelps *Shattered Voices: Language, Violence and the Work of Truth Commissions* (2004) 49.

underpinned and sustained through the violent use of language. Although the verbal onslaught was led by a minority in South Africa and no mass racial extermination precipitated as was the case in Germany, violent language was still used to legitimise the horrors of the era.

Violent language is not necessarily confined to language that is wielded to create divisions, but can also be thought of in terms of verbal onslaught. Insults and jeers are all verbal violence, but violent language can also be encountered in the form of oppressive legislation and demeaning policies, culminating in an institutionalised practice of racism and hate speech.⁶³ Steiner explores this idea in depth in his emotive essay, “The Hollow Miracle,” where he traces the evolution of the German language as once grand and romantic, to being reduced to brutish sounds and ostentatious clichés, serving as a ready and viable means of achieving the mass annihilation of the Jewish race during the Holocaust. Steiner ultimately concludes that the language has since decayed and died in the wake of its pivotal role in the genocide. While his remorseless attack on the German language has met with considerable controversy, Steiner’s ideas on creating a “native tongue”⁶⁴ of genocide remain valuable. He writes that Nazism gave rise to a flood of precise and functional vocabulary⁶⁵ that devised, managed, chronicled and rationalised⁶⁶ the horrors of the period, including medical testing, eugenics and extermination. As language gave a voice to the barbarism, it was contaminated, according to Steiner, by attempts to use language to enforce, persuade and justify brutality.⁶⁷ A language from which the discourse of Nazism sprung was used to instil a horror in its victims that, Steiner writes, cannot escape the fabrications and atrocity it was used to convey.⁶⁸ Steiner goes on to attribute a general environment of verbal violence characteristic of the period⁶⁹ to influencing the populace, especially through repetitive and indoctrinating propaganda messages and speeches.⁷⁰ Steiner echoes Orwell’s thoughts twenty years earlier on political language breeding a “reduced state of consciousness” in that the horror of the Purges and *gulags* can be explained away as the “elimination of unreliable elements” or any violent, forced population expulsion as “rectification of frontiers.” Bromwich writes that as a

⁶³ AJ Norval *Deconstructing Apartheid Discourse* 9.

⁶⁴ Steiner *Language* 122.

⁶⁵ *Ibid.*

⁶⁶ Steiner *Language* 124.

⁶⁷ Steiner *Language* 123.

⁶⁸ Steiner *Language* 124.

⁶⁹ Van den Toorn in Heyvaert and Steurs (eds) *Essays* 317.

⁷⁰ Van den Toorn in Heyvaert and Steurs (eds) *Essays* 321.

result, we receive, accept and transfer a “history falsified by language.”⁷¹ It is this link between language and political inhumanity⁷² that permits violent language to fester into brutality and desensitisation.

The key concept to linking violent language and its success in mass murder is that it preaches a denial of humanness⁷³ in others. Dehumanising translates to denying a person identity or any form of individualism,⁷⁴ thereby making the target unrelatable and irrelevant as a “lower life form.”⁷⁵ The Nazi discourse and agenda transformed the “Jew” into a functioning stimulus and validation for killing, calling on centuries of prejudice to culminate in the annihilation of a race and culture.⁷⁶ The effect of lessening a Jewish person’s significance, and consequently, worth, is that they are removed from “moral consideration”⁷⁷ and thus ethical constraints on violence begin to fade.⁷⁸ Our compassion and empathy, the unique attributes that make us human, ironically disappear when we fail to perceive the humanity in others who are deemed unworthy or not even human at all.⁷⁹ Human beings, as Blain⁸⁰ notes, have to be provoked into violent action and the conscience “neutralised” in order to commit an act of murder.⁸¹ It becomes a vastly easier task when individuality ceases and is replaced by representatives of a class that is evil, vile and immoral.⁸² After all, the phrase “destroying an enemy” is easier to digest than the reflex inhibition “killing a human being” generates.⁸³

To be placed beyond the bounds of humanness, morality and fairness⁸⁴ is a dangerous place to be. Contemporary examples include terrorists and enemy rulers in the post-9/11 world.⁸⁵ The

⁷¹ D Bromwich “Euphemism and American Violence” (2008) Accessed on 28 May 2012 at:

<http://www.nybooks.com/articles/archives/2008/apr/03/euphemism-and-american-violence/?pagination=false>

⁷² Steiner *Language* 117 ft1.

⁷³ N Haslam “Dehumanization: An Integrative Review” (2006) 10.3 *Personality and Social Psychology Review* 252 at 252.

⁷⁴ Haslam 2006 *Personality and Social Psychology Review* 254.

⁷⁵ AC Moller and EK Deci “Interpersonal Control, Dehumanization and Violence: A Self-Determination Theory Perspective” (2009) 13.1 *Group Processes and Intergroup Relations* 41 at 44.

⁷⁶ Blain “Group Defamation and the Holocaust” in Freedman and Freedman (eds) *Group Defamation* 46-47.

⁷⁷ Moller and Deci 2009 *Group Processes and Intergroup Relations* 44.

⁷⁸ Haslam 2006 *Personality and Social Psychology Review* 254.

⁷⁹ Note the association of “Jews” with “vermin” and “Blacks” with “apes.” The latter comparison is highlighted in Moller and Deci 2009 *Group Processes and Intergroup Relations* 43.

⁸⁰ M Blain “Group Defamation in the Holocaust” in MH Freedman and EM Freedman (eds) *Group Defamation and Freedom of Speech – The Relationship Between Language and Violence* (1995).

⁸¹ Blain “Group Defamation and the Holocaust” in Freedman and Freedman (eds) *Group Defamation* 46.

⁸² A Huxley “Words and Behaviour” (1937) in LR Fergenson “Group Defamation: from Language to Thought to Action” in Freedman and Freedman (eds) *Group Defamation* 73.

⁸³ Bigart in in LR Fergenson “Group Defamation: from Language to Thought to Action” in Freedman and Freedman (eds) *Group Defamation* 74.

⁸⁴ S Opatow “Moral Exclusion and Injustice: an Introduction” (1990) 46 *Journal of Social Issues* 1 at 1.

twenty-first century has witnessed the dominant villain in Western political discourse being “the terrorist,” where a current understanding of the term mainly signifies a Muslim extremist.⁸⁶ While the legitimate threat that groups such as Al Qaeda pose cannot to be undermined, the current one-dimensional implication of “terrorist” fails to take on any other religious, cultural or national connotations and expressly vilifies the Muslim extremist. Notwithstanding the well-known duality present in the very term, encompassing the ideas of both freedom fighter and fanatic, contemporary understandings of the term “terrorist” conjure up images of a bearded man in religious garb, sporting a machine gun or suicide bomb. This “Islamophobia” or “jihad journalism” has replaced the “red terror” of the Cold War and constructed a new enemy through dehumanising language⁸⁷ that likens terrorists to animals or prey that must be hunted down.⁸⁸ Descriptions and images in the media of an unkempt Saddam Hussein and dishevelled Osama bin Laden hiding in underground recesses have only further fortified this dehumanisation process to the point of many being willing to set aside conventional scruples in supporting the death penalty for the former Iraqi ruler. After all, it is easier to make a moral concession in the case of a “monster” than for a human being. This new association with the “terrorist” or “enemy” has moreover justified the gross human rights violations perpetrated in Abu Ghraib Prison and Guantanamo Bay Detention Centre.⁸⁹

Another well-documented onslaught of dehumanising language can be found in the context of Pearl Harbour and the subsequent War in the Pacific, where enemies on both sides were debased to facilitate violence and killing. In addition to the predictable belittling of the Japanese as “little men,”⁹⁰ “childish”⁹¹ or “primitive,”⁹² and archetypal comparisons with vermin and animals, some American soldiers went even further in equating the act of killing Japanese to sport. This has been evidenced in references to them hunting “bigger game”⁹³ and soldiers stencilling in “rodent exterminator” onto their helmets.⁹⁴ This process of

⁸⁵ Moller and Deci 2009 *Group Processes and Intergroup Relations* 44.

⁸⁶ See E Steuter and D Wills “Enemy Construction and Canadian Media Complicity in the Framing of the War on Terror” (2009) 2.2 *Global Media Journal – Canadian Edition* 11-12 generally for a discussion on the modern linguistic framing of the West and East as binary opposing entities: good versus evil, civilised versus barbaric, etc.

⁸⁷ E Steuter and D Wills “Enemy Construction and Canadian Media Complicity in the Framing of the War on Terror” (2009) 2.2 *Global Media Journal – Canadian Edition* 7 at 11-12.

⁸⁸ Steuter and Wills 2009 *Global Media Journal – Canadian Edition* 13.

⁸⁹ Steuter and Wills 2009 *Global Media Journal – Canadian Edition* 20.

⁹⁰ J Dower “Race, Language and War in Two Cultures” in Freedman and Freedman (eds) *Group Defamation* 29.

⁹¹ Dower “Two Cultures” in Freedman and Freedman (eds) *Group Defamation* 26.

⁹² Dower “Two Cultures” in Freedman and Freedman (eds) *Group Defamation* 27.

⁹³ Dower “Two Cultures” in Freedman and Freedman (eds) *Group Defamation* 28.

⁹⁴ Dower “Two Cultures” in Freedman and Freedman (eds) *Group Defamation* 28.

dehumanisation stripped soldiers of any misgivings in killing⁹⁵ and, once again, provided the necessary mental and moral impetus to even justify nuclear retaliation for the attack on Pearl Harbour. This is by no means a solely American initiative: the Japanese called on local superstition and folklore to liken Americans to the demonic beasts of myth that instilled fear and hatred into the psyche of the Japanese.⁹⁶ Similar behaviour characterised the apartheid regime in maintaining the divide between “Europeans” and “non-Europeans” as a barrier between “civilised” and “uncivilised,” “man” and “boy” and “human” and “subhuman.”

Language can therefore be a component factor of violence, particularly when used to fabricate and disseminate propaganda, and quash opinions in the service of controlling, programming and desensitising the masses,⁹⁷ but it is by no means the sole stimulus. Notwithstanding that it takes the right balance of political, economic, cultural, psychological and linguistic influences to sway public opinion, the use of language in this regard is certainly is an apt and basic place to start. Verbal violence is, after all, the form of human violence we have recourse to most basically⁹⁸ and hate speech is an effective implement in this regard. It is therefore the facility of language to encode a despicable agenda that allows for such atrocities. However, if language can be so negatively skewed, it stands to reason that it will also be able to be moulded for more benevolent ends.

2.2.2 Language as a Means to Counter Violence

The fluidity of language allows for it not only to be a force for violence, but also one for reuniting and healing. Discourse is essentially the agenda of non-violent movements as it is a universal symbol for rejecting war and weaponry for negotiation, understanding and problem-solving. Language is also the implement by which to engage in reconciliation processes in the wake of violence and provides great solace and closure to those seeking amnesty or acknowledgment.

Reconciliation is a manner in which governments demonstrate that they are pursuing past wrongs and attempting to “rebalance” its citizenry as an alternative to state and personal

⁹⁵ Dower “Two Cultures” in Freedman and Freedman (eds) *Group Defamation* 25.

⁹⁶ Dower “Two Cultures” in Freedman and Freedman (eds) *Group Defamation* 36-37.

⁹⁷ MC van den Toorn “Some Remarks on the Language of Nazism” in FJ Heyvaert and F Steurs (eds) *Worlds Behind Words: essays in honour of Prof. Dr. FG Droste on the occasion of his sixtieth birthday* (1989) 317.

⁹⁸ Žižek *Violence* 66.

violence.⁹⁹ It is a middle ground, as Knox and Quirk¹⁰⁰ put it, between the stance of “letting sleeping dogs lie” and the call for a nationwide “witch hunt,” where victims are acknowledged,¹⁰¹ perpetrators identified and accounts collected and published.¹⁰² The use of language in this respect is invaluable as a medium for reconciliation in recounting the past as well as shaping future traditions of healing and reunification through language. Reconciliation doubles as an emotional, as well as economic, respite as it eliminates time-consuming investigations, trials and the financial burdens associated with litigation.¹⁰³ There are therapeutic and psychological benefits in the act of “storytelling” for both victim and perpetrator: it grants the former closure in a safe environment while alleviating the guilt and torment of the latter¹⁰⁴ and affirming the truth.¹⁰⁵ Reconciliation goes even further than addressing individual burdens and also sends a broader message of vindication for those who fought in the struggle and contributes to rebuilding and restoring national and cultural identities through the medium of language.¹⁰⁶ Freire’s¹⁰⁷ concept of a dialogue is the essence of what reconciliatory language encompasses: it is a genuine encounter between equals that serves to give them import and worth as human beings.¹⁰⁸ By humanising the oppressed, we are dismantling polarised conceptions of race and rather attributing more nuanced dimensions to those denied humanity, such as emotions, feelings and rights.¹⁰⁹ Reconciliation and discourse is only possible between parties who do not silence each other¹¹⁰ so that rebirth can occur.¹¹¹

2.2.3 The Paradox That Emerges

In the wake of violence and atrocity, an institutionalised policy of reconciliation requires a new way in which to use words. Language is no longer an implement to oppress and

⁹⁹ Godwin Phelps *Shattered Voices* 52.

¹⁰⁰ Knox and Quirk *Peace Building* 181.

¹⁰¹ LS Graybill *Truth and Reconciliation in South Africa – Miracle or Model?* (2002) 81.

¹⁰² Godwin Phelps *Shattered Voices* 53.

¹⁰³ *Ibid.*

¹⁰⁴ Graybill *Miracle or Model?* 81.

¹⁰⁵ Gqola 2001 *Transformation* 96.

¹⁰⁶ Albie Sachs in Graybill *Miracle or Model?* 82.

¹⁰⁷ P Freire *The Pedagogy of the Oppressed* 3ed (1996).

¹⁰⁸ Friere *Oppressed* 69.

¹⁰⁹ MA Burke, candidate for Master of Arts at Rhodes University, must be acknowledged for his contribution and insight into formulating this idea.

¹¹⁰ Friere *Oppressed* 69.

¹¹¹ Friere *Oppressed* 72.

dominate but a tool of understanding, peaceful coexistence and non-violence.¹¹² This shift in the manner of employment of language is in line with the malleable of qualities of language, in that words can be shaped to our own needs, wants or desires.¹¹³ But, counter-intuitively, what a truth commission and the reconciliatory process essentially do is to substitute dialogue for state-sanctioned retribution and even violence.¹¹⁴ Though it must be acknowledged that the goal driving the promotion of healing through language is to give a voice to victims who lost their power to speak out against atrocities and prevailing racial narrative,¹¹⁵ this chiefly symbolic exercise forces society to re-evaluate the way in which language is used. Embedded in this new approach to language is a necessary and almost radical paradigm-shift in the way language must be viewed and used in that it can just as easily be used for confrontation as it can be for compromise. The paradox between language being characterised as a tool for oppression and violence, and yet just as naturally being the universal symbol of non-violence,¹¹⁶ is patent and problematic. Implicit in such a change is that a vacuum will inevitably be created where the words that were once commonplace now submerge and resurface as a reflex or outburst. This is problematic in a society where there is a particular need to safeguard against words that incite violence or advocate hatred and a desire transform itself.

Harris *et al* write that reconciliation operates on a political, community and individual level, requiring the satisfaction of all three tiers to warrant that societal rebirth and reunification has successfully taken place.¹¹⁷ In the first instance, the negotiated revolution and compromises to achieve political peace are evidence of political reconciliation.¹¹⁸ Secondly, however, there is less certainty as to whether community-wide reconciliation has been achieved as certain racial and political divisions still persist, particularly in the case of residential segregation and xenophobic violence.¹¹⁹ Individual-level reconciliation is far more complex as it is dependent on individual sentiments, however, judging by the prevalent of racism, xenophobia and hate crimes in contemporary South African society,¹²⁰ one can say that there is still much work to be done on this front.

¹¹² Habermas in Žižek *Violence* 60.

¹¹³ See 2.2 for an exposition on the malleability of language.

¹¹⁴ Neisser 1994 *Constitutional Law Journal* 136. See also 2.2 of this thesis on the malleability of language.

¹¹⁵ Neisser 1994 *Constitutional Law Journal* 136.

¹¹⁶ JM Muller in Žižek *Violence* 60-1.

¹¹⁷ Harris *et al* 2004 *The Race and Citizenship in Transition Series* 7.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

2.3 Hate Speech as a Manifestation of Violent Language

Hate is a notoriously difficult concept to define¹²¹ as it exists in countless guises. It has been suggested that its range can be understood to encompass “the most powerful of virulent emotions lying beyond the bounds of human decency”¹²² to a mere “active dislike.”¹²³ Hate can be understood as an emotion, a provocation, an action or as a belief,¹²⁴ though in whichever manifestation it is found, it ripens and renews, spreading to infect others¹²⁵ to join in the denial of dignity and humanity in those it targets. According to Opatow and McClelland,¹²⁶ hate goes beyond a mere emotion but also exists as a “justice construct”¹²⁷ when it is used to activate injustice, derogation and also often violence.¹²⁸

Hate speech is thus a verbal attack geared at devaluing the victim’s sense of worth¹²⁹ and demeaning them, individually and as well as by virtue of being part of a larger group. Sociolinguistically speaking, hate speech is a discourse of power, dominance and control¹³⁰ that is employed to intentionally “misrecognise”¹³¹ those it targets. This misrecognition is achieved through manipulating language to reduce and dissect racial groups into single characteristic feature; oversimplifying them into trait or flaw used to identify the entire group.¹³² Hate speech cannot be equated with mere “nasty comments” or taunts concerning general characteristics held in esteem by society such as a person’s intelligence, athletic ability, skills or physical appearance because hate speech constitutes so much more. Racial hate speech, in particular, stems from historic and enduring prejudice¹³³ that gains more impetus the longer it is kept alive. It also carries with it and impresses social stigma and psychological harm on its

¹²¹ A Borovoy in A Borovoy, K Mahoney, B Brown, J Cameron, D Goldberger and M Matsuda “The James McCormick Mitchell Lecture - Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation” (Spring 1988-89) 37 *Buffalo Law Review* 337 at 340.

¹²² *R v Keegstra* [1990] 3 S.C.R 697 at 164.

¹²³ *R v Keegstra* [1990] 3 S.C.R 697 at 164.

¹²⁴ S Opatow and SI McClelland “The Intensification of Hating: A Theory” (2007) 20 *Social Justice Research* 68 at 70.

¹²⁵ Opatow and McClelland 2007 *Social Justice Research* 71.

¹²⁶ Opatow and McClelland 2007 *Social Justice Research* 68.

¹²⁷ Opatow and McClelland 2007 *Social Justice Research* 69.

¹²⁸ *Ibid.*

¹²⁹ OM Fiss *The Irony of Free Speech* (1996) 16.

¹³⁰ V Reddy “Pervert and sodomites: homophobia as hate speech in South Africa” (2002) 20.3 *Southern African Linguistics and Applied Language Studies* 163 at 164.

¹³¹ *Ibid.*

¹³² Žižek *Violence* 60-1.

¹³³ Neisser 1994 *Constitutional Law Journal* 108.

victims, culminating in exclusion from society.¹³⁴ Further, Niesser notes it as a group attack on an individual's identity: with race an absolute and "immutable"¹³⁵ circumstance, and by virtue of being born a member, a person's individual attributes and skills are dismissed in favour of a superficial judgment as to their overall worth.¹³⁶ While the view that race is a social construct and not biological truth¹³⁷ is currently dominant, hate speech still is built around that which is physical and obvious and thus race is inscribed as a prejudicial characteristic of a person or group.

As aptly observed by Baines, "race might be a social construct but it is still lived as 'real.'"¹³⁸ Unfortunately, what we construct as "race" has become an identifiable and distinguishable feature we attribute to most people before even considering their names or sex and it is for that reason that race is said to be unalterable¹³⁹ and absolute. It is in this misconception and prejudice that stereotypes flourish and become entrenched in how society views itself.¹⁴⁰ We assign meaning and worth according to these stereotypes that "connect our faces to our souls"¹⁴¹ and it is through the indignity this generates that hate speech injures. As such, it is submitted that racial hate speech does far more damage than ordinary insults do¹⁴² because the racial stereotypes to which we are assigned membership by society is something that an individual is powerless to change.

The overall effect of this, and why hate speech is offensive to one's sense of dignity and equality, is that it not only preaches the inferiority of groups¹⁴³ but also effectively silences individuals as their words or actions will thereby lack any authority and significance.¹⁴⁴ The more immediate effects of hate speech can range from psychological to physiological. The former manifests in the victim being impaired from participating and contributing meaningfully to society, while the latter can range from immediate rapid pulse rate, to more

¹³⁴ Neisser 1994 *Constitutional Law Journal* 109.

¹³⁵ Neisser 1994 *Constitutional Law Journal* 110.

¹³⁶ Neisser 1994 *Constitutional Law Journal* 110.

¹³⁷ A Smedley and BD Smedley "Race as Biology Is Fiction, Racism as a Social Problem Is Real – Anthropological and Historical Perspectives on the Social Construction of Race" (January 2005) Vol 60 No1 *American Psychologist* 16.

¹³⁸ G Baines "Racist Hate Speech in South Africa's Fragile Democracy: the case of Ngema's 'AmaNdiya'" in M Drewett and M Cloonan (eds) *Popular Music Censorship in Africa* (2006) 63.

¹³⁹ Neisser 1994 *Constitutional Law Journal* 110.

¹⁴⁰ M Pieterse "Stereotypes, Sameness, Difference and Human Rights: Catch 22?" (2001) 16 *SAPR/PL* 93 at 94.

¹⁴¹ IFH López "The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice" (1994) 29 *Harvard Civil Rights-Civil Liberties LR* 1 at 7.

¹⁴² Neisser 1994 *Constitutional Law Journal* 110.

¹⁴³ LW Sumner *The Hateful and the Obscene – Studies in the Limitation of Free Expression* (2004) 160.

¹⁴⁴ Fiss *Irony of Free Speech* 16.

long-term problems such as PTSD, nightmares, hypertension, psychosis and suicide.¹⁴⁵ Other more far-reaching socio-economic effects include victims quitting jobs, giving up on education opportunities, avoiding certain public places, moving to different cities, modifying their own behaviour and looks and living in fear.¹⁴⁶

The significance in guarding against hate speech is that hate speech is used to create a “climate”¹⁴⁷ ripe to trigger dehumanisation through violence and oppression.¹⁴⁸ It is viewed as a catalyst, or “poison,”¹⁴⁹ that incites widespread hatred, discrimination and violence. This is why the childhood maxim of “sticks and stones”¹⁵⁰ is a mere aspirational rhyme rather than the truth of human experience; some even go as far as to accuse it of being utter falsehood.¹⁵¹ Engaging in hate speech is more than a fleeting insult but something that goes to the core of a person or group’s identity.¹⁵² Hate contaminates, “swarming in a thousand different ways,”¹⁵³ producing anger, undesirable and adverse judgments, as well as urges to destroy and even obliterate.¹⁵⁴ This ranges from controlled personal responses to crime or violence, to war and genocide.¹⁵⁵ The Jewish persecution in Nazi Germany, ethnic cleansing in the Balkans and the Rwandan genocide are prime examples of how hate can be nurtured and germinated into large-scale annihilation of people based on race.

Hate speech is self-perpetuating and infectious. This should not suggest that hate is an outlier on the chart of human experience; rather, hate is a central feature of society that is used as a form of social commentary and moral guide.¹⁵⁶ As such, culturally sanctioned hate targets are given societal backing, such as condemning rapists, liars or thieves¹⁵⁷ but where hate is exploited to generate unwarranted, unjustifiable and arbitrary loathing for entire racial groups,

¹⁴⁵ M Matsuda 1993 in Sumner *The Hateful and the Obscene* 159-60.

¹⁴⁶ M Matsuda 1993 in Sumner *The Hateful and the Obscene* 159-60.

¹⁴⁷ JK Muir “Hating for Life – Rhetorical Extremism and Abortion Clinic Violence” in R Kirk Whillock and D Slayden (eds) *Hate Speech* (1995) 178.

¹⁴⁸ See 1.1 of this thesis on the merits of safeguarding against hate speech.

¹⁴⁹ S Sottiaux “‘Bad tendencies’ in the ECtHR’s “hate speech” jurisprudence” (2011) 7.1 *European Constitutional Law Review* 40 at 54.

¹⁵⁰ The popular childhood maxim in its full form reads as: “sticks and stones may break my bones, but words will never harm me.”

¹⁵¹ Blain “Group Defamation and the Holocaust” in Freedman and Freedman (eds) *Group Defamation* 46.

¹⁵² Neisser 1994 *Constitutional Law Journal* 110.

¹⁵³ Opatow and McClelland 2007 *Social Justice Research* 70.

¹⁵⁴ G Schoenewolf *Encyclopaedia of Human Behaviour* (1994) 501 in Opatow and McClelland 2007 *Social Justice Research* 70.

¹⁵⁵ *Ibid.*

¹⁵⁶ R Kirk Whillock and D Slayden (eds) *Hate Speech* (1995) Introduction x.

¹⁵⁷ *Ibid.*

there is great cause for concern. A primary and rudimentary tool to promote violence is the dissemination of hateful ideas through language (written and spoken), and notably, through violent language, or as I argue here, by means of hate speech as a manifestation of violent language. Hate is an undeniably deep and powerful emotion with real and legal consequences when it manifests as verbal violence in the form of hate speech. Hate speech is therefore violent language in that it not only brutally divides along arbitrary lines, such as race, but it delivers insult and vilification in the mere employment of hate speech terms.

Language has the power to release the inhibitions of a person against violence and enable them to perpetuate violence upon another human, writes Cover.¹⁵⁸ This affinity towards violence accounts for the fact that hate speech “breathes the spirit of destruction and violence”¹⁵⁹ as a manifestation of violent language.¹⁶⁰ It is a verbal expression of imminent physical or psychological violence¹⁶¹ that forcefully divides and intentionally injures and dehumanises its victims. Hateful words wielded “dismember”¹⁶² their objects and treat the individual, offensive, identifiable parts of a person as their whole.¹⁶³ The violent use of language demonstrates that it is a system of differences¹⁶⁴ that we can create and perpetuate at will. Hate speech does exactly this. This almost “metamorphic”¹⁶⁵ affinity language possesses enables human beings to relegate their fellow humans to the ranks of sub-human to the point of mass annihilation and torture. It is this quality of language and its manipulation through hate speech that characterised the apartheid regime as an era of institutionalised violence waged on both a linguistic, political and physical front.

2.4 The South African Challenge

¹⁵⁸ RM Cover “Violence and the Word” (1986) 95 *Yale Law Journal* 1601.

¹⁵⁹ B Parekh “Hate Speech – Is there a case for banning?” (2005-2006) *Public Policy Research* 213 at 214.

¹⁶⁰ Moreover, “violent language” an “hate speech” have been used synonymously in various writings, such as LR Fergenson “From Language to Thought to Action” in MH Freedman and EM Freedman (eds) *Group Defamation and Freedom of Speech – The Relationship Between Language and Violence* (1995) at 83 and A Borovoy, K Mahoney, B Brown, J Cameron, D Goldberger and M Matsuda “The James McCormick Mitchell Lecture - Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation” (Spring 1988-89) 37 *Buffalo Law Review* 337.

¹⁶¹ Fergenson “From Language to Thought to Action” in Freedman and Freedman (eds) *Group Defamation* 83.

¹⁶² Zizek *Violence* 61.

¹⁶³ *Ibid.*

¹⁶⁴ J Hassard and D Pym *The Theory and Philosophy of Organisations: Critical Issues and New Perspectives* (1990) 175.

¹⁶⁵ Marais 2011 *Studies in the Novel* 96.

2.4.1 South African Experience of Violent and Hateful Speech

Hate speech is a universal ill with a particular local sting and as with much of South Africa's contemporary issues, it has its roots in darker times. The "tragic and traumatic"¹⁶⁶ history of this country is testament to not only one of the darkest chapters in human experience but also to the tyrannical misuse and abuse of language. While physical violence and oppression were permanent features of the apartheid rule, the regime was also a war fought on the linguistic front. Language was employed as an effective tool of social division and dehumanisation and the regime gained legitimacy through the "exteriorisation of a series of Others."¹⁶⁷ "natives," "Bantus," "blacks," "coloureds," "non-Europeans," "sea-kaffirs," "Hottentots" and the foulest of all, "kaffirs," all deemed alien and ungodly.¹⁶⁸ The relevance of these is that they became implanted in material apartheid practices and discourse.¹⁶⁹ An innumerable list of synonyms for the connotation of "black" were produced that not only shows no sign of abating, but is still ever-growing among the white internal and diasporic South African communities.¹⁷⁰

During the reign of apartheid, words occupied a dichotomous role in both fighting and defending apartheid. This may be viewed as a rather simplistic characterisation of blatant, state-sanctioned human rights violations but one must consider how institutionalised racism existed through the use of state discourse and everyday words that can only be characterised today as "hate speech."¹⁷¹ Oppressive language, however, is not only confined to speech and dialogue but also manifests itself in the policies and legislation drawn up by the apartheid government. Hate speech, such as racial slurs, was complemented and condoned by the onslaught of legislating and policy-making that characterised the apartheid state. The language used to prevent integration and rather achieve "separate development,"¹⁷² was specially devised to further the political agenda. This apartheid grammar was riddled with

¹⁶⁶ GE Devenish *The South African Constitution* (2005) 100.

¹⁶⁷ Norval *Apartheid Discourse* 54.

¹⁶⁸ *Ibid.*

¹⁶⁹ Norval *Apartheid Discourse* 9.

¹⁷⁰ In footnote 24 of this thesis, I included an anecdote on the use of the word "marmites" to surreptitiously refer to "black" people. In my own experience both living in South Africa and as an expatriate, I can add that I have heard an array of vocabulary created to covertly refer to black people, including "the dark side" and "non-swimmers."

¹⁷¹ For example, the draft Promotion of Equality and the Prevention of Unfair Discrimination Bill (Bill 57 of 1999) listed a host of words that were regularly used in apartheid and which would be unacceptable in the current era. Although this list does not appear in the final Act, it gives an indication of the language that characterised the apartheid regime. These words included "kaffir," "kaffermeid," "coolie" and "hotnot" and their variations.

¹⁷² B Bunting *The Rise of the South African Reich* (1964) 142.

euphemisms and incongruities to rationalise and legitimise the latent inequalities and oppression that the language embodied. A prime example of such language exists, for instance, in the term “separate development.” Affixing these two words was completely contradictory in the apartheid reality as “development” was a mere misnomer for “existence” or “dwelling.” It was clear that the regime did not intend on fostering development equivalent to that in “white areas” in practice¹⁷³ and the term was merely a segregationist justification for “homelands” and “townships.” Similarly, in “Bantu Education” the latter term did not have the same implications for both black and white children. The “education” received by children in South Africa diverged profoundly along racial lines that “Bantu education” was not simply supplying the same education in a separate location, but tailoring its content to desensitise black people to their own autonomy and to mould them into the positions the regime saw fit for them to occupy.¹⁷⁴

Legislation was wielded as an implement of the regime and changed whimsically to further the political agenda.¹⁷⁵ Likened by some to the South African equivalent of the Nuremberg Laws,¹⁷⁶ the legislation passed from 1948 onwards laid a solid foundation for the reign of apartheid. These statutes were characterised by their employment of the imperative tense, active voice and semantic peremptory markers¹⁷⁷ such as “shall.”¹⁷⁸ These all reflect the dominant and unwavering stance of the era, and indicating the resolve of the government in its policies and practices. The nature of legislation is that it is normative and prescriptive and as such, concretised the racist and oppressive message that had become embedded in not only the national identity but also the national psyche. The enforcement of such laws existing in spaces such as “whites only/*slegs blankes*” signage and the use of racial slurs by officials as well as the general populace were also ardent contributors to the violent language of the period.¹⁷⁹

¹⁷³ Bunting *South African Reich* 142.

¹⁷⁴ Bunting *South African Reich* 205.

¹⁷⁵ Bunting *South African Reich* 159.

¹⁷⁶ Bunting *South African Reich* 142.

¹⁷⁷ C Botha *Statutory Interpretation – an Introduction for Students* 4ed (2007) Juta: Cape Town 111.

¹⁷⁸ There are innumerable examples in apartheid statutes. For ease of reading, I have included two of the most notorious: section 2(2) of the Reservation of Separate Amenities Act 49 of 1953: “any person who wilfully enters or uses any public premises... which has been set apart or reserved for the exclusive use of persons belonging to a particular race or class, being a race or class to which he does not belong, **shall** be guilty of an offence;” section 5(1) of the Population Registration Act 30 of 1950: “every person... **shall** be classified ... as a white person, a coloured person or a native.”

¹⁷⁹ R Saunders “The Agony and the Allegory – the Concept of the Foreign, the Language of Apartheid and the Fiction of JM Coetzee” (Winter 2001) 47 *Cultural Critique* 215 views the language used in apartheid to be one that “represses linguistic foreignness” in that it oppresses those we term “foreign.” (In the context of apartheid,

It has been asserted that language is what distinguishes man from beast,¹⁸⁰ but the violence in the language of apartheid cannot be described as anything but savage. The hate speech still prevalent in South Africa was certainly borne out of various universal racial prejudices, but acutely out of the apartheid racial narrative, where it thrived. To use language, a medium of violence in its own right, as a means of conciliation and peace is an uneasy compromise that leaves a vacuum where hate speech still lingers in private and in hushed tones, occasionally resurfacing as a bitter reminder that democracy did not change the hearts and minds of all in South Africa. With all the notions of truth, reconciliation and healing language, it would be naïve to think that it would compel South Africans to change the language they use in relating to one another.¹⁸¹ racial identity still informs a large part of identity in the country and, by extension, so does violent language and racial hate speech. It is against this backdrop that the suitability of current and proposed legal measures to combat hate speech must be measured.

With such a complex and deep-rooted practice of hate speech in this country, it is imperative that this phenomenon be addressed effectively and within the parameters of the Constitution. Hate speech may exist on “the vast linguistic continuum”¹⁸² but it cannot be accepted or tolerated for this reason alone. It is a societal ill that is not condoned by the Constitution, nor the values it espouses. Rather, the Constitution does not consider hate speech to be a feature on the continuum of permissible speech as it defies all that our society is now meant to foster. The right to freedom of expression is held sacred by the Constitution,¹⁸³ particularly in light of past incursions onto this right. However, it is not always as simple as conveying one idea to another if that very concept is offensive to the constitutional project as a whole and the very idea of transformation that we are so desperately seeking to achieve in South Africa. This

the label “black” would be a prime example of one who would be “foreign”). This, Saunders argues, was key to the functioning of the entire regime of apartheid as one of “modernity’s most drastic efforts at producing foreignness.” This culture of creating defamiliarisation through language can be easily linked to Žižek’s notion of violent language in that the use of certain words divide and dehumanise, which is a violent act in itself. Using practical examples of “whites only/*slegs blankes*” signage and racial slurs, I suggest that the language used during apartheid is violent language that upheld the regime through creating two distinct classes (“whites” and “non-whites”) that were used to establish a “normal” group and “foreign,” “alien” or “sub-human” group. This distinction between groups is important as it determined an individual’s rights, or lack thereof, during apartheid South Africa

¹⁸⁰ Rosset in Žižek *Violence* 61.

¹⁸¹ Gqola 2001 *Transformation* 97.

¹⁸² Prof Mike Marais describes hate speech as existing on the “vast linguistic continuum” and not as a strange or unusual phenomenon. (His views are taken from email communication with the author elucidating his views on hate speech as part of the linguistic reality and in reference to his recent publication: M Marais “Violence, Postcolonial Fiction, and the Limits of Sympathy” (Spring 2011) 43.1 *Studies in the Novel* 94).

¹⁸³ See 4.3.2 for an outline of the right to freedom of expression as outlined in the Constitution.

creates considerable tension in a country that is intent on promoting fundamental rights, such as freedom of expression, on the one hand, while justifiably limiting certain impermissible speech, on the other.¹⁸⁴ We celebrate language as our medium of communication, self-fulfilment and self-expression for the reason that it is dynamic and fluid, while simultaneously rejecting aspects of free speech that advocates hatred and incites harm, borne out of the very fact that language is so malleable. This shift in how language is used in South Africa creates a complex tableau for legislators and guardians of the Constitution in achieving an appropriate picture of hate speech provisions in the democratic era.

2.4.2 A New Language: Reconciliation and Transformation

The negotiated South African revolution in 1994 marked the end to a brutal chapter in the country's history. It was a deliberate election to forego a violent rebellion in favour of launching a dialogue to guide the country through its transition to democracy.¹⁸⁵ In the wake of a nation recovering from systemic and institutionalised racism, a policy of reconciliation was adopted to help the nation to recover from the onslaught that was apartheid.¹⁸⁶ Harris *et al* write that apartheid established race as an apparatus for violence that created a social reality for South Africans to view the world through the polarised categories of "black" and "white" and a common justification to maintain these divisions through the use of violence.¹⁸⁷ In such a violent linguistic terrain, "a new vocabulary" developed to describe the new South Africa,¹⁸⁸ a nation where "speaking begins and silencing ends."¹⁸⁹

Reconciliation preaches non-violence and compromise and, as such, was believed by many to be the most effectual means of healing the wounds of the past and moving forward to a united future.¹⁹⁰ It is a process that essentially substitutes death and destruction for dialogue and

¹⁸⁴ See 4.3.2.1 for an exposition on how the right to free expression is justifiably limited in the Constitution.

¹⁸⁵ *AZAPO v President of South Africa* 1996 (4) SA 671 (CC) para 18; 45 note the deliberate election of the drafters of the Constitution to favour the reconstruction of society while still having regard to acknowledging the untold suffering that occurred during apartheid and that without processes such as the TRC and awarding of amnesty, the "historic bridge" we seek to build may never have been possible.

¹⁸⁶ The Promotion of National Unity and Reconciliation Act 34 of 1995.

¹⁸⁷ B Harris, N Valji, B Hamber and C Ernest "Arranging Prejudice: Exploring Hate Crime in Post-Apartheid South Africa" (2004) *The Race and Citizenship in Transition Series* 3.

¹⁸⁸ *Ibid.*

¹⁸⁹ Gqola 2001 *Transformation* 96.

¹⁹⁰ JL Gibson and A Gouws "Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle over Apartheid" (September 1999) 93.3 *American Political Science Review* 501 at 501.

understanding and thus necessitates an end¹⁹¹ to malicious and violent language. In the attainment of democracy, this was the path that was chosen for South Africa in the wake of apartheid. As articulated by former President Thabo Mbeki, reconciliation serves a three pronged function in moving forward: nation-building, national reconciliation and national cohesion.¹⁹² The impetus behind reconciliation is the notion that South African society is ready to embark on a *renaissance* in terms of democracy, inclusion, equality, dignity, improved quality of life and constitutional supremacy.¹⁹³ However, an aspirational governing document is hollow without the requisite social desire to change. The reconciliation process can thus be seen as a marked commitment to transformation. Reconciliation is mandated¹⁹⁴ as a means of reparation and healing¹⁹⁵ through confession rather than victimisation, while concurrently serving as a means of gathering information¹⁹⁶ that otherwise would have been lost¹⁹⁷ to the obscurity and secrecy of apartheid. While this is an enlightened and progressive notion, it rejects age-old designs of retribution and even justice. The traditional assessment of exacting revenge centred on “blood vengeance” and was viewed as a noble and sacred duty, even a right.¹⁹⁸ This most basic and primal entitlement tentatively devolved on the State to punish offenders,¹⁹⁹ thereby upholding a sense of order, justice and legality. The instinctual notion of “he had it coming” has a strong cathartic place²⁰⁰ society’s vision of justice, regardless of how evolved and progressive we purport to be.

The reconciliation process thus hinges on the public’s commitment to transform and thus subscribing to the method is crucial. Negotiated peace, after all, can be seen as a trade-off and even acceptance of apartheid, thereby disavowing the legitimacy of the armed resistance to the regime.²⁰¹ The apartheid regime was more than willing to use brutal force²⁰² in its

¹⁹¹ E Neisser “Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence” (1994) 5 *Constitutional Law Journal* 103 at 136.

¹⁹² Address by Thabo Mbeki to the Joint Sitting of Parliament to Report on the Processing of some Presidential Pardons, Cape Town, 21 November 2007. <http://www.thepresidency.gov.za/president/sp/2007/sp11211540.htm> (Accessed on 15 December 2009).

¹⁹³ Preamble, the Constitution of the Republic of South Africa, 1996; Klare 1998 *SAJHR* 149-150.

¹⁹⁴ Reconciliation is implied in the Postamble of the Interim Constitution; in the Preamble of the Constitution, with the desire to “heal wounds of the past” and mandated through the constitutional recognition; and inclusion of the Promotion of National Unity and Reconciliation Act 34 of 1995 in Schedule 6.

¹⁹⁵ C Knox and P Quirk *Peace Building in Northern Ireland, Israel and South Africa – Transition, Transformation and Reconciliation* (2000) 167.

¹⁹⁶ Set out in the aims of the National Unity and Reconciliation Act 34 of 1995.

¹⁹⁷ Godwin Phelps *Shattered Voices* 55.

¹⁹⁸ Godwin Phelps *Shattered Voices* 12-15.

¹⁹⁹ Godwin Phelps *Shattered Voices* 31-32.

²⁰⁰ Godwin Phelps *Shattered Voices* 39.

²⁰¹ Taylor and Habib 1997 in Knox and Quirk *Peace Building* 164; Godwin Phelps *Shattered Voices* 53.

defence and mere talking may pale in comparison as an “unsatisfactory alternative to justice.”²⁰³ Reconciliation will thus be viewed by many to be a substitute for retribution for the hate and violence wielded during the regime.²⁰⁴ Be that as it may, the Constitutional Court nevertheless guides us that non-retributive justice is preferred in the new dispensation and that vengeance must be replaced by a culture of human rights for all.²⁰⁵

The value of a non-violent transition cannot be stated enough as it minimises bloodshed and carries with it the notion of an enlightened society, moving away from brutish violence and revenge and towards a transformed way of life.²⁰⁶ It is also a strategic move in recognising the vulnerability of the regime that, in the South African case, was defended by a mere fifth of the population.²⁰⁷ But, as Seidman²⁰⁸ aptly points out, South Africa does not mould easily into the place reserved for it as a “monument to non-violent strategies”²⁰⁹ as it would be untrue to suggest that the struggle for democracy did not employ violence at times. Rather, one tends to refer to the attainment of democracy as peaceful and non-violent in comparison to the violent backlash that was predicted for the nation. Working from this comparative standpoint, a highly armed and industrialised nation was successfully and internally deposed²¹⁰ and negotiated transition²¹¹ and policy of transformation²¹² through reconciliation was the order of the day. The selection of words over weapons is therefore of tremendous symbolic value in realising reconciliation and transformation over destruction and war but whether this has actually been achieved in language is uncertain. The proliferation of hate speech still present in contemporary South African dialogue calls into question whether the process of reconciliation through language is being achieved.

²⁰² GW Seidman “Blurred Lines: Nonviolence in South Africa” (June 2000) 33.2 *PS: Political Science and Politics* 166.

²⁰³ Godwin Phelps *Shattered Voices* 53.

²⁰⁴ Neisser 1994 *Constitutional Law Journal* 136.

²⁰⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 130-131 held that “retribution ought not to be given undue weight in (the new era... as) the Constitution is premised on the assumption that ours will be a constitutional state founded on the recognition of human rights.”

²⁰⁶ DM Mayton II, S Susnjic, BJ Palmer, DJ Peters, R Gierth and RN Caswell “The Measurement of Nonviolence: a Review” (2002) 8.4 *Peace and Conflict: Journal of Peace Psychology* 343 at 343;344.

²⁰⁷ S Zunes “The role of non-violent action in the downfall of apartheid” (1999) 37.1 *The Journal of Modern African Studies* 137 at 138;140.

²⁰⁸ GW Seidman “Blurred Lines: Nonviolence in South Africa” (June 2000) 33.2 *PS: Political Science and Politics* 161.

²⁰⁹ Seidman 2000 *PS: Political Science and Politics* 161.

²¹⁰ Zunes 1999 *The Journal of Modern African Studies* 137.

²¹¹ KE Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 at 147.

²¹² Preamble of the Constitution of the Republic of South Africa, 1996.

With the formulation of a transformative Constitution, a national policy was needed to direct the reconciliation process. The Promotion of National Unity and Reconciliation Act²¹³ was promulgated to shape the policy of reconciliation through dialogue and reciprocity by means of the establishment of a truth commission and the granting of reparations and amnesty. It was drafted to reflect the fact that what is now valued over vengeance, retaliation and victimisation is understanding, knowledge and truth.²¹⁴ The Reconciliation Act set up the Truth and Reconciliation Commission as an overt way to establish the nature, causes and extent of the human rights violations committed during apartheid in the pursuit of national unity and the rebuilding of society.²¹⁵ The Commission is the most obvious and symbolic example of this path of reconciliation through language. This Commission was set up to try to piece together as comprehensive a picture as possible of the extent of gross human rights violations perpetrated between 1 March 1960 and 11 May 1994.²¹⁶ This body served as part “public confessional”²¹⁷ and part dispenser of pardons²¹⁸ in exchange for full disclosure of crimes perpetrated by “both the champions and enemies of apartheid.”²¹⁹

Through the medium of discourse rather than destruction, people were invited to come forward to the hearings of the Truth and Reconciliation Commission to share their accounts of apartheid, whether as victims or agents of the regime. In doing so, victims could recount their tales and perpetrators could seek forgiveness and amnesty in an attempt to restore human dignity to all parties and provide crucial answers for families whose loved ones disappeared during the regime.²²⁰ It was a process of storytelling in the medium of accounts from victims and perpetrators alike to attempt to piece together the truth of apartheid.²²¹ Though the broad

²¹³ The Promotion of National Unity and Reconciliation Act 34 of 1995.

²¹⁴ *Ibid.*

²¹⁵ The Truth and Reconciliation Commission (“TRC”) was established through the Promotion of National Unity and Reconciliation Act 34 of 1995.

²¹⁶ Preamble of the Promotion of National Unity and Reconciliation Act. The original cut-off date of 5 December 1993 was extended to 11 May 1994 (SL Russell-Brown “Out of the Crooked Timber of Humanity: the Conflict between South Africa’s Truth and Reconciliation Commission and International Human Rights Norms Regarding Effective Remedies” (2002-2003) 26 *Hastings International and Comparative Law Review* 227 at ft181.)

²¹⁷ A Holiday “Forgiving and Forgetting: the Truth and Reconciliation Commission” in S Nuttall and C Coetzee (eds) *Negotiating the Past: The Making of Memory in South Africa* (1998) 46

²¹⁸ Though the TRC received much publicity for the fact that it granted amnesty to gross violators of human rights, the statistics show that only 1146 applications were granted out of the 7112 amnesty applications filed with the TRC, showing that the process was more about truth seeking and reunification than dispensing pardons. (Russell-Brown 2002-2003 *Hastings International and Comparative Law Review* 259).

²¹⁹ Holiday in Nuttall and Coetzee (eds) *Negotiating the Past* 46.

²²⁰ Preamble of the Promotion of National Unity and Reconciliation Act; Russell-Brown 2002-2003 *Hastings International and Comparative Law Review* 256.

²²¹ Holiday in Nuttall and Coetzee (eds) *Negotiating the Past* 46.

policy was that of non-violence and reconciliation, the establishment of the TRC in law²²² and practice was a concrete example of the general promotion of fostering dialogue over violence and served as a beacon for hope and transformation the world over.

The TRC was, above all, a symbolic exercise where the forgiveness and closure is granted on both sides. Reconciliation was effected through the medium of language where stories are told or accounts read out in the hope of amassing knowledge and truth so that forgiveness and reunion may follow.²²³ The truth created was of particular significance to the South African oral tradition of story-telling in which the narrative process is as important as the content conveyed.²²⁴ It was sought to be a language of unconstrained truth,²²⁵ framed in a discourse of rights and constitutional values that was markedly absent during the apartheid years. Significantly, the conduit of this discourse was also in the spoken language of one's choice, demonstrating not only affirmation of the story and experience, but a simultaneous assertion of the break from linguistic prescriptivism and oppression. The manner of delivery was also importantly distinctive, with individuals recounting experiences as a story rather than a legal argument or court claim.²²⁶

Holiday makes the interesting point that although the process was about truth, full and frank confession and granting amnesty from prosecution, this *milieu* does not necessarily create forgiveness.²²⁷ The TRC created memory²²⁸ where there was obscurity and granted closure where there were so many questions left unanswered, but it created an uneasy blend of "pragmatic *rapprochement* and forgiveness."²²⁹ However, regardless of the inherent conceptual pitfalls of the process and the inevitable question of whether it did indeed accomplish what it ambitiously set out to,²³⁰ what the TRC did undeniably achieve was a new

²²² Promotion of National Unity and Reconciliation Act 34 of 1995.

²²³ Gibson and Gouws 1999 *American Political Science Review* 501

²²⁴ The Truth and Reconciliation Commission *Truth and Reconciliation Commission Report Volume 1* (1998) 112.

²²⁵ Tutu (1998) in Gqola 2001 *Transformation* 97.

²²⁶ The Truth and Reconciliation Commission *Truth and Reconciliation Commission Report Volume 1* (1998) 112.

²²⁷ Holiday in Nuttall and Coetzee (eds) *Negotiating the Past* 47.

²²⁸ See S Nuttall and C Coetzee (eds) *Negotiating the Past: The Making of Memory in South Africa* (1998) for a general account of how the TRC created memory through the use of language and the benefits and pitfalls associated with this process.

²²⁹ B Parry "Reconciliation and Remembrance" (1995) 5 *Pretexts* 84.

²³⁰ Holiday in Nuttall and Coetzee (eds) *Negotiating the Past* questions whether forgiveness was attained, or even appropriate, in the public platform of the TRC and Gqola 2001 *Transformation* interrogates the notion of "rainbowism" (from the catch phrase "Rainbow Nation") and whether it is at all possible, or a mere ideal, even with the establishment of the TRC.

grammar of reconciliation. A vernacular of “truth,” “amnesty” and “confession” replaced old notions of how language was used in the attainment of truth and reunion in South Africa.

This paradigm-shift in the role that language occupies in this society is pivotal to the understanding of the role of language in South Africa. Freedom of expression is now considered to be a fundamental right that is held sacrosanct by the Constitution, however, it is not absolute in its permissibility. As a society committed to transforming itself and, by extension its use and conception of language, the continued problem of hate speech that plagues the country eighteen years into democracy cannot be tolerated as a feature of everyday language in a society fostering equality, dignity and human rights. Hate speech is a sizeable obstacle to creating a new and equal society. On a socio-linguistic level, the means used to demean and justify segregation and racial violence is the same tool employed to advance reconciliation; to put it more succinctly, what was once used to harm and divide the nation, must now heal it. This very concept is problematic, observes Žižek, as the act of using language obliges discussion and debate and is characterised as a renunciation of violence.²³¹ This is ironic as language in itself can be violent, and has been for the last sixty years, and certainly earlier,²³² in South Africa. Žižek extends this to the entire reconciliation process for liberation of any kind necessitates the act of rejecting, which is in itself a violent act. Also, matters are further complicated by the new era’s commitment to human rights, with the right to freedom of expression being crucial to a healthy, democratic state.²³³ For the present purposes, however, the focus will rather be on the paradoxical uses of language, though painting reconciliation as a violent process certainly provides food for thought.

2.4.3 The Tension That Emerges

After all, for the apartheid regime to persist, complete control over the minds of the population, especially the young, was indispensable.²³⁴ A “political grammar”²³⁵ was used not only to establish the regime but also to maintain it during its fifty-year reign, which was

²³¹ Žižek *Violence* 60-61.

²³² See South African Human Rights Commission Report on Provincial Dialogues: “Transition Blind spot: navigating the balance between freedom of expression and hate speech in shaping a common or shared identity, heritage and moral consensus in South Africa” 9-30 November 2011 pp 14 for an account of hate speech dating back to colonialism.

²³³ See the discussion on the constitutional right and limitations of free expression in South Africa at 4.3.2.

²³⁴ Bunting *South African Reich* 193.

²³⁵ Norval *Apartheid Discourse* 9.

characterized by an arsenal of repressive legislation, oppressive policies and suppressive language. An exclusionary and prohibitory dialogue became essential to the ruling party's national identity,²³⁶ which in turn established racial "identitary" language and practices.²³⁷ They were implemented to mould the type of society the dominant forces desired and its legacy²³⁸ is still felt in the way language was used, but also perceived. In fact, the use of racially divisive language has a history that certainly predates apartheid, with the racial dimensions that existed during colonialism.²³⁹ Gqola pertinently observes that considerations of language in South Africa have always proven to be "contested terrain."²⁴⁰ Language not only shaped racial constructions during apartheid and disseminated the racial labels that characterised the period, but it also predetermines the manner in which we talk about apartheid now.²⁴¹ Although the country is now free from many of the physical and legal indications of apartheid, the language it bred and encouraged lives on and informs much of today's discourse.²⁴² One could easily extend and compare Gqola's sentiments to the phenomenon of hate speech that continues to plague this country.

This reversal of the dehumanising and silencing process of apartheid feeds into the larger idea of a transformed society and evidences a decisive break from the oppressive, hateful and violent vernacular of previous years. This rupture forced South Africans to re-evaluate their perception of how language was used and the words they use. Draconian legislation was repealed, oppressive policy discontinued, discriminatory signage removed and freedom of speech guaranteed in line with the rights to dignity and equality under the new Constitution. The challenge for lawmakers now is in regulating language while upholding constitutional values and democracy, in particular the right to freedom of expression, but yet outlawing hateful and violent language. Conceptually, condemning hate speech is not problematic in light of the provisions of the Constitution,²⁴³ but the difficulties in the practicality of this task

²³⁶ Norval *Apartheid Discourse* 43.

²³⁷ Norval *Apartheid Discourse* 25.

²³⁸ Norval *Apartheid Discourse* 202.

²³⁹ See R Krüger "Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts" (2008) Rhodes University Doctoral Thesis at 2.2 for an outline of racial prejudice during colonial times; See J Meierhenrich *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (2008) Chapter 4 an account of a tradition of racial prejudice in South Africa between not only black and white, but also between the Afrikaners and English as a basis for the segregation and racial dynamics that have since shaped this country.

²⁴⁰ P Gqola "Defining people: analysing power, language and representation in metaphors of the New South Africa" (2001) 47 *Transformation* 94 at 95.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ See 4.3.2.1 on how language is justifiably curtailed in terms of the Constitution.

are what create considerable tension. Language is malleable in its very nature and thus it is hard to create legal norms and clear-cut definitions for hate speech, but yet that is the challenge. In order to ensure consistency, an appropriate legal standard that suitably manages this tension within the constitutional framework is required.

2.5 Regulating Language

The question of prohibiting hate speech is a consideration of the regulation of language; a difficult task at the best of times. Language is by its own nature is fluid and pliable, making it often hard to obtain certainty or agreed context. This is how ambiguities, ambivalence and inconsistencies arise. It is perhaps for this reason that “few professions are as concerned with language as is the law.”²⁴⁴ The law, while a language unto itself²⁴⁵ consisting of its own vocabulary and style,²⁴⁶ is premised on the idea of creating certainty, obtaining verification and allowing for validation.²⁴⁷ Waldron aptly points out the crucial intersect between law and language in that words obtain the meanings we assign to them through our own contexts and knowledge, making it imperative that some guidance or rules be offered to guide their application.²⁴⁸ This is the rationale for regulating language, and prohibiting of hate speech, but the inherent, malleable nature of language complicates this task. Regulating language through the medium of language may be conceptually challenging, but it is the only way to prohibit hate speech in law. How language is ultimately employed to achieve these ends to try to obtain a definition of hate speech and from there, suitably prohibit it is what I will explore. It is vital that appropriate hate speech measures exist in a country such as South Africa, given its hateful past and aspirational transformative future.

²⁴⁴ Tiersma in Gibbons *Forensic Linguistics* 1.

²⁴⁵ JB White “Law as Language: Reading Law and Reading Literature” (1981-1982) 60 *Texas Law Review* 415 at 415; W Probert “Law Through the Looking Glass of Language and Communicative Behaviour” (1967) 20.3 *Journal of Legal Education* 253 at 254; J Gibbons, V Prakasam, KV Tirumalesh, H Nagarajan (eds) *Language in the Law* (2004) 1-9.

²⁴⁶ White 1981-1982 *Texas Law Review* 417.

²⁴⁷ Probert 1967 *Journal of Legal Education* 254; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 108 entrenches the notion that legal certainty is a crucial tenet of the rule of law, which guides the South African democratic state, along with constitutional supremacy, per section 1 of the Constitution of the Republic of South Africa.

²⁴⁸ J Waldron “Vagueness in Law and Language: Some Philosophical Issues” (1994) 82 *California Law Review* 509 at 509-511.

2.6 Concluding Remarks

Hate speech is a manifestation of violent language. The very nature of violent language allows it to operate as a mechanism of division and damage of devastating proportions that has forever marked countries such as Germany, Rwanda and South Africa. The current policy of reconciliation in South Africa has done much to expose the damage done by violent language but it has not translated into the way in which we use language. The considerable shift in living with violent language to a mandated discourse of reconciliation and achievement of fundamental rights creates a considerable tension how language is used in South Africa. This has implications for hate speech and thus suitable measures are needed to combat this social ill if a fully transformed nation is ever to be achieved on a social and linguistic front.

Law regulates behaviour and language through curtailing the right to free expression. However, there is the tangible unease in the idea of law regulating language, through using language, which must be acknowledged. Law and language are inextricably linked and this makes the task of regulating language difficult to be suitably achieved. The international community has established a common benchmark to try to set a tone to be incorporated into domestic systems by agreeing on certain common standards on and language. I will explore these international norms in the next chapter and following from there, how these norms are incorporated into the South African system.

CHAPTER 3

INTERNATIONAL STANDARDS ON HATE SPEECH AND THEIR APPLICATION

3.1 Introduction

There is a universal need for hate speech regulation and the international law stance on hate speech creates a common standard for nations. Hate speech regulation is not a mere means of empowering governments to mute discord²⁴⁹ but rather it serves greater societal goals. Four such purposes include avoiding disruption to public order; preventing psychological harm to its victims; prohibiting the exclusion of minority groups; and averting social uproar and political collapse.²⁵⁰ All of these can be viewed without any trouble as meaningful aims underpinning the larger goal of transforming society from feudal and oppressive autocracies into nations founded on common principles and universal human rights. Rebirth and societal renovation is particularly relevant to the South African experience, as the country now embraces international norms and conventions in an attempt to secure its place in the international community.

The harm hate speech inflicts is given international recognition due to the various international instruments that exist to safeguard against its ills. In the wake of the atrocities of the Second World War, the international community sought to articulate common standards on universal human rights and obligations that would serve as blueprints for domestic laws. Therefore, any examination of South African hate speech prohibitions must be preceded by excursus on the international norms that inform the national standard. South African law is constitutionally mandated to conform to international law in that all interpretation of national law must be interpreted in a manner that is consistent with its overarching international counterpart.²⁵¹

²⁴⁹ Johannessen 1997 *SAJHR* 136.

²⁵⁰ S Braun *Democracy off balance: freedom of expression and hate propaganda law in Canada* 62 in *Afri-Forum v Malema* 20968/2010 (EQ Jhb).

²⁵¹ Section 233 of the Constitution of the Republic of South Africa, 1996.

Since 1994, South Africa has taken the decision to subscribe to several major international human rights agreements²⁵² and has signed and ratified various international and regional accords that encompass a general denouncement of hate speech and associated ills.²⁵³ These instruments are relevant in light of the constitutional imperative²⁵⁴ to consider international law in interpreting and applying the Bill of Rights. In what follows, I trace how international law relates to free expression and the prohibition of hate speech so as to discern the standard to which South African law must conform.

3.2 Setting the International Scene: Entrenching Fundamental Rights

In the wake of the atrocities of the Second World War, a series of international documents and agreements were penned in the realisation that a standard for the treatment of all human beings was gravely lacking in the world.²⁵⁵ An international commitment to set principles, it was hoped, would ensure the incorporation and application of these principles in domestic legal systems. This would spread the idea that there are certain sacrosanct rights intrinsic to all humans that must be upheld. These international instruments are based on inviolable human rights principles that are innate to all,²⁵⁶ such as the right to life, to nationality or the right not to be tortured. These principles are designed to form a shared benchmark and were committed to memory in the United Nations Charter in 1945 and then immortalised in the Universal Declaration of Human Rights in 1948.

3.2.1 Entrenching a Culture of Human Rights

As a bastion for human rights and a reinvigorated version of the failed League of Nations, the United Nations has been instrumental in entrenching the notion of fundamental rights. Its first task and symbolic opening to its future work was to produce a “constitution of the

²⁵² ME Olivier “South Africa and international human rights agreements: procedure, policy and practice (part 1)” (2003) 2 *TSAR* 293 at 296-297.

²⁵³ Note the constitutional commitment to emerge as a “democratic and open society... able to take its rightful place as a sovereign state in a family of nations” in the Preamble.

²⁵⁴ Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

²⁵⁵ Office of the UN High Commission for Human Rights “Fact Sheet No 13, International Humanitarian Law and Human Rights” at pp 3 observes that the after the Spanish Civil War and the Second World War, the world was shown that international humanitarian law needed to align itself with the changing character of warfare. www.ohchr.org/Documents/Publications/FactSheet13en.pdf (Accessed 5 December 2012).

²⁵⁶ J Dugard, DL Bethlehem and M du Plessis *International Law: a South African Perspective* 3ed (2008) 43.

international community.”²⁵⁷ The United Nations Charter was the fruit of this endeavour and signified an international commitment to human rights through international cooperation before aggression.²⁵⁸ The Charter embodied a decisive break in the manner in which international relations had previously been conducted and compliance with international norms was now to be established and enforced.²⁵⁹ This enlightened approach translated into the way in which human rights were now viewed as paramount and sacrosanct. The Preamble to the Charter reiterates a “fundamental faith in human rights, the dignity and worth of the human person (and) in equal rights of men and women.” While it is silent on the right to freedom of expression and its limitations, the Charter lays the groundwork in securing the rights to dignity and equality to all. These fundamental rights are the foundation to all rights and the reason why hate speech prohibitions are justifiable curtailments of the right to free speech.²⁶⁰ Although the Charter has been criticised for that fact it lacks enforcement mechanisms, does not confer any legal obligations on states and frames human rights in non-specific terms,²⁶¹ it sets the tone for subsequent international instruments.

In the same spirit, the UN Commission on Human Rights drafted the Universal Declaration of Human Rights (UDHR) three years later in 1948.²⁶² Eleanor Roosevelt, a co-drafter of the Declaration, hailed this document an “a common standard of achievement for all peoples and nations” and hoped it to grow to be the Magna Carta of its time.²⁶³ The Declaration expands on the UN Charter and gives greater substance to rights articulated therein, establishing categories of first and second-generation rights.²⁶⁴ The right to freedom of expression, for instance, is provided for in Article 19 of the Universal Declaration of Human Rights and it covers a broad base of freedom of opinion and expression, including the receiving and imparting of information in any manner. While the UDHR fails to directly address that freedom of expression is but one side of the proverbial hate speech coin, recourse can be attained through its protection of dignity in Article 1 and equality in Article 7, which are

²⁵⁷ B Fassbender “The United Nations Charter as Constitution of the International Community” (1998) 36 *Columbia Journal of Transnational Law* 529.

²⁵⁸ Preamble of the United Nations Charter.

²⁵⁹ J Dugard, M du Plessis, A Katz and A Pronto *International Law: a South African Perspective* 4ed (2011) 4.

²⁶⁰ See 4.3.2.1 on the justification of constitutionally prohibiting hate speech, as well as a discussion on the links that the harm in hate speech has to the right to equality and human dignity at 4.3.3.

²⁶¹ Dugard *et al International Law* 4ed 322.

²⁶² Black in Risse *et al* (eds) *International Norms* 1; Dugard *et al International Law* 4ed 325.

²⁶³ E Roosevelt in T Risse, SC Ropp and K Sikkink (eds) *The Power of Human Rights – International Norms and Domestic Change* (1999) 1.

²⁶⁴ Dugard *et al International Law* 4ed 325.

relevant in the prohibition of hate speech.²⁶⁵ Further, Article 8 entitles everyone to an effective remedy for any human rights violation, thereby entitling victims of hate speech to recourse under the Declaration.

The effect of the UN Charter and the UDHR has proved to be considerable, with the Declaration making its mark even as a part of customary international law.²⁶⁶ These documents have prompted many more international instruments to be drafted as a complement and more extensive detailing of the fundamental rights they set out, particularly in terms of hate speech regulation.²⁶⁷

3.2.2 South Africa and the International Human Rights Culture

Though initially actively involved in the drafting of the UN Charter,²⁶⁸ South Africa blatantly flouted its principles for next fifty years, rendering the rights to human dignity and equality completely unrecognisable in the apartheid state. An embodiment of the iconic Orwellian quote “all animals are equal, but some are more equal others,”²⁶⁹ South African foreign policy embraced the UN Charter in theory but did not believe in extending fundamental rights absolutely in practice in its domestic policy. This attitude culminated in South Africa’s abstention²⁷⁰ during the voting in of the UDHR in 1948 on the grounds that the document’s formulation of the right to equality was “too excessive and unrealistic” and that dignity was more of a philosophical concept than a right.²⁷¹ This event was a clear indication of the patently unequal domestic policy to follow in South Africa.²⁷² Black’s²⁷³ view is that the apartheid government never negated the soundness of certain international norms, such as the rule of law, representative democracy and self-determination: instead, the regime applied

²⁶⁵ See 4.3.3 for a discussion on dignity and equality as interlinking rights relevant to the prohibition of hate speech.

²⁶⁶ Dugard *et al International Law* 4ed 326.

²⁶⁷ *Ibid.*

²⁶⁸ Then Prime Minister, General Smuts was largely responsible for the drafting of the Preamble of the UN Charter (Dugard *et al International Law* 4ed 18).

²⁶⁹ G Orwell *Animal Farm* (1945) A Project Gutenberg of Australia eBook, eBook No.: 0100011h.html <http://gutenberg.net.au/ebooks01/0100011h.html> (Accessed 17 December 2012).

²⁷⁰ H Lauterpacht “The Universal Declaration of Human Rights” (1948) 25 *British Yearbook of International Law* 354 at 361.

²⁷¹ Lauterpacht 1948 *British Yearbook of International Law* 370 (ft I).

²⁷² MA Glendon “Foundations of Human Rights: the Unfinished Business” (1999) 44 *American Journal of Jurisprudence* 1 at 8.

²⁷³ D Black “The Long and Winding Road: International Norms and Domestic Political Change in South Africa” in T Risse, SC Ropp and K Sikkink (eds) *The Power of Human Rights – International Norms and Domestic Change* (1999).

drastic reinterpretations of these peremptory norms, rendering them unrecognisable.²⁷⁴ These sentiments are very telling of the regimes to follow in fellow abstaining nations, such as Saudi Arabia and the Eastern European bloc. In fact, Dugard points out that South Africa's influence on the evolution of international law was not through any positive contribution, but rather in creating a model on which the global community could draft preventative measures to prevent an apartheid-esque regime.²⁷⁵ Accordingly, many international instruments drafted during the 1960-70s were bolstered with provisions promoting the right to equality through human dignity and freedom of expression,²⁷⁶ through measures such as hate speech proscription.

The apartheid government's policy of "non-participation"²⁷⁷ in international human rights agreements precluded it from signing up to subsequent international instruments on regulating expression, preventing unfair discrimination and prohibiting hate speech.²⁷⁸ With the attainment of democracy in 1994, however, South Africa has re-joined the international community and a crucial part of reasserting itself was undoing the work of the apartheid government. In addition to repealing unconstitutional legislation and policy, South Africa actively can be said to have finally endorsed the Universal Declaration of Rights through its own Bill of Rights and the ratification of similar pieces of international law and peremptory norms. Current South African policy thus demonstrates a decisive break from the apartheid tradition and is now enjoined to subscribe to major human rights agreements and incorporate them into domestic law.²⁷⁹

3.3 Applicable International Provisions on Hate Speech

South Africa has overtly ratified certain central international mechanisms in relation to freedom of expression and hate speech. Of the plethora of international instruments, the four

²⁷⁴ Black in Risse *et al* (eds) *International Norms* 87.

²⁷⁵ Dugard *et al* *International Law* 4ed 19.

²⁷⁶ *Ibid.*

²⁷⁷ Olivier (part 1) 2003 *TSAR* 293.

²⁷⁸ See the discussion on the hate speech prohibitions contained in the International Covenant on Civil and Political Rights at 3.3.1; the International Convention on the Elimination All Forms of Racial Discrimination at 3.3.2; the Convention on the Prevention and Punishment of the Crime of Genocide at 3.3.3; and the African Charter on Human and Peoples' Rights at 3.3.4.

²⁷⁹ *Ibid.*

below have been highlighted as the foremost on hate speech proscription to which South Africa is party.

3.3.1 International Covenant on Civil and Political Rights (ICCPR)

South Africa signed the Covenant on 3rd October 1994.²⁸⁰ It was ratified by December 1998,²⁸¹ with the establishment of the Truth Commission,²⁸² the subsequent work of the TRC and the drafting of the new Constitution.²⁸³ This treaty builds on the rights itemised in the UDHR and expands on their content and means of enforcement.²⁸⁴ The ICCPR accordingly fosters the ideal that all humans should be civilly and politically free and empowered with certain inalienable rights.²⁸⁵ It obliges each member state to provide an effective legal remedy to human rights violations, regardless of whether the perpetrators are civilian or State.²⁸⁶ The Covenant declares that everyone shall have the right to freedom of expression in article 19:

- (1) Everyone shall have the right to hold opinions.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

However, this right is not provided absolutely as the Covenant recognises the potential free reign of this pledge and its aptitude for abuse. It therefore limits freedom of expression in terms of furthering propaganda for war²⁸⁷ and sponsoring hatred. Article 20(2) deals with this hate speech facet and legally obliges states to ensure that advocating national, racial or religious hatred that incites discrimination, hostility or violence is prohibited by law.

²⁸⁰ Olivier (part 1) 2003 *TSAR* 296.

²⁸¹ Russell-Brown 2002-2003 *Hastings International and Comparative Law Review* 231 (ft 23)

²⁸² Russell-Brown 2002-2003 *Hastings International and Comparative Law Review* 231.

²⁸³ In the language of the Covenant, South African law proscribes the advocacy of national or religious hatred when used to incite discrimination, hostility or violence, yet many countries have not replicated this wording. For instance, South African legislation deals with that which will be hurtful, incite harm or promote hatred. This failure to carry through a faithful wording of the ICCPR presents as an impediment to the consistent application of the Covenant will be further probed in my discussion of the wording of national legislation at 5.2.2-5.2.3.

²⁸⁴ SL Russell-Brown "Out of the Crooked Timber of Humanity: the Conflict between South Africa's Truth and Reconciliation Commission and International Human Rights Norms Regarding Effective Remedies" (2002-2003) 26 *Hastings International and Comparative Law Review* 227 at 232.

²⁸⁵ Preamble of International Covenant on Civil and Political Rights.

²⁸⁶ Article 2(3)(a) of the International Covenant on Civil and Political Rights.

²⁸⁷ Article 20(1) of International Covenant on Civil and Political Rights.

3.3.1.1 Hate Speech Complaints at the ICCPR Committee

The Office of the United Nations High Commissioner for Human Rights hosts a specialist Human Rights Committee that monitors the implementation of the ICCPR by member states.²⁸⁸ This panel of independent experts hears individual and state complaints on alleged violations of the Covenant and in its capacity has pronounced on matters of limitations on expression and hate speech. In a General Comment on the integrity of article 20, the Committee has already stated that this prohibition on hate speech is “fully compatible” with the right to freedom of expression that the ICCPR also safeguards.²⁸⁹ The Committee reasoned that the right to free expression carries with it special duties and responsibilities, central to which is not to abuse this right in the form of speech that advocates hates and incites discrimination, hostility or violence.²⁹⁰

The Committee has dealt with a number of hate speech cases. In *JRT and the WG Party v Canada*,²⁹¹ Mr T, a 69-year old Canadian citizen, joined forces with a political party in an attempt to attract membership to their cause. They set up a telephone service, whereby callers listened to pre-recorded messages of the WG Party policies, much of which consisted of anti-Semitic content. One notable message was a warning of “the danger of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.” Both Mr T and the WG Party were found guilty at the Federal Court level of violating the Canadian Human Rights Act by communicating matter exposing people to hatred or contempt on the basis of their race. After their appeal was dismissed at the Canadian Federal Court of Appeal, the appellants approached the UN Human Rights Committee on the basis that their right to freedom of expression under article 19 of the ICCPR had been violated. The State argued by communicating racist ideas, the Covenant did not protect them under article 19 as they had breached article 20(2), prohibiting the dissemination of hate speech. The Committee agreed with the State and found that the opinions broadcast evidently constituted an advocacy of racial or religious hatred. As a

²⁸⁸ Office of the United Nations High Commissioner for Human Rights Website “Human Rights Committee” <http://www2.ohchr.org/english/bodies/hrc/index.htm> (Accessed 17 December 2012).

²⁸⁹ Office of the United Nations High Commissioner for Human Rights “General Comment No.11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art20)” (1983) at para 2 <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/60dcfa23f32d3feac12563ed00491355?Opendocument> (Accessed 17 December 2012).

²⁹⁰ *Ibid.*

²⁹¹ *JRT and the WG Party v Canada* 104/1981 HRC Committee (6 April 1983).

member state, Canada was compelled to condemn such expression.²⁹² Accordingly, the Committee found that the telephone messages were incompatible with the provisions of the ICCPR and thus were inadmissible.²⁹³

In *Robert Faurisson v France*,²⁹⁴ a French professor was found to have violated his rights to freedom of expression in academic research by contesting the nature of the use of gas chambers in Nazi concentration camps. He claimed that the gas chambers were not used in the extermination of Jews, but rather for sanitation. His controversial statements in academic articles and in the press spoke of the “myth of the gas chambers (as) a dishonest fabrication endorsed by the victorious powers of Nuremberg” and of “(his) excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber” resulted in him being prosecuted under French law for denial of crimes against humanity. Having been found guilty in the French courts, Faurisson took his case to the UN Human Rights Committee, claiming that the applicable law was a means of “unacceptable censure, obstructing and penalising historical research,” violating his right to freedom of expression under the ICCPR.²⁹⁵ The State claimed that Faurisson’s “revisionist theses” were what the French law has intended to cover in its aim to prohibit racial discrimination, incite racial hatred or glorify war crimes or crimes perpetrated against humanity.²⁹⁶ It also noted the Committee’s previous approval of the French law in question and, furthermore, that Faurisson’s remarks were a clear violation of the Covenant’s prohibition of racial discrimination under article 20(2), an offense which member states were obliged to criminalise.²⁹⁷ Although the communication was found to be inadmissible on various technical grounds, the Committee did comment on the integrity of the French law in question. It held that any restriction on the right to freedom of expression must be provided by law, address the aims of article 19²⁹⁸ and be necessary to achieve a legitimate purpose.²⁹⁹ In this regard, the Committee found that French law in question was evidence of the first requirement and, furthermore, it was deemed to be compliant with the aims of the Covenant.³⁰⁰ Secondly, the author’s conviction was not a

²⁹² *JRT and the WG Party v Canada* para 8(b).

²⁹³ *JRT and the WG Party v Canada* para 8-9.

²⁹⁴ *Robert Faurisson v France* CCPR/C/58/D/550/1993 HRC Committee (8 November 1996).

²⁹⁵ *Robert Faurisson v France* para 3.1.

²⁹⁶ *Robert Faurisson v France* para 4.1.

²⁹⁷ *Robert Faurisson v France* para 7.7.

²⁹⁸ Article 19(3)(a-b) cites the aims of its provisions on freedom of speech as serving the need to respect the rights or reputations of others and to protect national security, public order, public health or morals.

²⁹⁹ *Robert Faurisson v France* para 9.4.

³⁰⁰ *Robert Faurisson v France* para 9.5.

question of whether his rights to unbridled expression had been violated, but rather whether he had violated the rights and reputations of others (the Jewish community).³⁰¹ The Committee found, finally, that the French law served in the struggle against racism and anti-Semitism, of which Holocaust denial was the “principal vehicle” of its dissemination. Thus, the provision was necessary and presented no violation of the ICCPR by France.³⁰² While the main decision did not engage with article 20(2) of the Covenant, the separate concurring decisions did and found that it was a relevant provision in this case. It was noted in Opinion C³⁰³ that every individual has the right to be free not only from discrimination, but also incitement in this regard and Holocaust denial is “a contemporary expression of racism and anti-Semitism... by virtue of the fact that such statements propagate ideas tending to revive Nazi doctrine and the policy of racial discrimination (and) tend to disrupt the harmonious coexistence of different groups in France.”³⁰⁴ Opinion E³⁰⁵ built on these views, linking article 20(2) to Faurisson’s remarks being an advocacy of racial hatred constituting incitement “at the very least” to hostility and discrimination of the Jewish community, resulting in the author’s direct violation of the Covenant.³⁰⁶

The reluctance of the Committee to invoke article 20(2) was noted in another decision, *M Vassilari v Greece*.³⁰⁷ In this case, an article expressing derogatory remarks against the Roma people in Greece including calls for their eviction was brought to the Human Rights Committee. The article, entitled “Objection against the Gypsies: Residents gathered signature for their removal” accused the Roma of crimes and demanded their eviction, failing that, “militant action.” Article 20(2) was cited as the primary cause of the complaint, claiming that the Greek Anti-Racism Law was ineffective in granting them relief. The law failed to acknowledge the racist nature of the expression in question, constituting a violation of Greece’s obligation to ensure that all expression that advocates racial hatred and incites discrimination, hatred or violence is prohibited. The Committee found that the parties failed to exhaust all internal remedies before approaching this forum and thus the claim was inadmissible. It found that on these grounds it was not necessary to explore the merits of the

³⁰¹ *Ibid.*

³⁰² *Robert Faurisson v France* para 9.7.

³⁰³ *Robert Faurisson v France* Annexure C: Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckhart Klein (concurring).

³⁰⁴ *Robert Faurisson v France* Annexure C: Individual Opinion para 4-5.

³⁰⁵ *Robert Faurisson v France* Annexure E: Individual Opinion by Rajsoomer Lallah (concurring).

³⁰⁶ *Robert Faurisson v France* Annexure E: Individual Opinion para 9-11.

³⁰⁷ *M Vassilari v Greece* CCPR/C/95/D/1570/2007 HRC Committee (29 April 2009).

claim under article 20(2) but rather the extent to which Greece had complied with its obligations under the ICCPR.³⁰⁸ Greece was found to be fully compliant in this regard.³⁰⁹ The dissenting opinion³¹⁰ raised the question as to the applicability of article 20(2) that it should have been considered, as its relevancy cannot be understated as it protects individuals, such as the complainants'.³¹¹ By neglecting to pronounce of this aspect of the case, the dissenting opinion stated that further uncertainty would persist with regard to the scope of applicability of article 20(2).³¹²

3.3.2 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Another significant international act in recognising human rights and rejecting racist discourse is South Africa's commitment to the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD). South Africa signed this Convention on 3rd October 1994 and ratified it on 10th December 1998,³¹³ overtly demonstrating the country's commitment to equality and dignity by its becoming a member to the treaty. The CERD Committee has partly attributed the origins of the Convention to the denigration and cruelty of the apartheid regime,³¹⁴ making the eventual signing and ratification of the instrument particularly poignant.

Article 4 of the ICERD obliges state parties to condemn ideas or theories premised on racial superiority, or which justify or promote racial hatred and discrimination in any form. It states that members;

- (a) "shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic

³⁰⁸ *M Vassilari v Greece* para 6.5.

³⁰⁹ *M Vassilari v Greece* para 8.

³¹⁰ *M Vassilari v Greece* Individual Opinion of Committee Member Mr Abdelfattah Amor (dissenting).

³¹¹ *M Vassilari v Greece* Individual Opinion of Abdelfattah Amor pp12.

³¹² *Ibid.*

³¹³ Olivier (part 1) 2003 TSAR 296-299; SAHRC Report on Provincial Dialogues: "Transition Blind spot: navigating the balance between freedom of expression and hate speech in shaping a common or shared identity, heritage and moral consensus in South Africa" 9-30 November 2011 pp5.

³¹⁴ CERD Committee "Consideration of reports submitted by states parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination – South Africa" (2006) pp 1. Accessed on 9 July at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CERD.C.ZAF.CO.3.En?Opendocument>.

- origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) shall declare illegal and prohibit organisations... and propaganda activities which promote and incite racial discrimination...;
- (c) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

The ICERD not only proscribes hate speech but enjoins member states to take the further step in their condemnation of hate speech by creating offences. The ICERD thus embodies similar sentiments to the ICCPR but takes a bold step in imposing that signatories declare the dissemination of ideas based on hatred and incitement to racial discrimination an offence punishable by law and that they extend this to organisations and public authorities. This aspect of broad regulation over private and public entities is an important aspect in ensuring hate speech has no safety net in any organisation.

3.3.2.1 Hate Speech Complaints at the CERD Committee

An independent panel of experts tracks the enactment of the Convention in its member states in various ways.³¹⁵ The CERD Committee is charged assessing states’ regular reports as well as producing research and examining complaints on an individual and state level.³¹⁶ The following decisions all involved complaints of hate speech in relation to article 4 of the ICERD.

In dealing with complaints of states’ compliance with the ICERD, the Committee pronounced on the matter of *Sadic v Denmark*.³¹⁷ The petitioner alleged that he had suffered hate speech at work when he attempted to claim overdue payments and was insulted by his employer and called an “Arab pig... immigrant pig... God-damned idiot and psychopath,” amongst other generalisations on the Arab race. Sadic had initially sought recourse under the Danish Criminal Code but was advised that because the racist remarks had not been made publicly or with the requisite intention of wider dissemination, the relevant Danish criminal sanctions were not applicable and the investigation was discontinued. As a last resort, Sadic sought the

³¹⁵ Office of the United Nations High Commissioner for Human Rights: Committee on the Elimination of Racial Discrimination Website <http://www2.ohchr.org/english/bodies/cerd/> (Accessed 5 November 2012).

³¹⁶ *Ibid.*

³¹⁷ *Sadic v Denmark* (25/2002) CERD C/62/D/25/2002 (21 March 2003).

aid of the CERD Committee, claiming that the relevant section of the Danish Criminal Code was incompatible with the ICERD. The Committee held that the petitioner's refusal to make use of an alternative remedy in the Danish law of defamation barred any relief at the CERD Committee.³¹⁸ After all, according to article 6, a state is required to provide an "effective remedy" and this was done by Danish defamation measures. The Committee did, however, invite the state to reconsider the restrictive wording of its hate speech provisions as they "(did) not appear to be fully in conformity" with the requirements of article 4 of the Convention.³¹⁹ However, upon closer inspection, the Danish understanding of defamation does not provide for hate or violent speech either: it penalises the violation of one's honour by offensive words or conduct,³²⁰ which is quite different from hate speech.³²¹ While defamation and hate speech share an aspect of loss of one's dignity, the latter goes much deeper into violent, dehumanising speech and incitement to violence. Therefore, this verdict by the CERD Committee is only useful insofar as it calls on the government to reform their hate speech laws. In a similar case, the CERD Committee failed to find a violation of the Convention on the facts, but urged the Dutch government to re-evaluate its measures in light of its commitments to article 4.³²²

The CERD Committee has been consistent in its stance that its role in monitoring the observance and implementation article 4 is in terms of a state's obligations, and not in terms of an individual's rights. In *Jewish Community of Oslo v Norway*,³²³ the Committee ruled that the nation had not provided sufficient recourse to victims of racial hatred and threats of violence. A series of violent incidents had occurred in Oslo in the aftermath of a memorial for Nazi, Rudolf Hess. The leader of a group of neo-Nazis condemned the Jewish race and accused them of pillaging the country and spreading immoral and un-Norwegian thoughts and further showed great deference to Hitler, vowing to "follow in his footsteps." After a loss in the Norwegian Supreme Court, the petitioners approached the CERD Committee citing Norway's failure to provide an effective remedy for the hate speech they suffered. The

³¹⁸ *Sadic v Denmark* para 6.3-4.

³¹⁹ *Sadic v Denmark* para 6.8 notes that there is no mention of the violence aspect of hate speech in section 266 of the Danish Criminal Code, only that it serves to guard against public dissemination of threatening, insulting or degrading language.

³²⁰ Section 267 of Danish Criminal Code.

³²¹ See 7.2 on hate speech and defamation sharing similar ground, but ultimately protecting different types of speech.

³²² *LK v The Netherlands* 4/1991(16 March 1993) para 6.8.

³²³ *Jewish Community of Oslo v Norway* 30/2003 CERD/C/67/D/30/2003 (17 June 2003).

Committee noted that all internal remedies had been exhausted³²⁴ and expressed concern that the Supreme Court's ruling upholding free speech could be viewed as a dangerous precedent in unsuccessful hate speech prosecutions.³²⁵ The Committee viewed the content of the pro-Nazi speech to espouse notions of racial superiority and violence and held that such hate speech did not warrant an increased level of protection under freedom of speech.³²⁶ Therefore the ruling of Norway's Supreme Court was condemned for its lack of harmony with article 4 of the ICERD and for neglecting to provide an effective remedy to victims of the hate speech concerned. This case solidifies the link between hate speech and article 4 of the ICERD and condemns member states that fall foul of its provisions.

3.3.3 Convention on the Prevention and Punishment of the Crime of Genocide

South Africa, having acceded to this Convention on 10 December 1998,³²⁷ pledges to punish perpetrators of the international crime of genocide. Genocide is defined in the Convention as an intent to destroy, in whole or in part, a national, ethnic, racial or religious group that manifests as the killing of members of the group;³²⁸ causing them serious bodily or mental harm;³²⁹ deliberately inflicting conditions of life calculated to destroy them wholly, or partly;³³⁰ imposing measures to prevent births within the group;³³¹ or forcibly transferring children away from the group.³³²

Coming into force in 1951, the Genocide Convention, as with many human rights instruments, has its roots in the atrocities committed during the Second World War.³³³ The Convention has been used to try war criminals, such as Adolf Eichmann, for their involvement in the mass annihilation of national or ethnic groups. The Genocide Convention does not preclude "hate speech" specifically as a crime relating the genocide, but the

³²⁴ *Jewish Community of Oslo v Norway* para 7.2.

³²⁵ *Jewish Community of Oslo v Norway* para 10.2.

³²⁶ *Jewish Community of Oslo v Norway* para 10.5.

³²⁷ United Nations Treaty Collection: Genocide Convention

http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants (Accessed 5 November 2012).

³²⁸ Article 2(a) of the Convention on the Prevention and Punishment of the Crime of Genocide.

³²⁹ Article 2(b) of the Convention on the Prevention and Punishment of the Crime of Genocide.

³³⁰ Article 2(c) of the Convention on the Prevention and Punishment of the Crime of Genocide.

³³¹ Article 2(d) of the Convention on the Prevention and Punishment of the Crime of Genocide.

³³² Article 2(e) of the Convention on the Prevention and Punishment of the Crime of Genocide.

³³³ CH Möller "South Africa's Obligation under International Law to Prosecute and Punish Perpetrators of Gross Human Rights Violations and to Provide Compensation for their Victims" UCT Minor Thesis in Public International Law.

International Criminal Tribunal for Rwanda³³⁴ established the link between inciting genocide and violent language as a means to achieve this end.³³⁵

3.3.3.1 Hate Speech Complaints and the Genocide Convention

In its capacity, the United Nations International Criminal Tribunal for Rwanda tried and convicted three media executives for their roles in the Rwandan Genocide in 1994. The verdict and sentence was confirmed in the Appeals Chamber in 2007³³⁶ for Ferdinand Nahimana and Jean-Bosco Barayagwiza, top executives of *Radio télévision libre des milles collines* (RTLM)³³⁷ and Hassan Ngezi, editor-in-chief of the *Kangura* newspaper, for their instrumental and influential roles in the genocide. The use, or rather abuse, of the Rwandan media as tools for hateful propaganda in the genocide is infamous and the *Nahimana* case serves to cement the cause and effect of hate speech in this way. The *Kangura* newspaper was described at the trial as “(having) the effect of poison” in proliferating “fear-mongering and hate propaganda... whipping the Hutu population into a killing frenzy.”³³⁸ RTLM, otherwise known as “Radio Machete,” was described by the trial court as the “weapon of choice” in ordering the eradication of the Tutsis.³³⁹ Citing articles 2 and 3 the Genocide Convention, the Appeals Chamber confirmed the ruling of conspiracy to commit genocide, genocide,³⁴⁰ direct and public incitement to commit genocide and persecution and extermination as crimes against humanity for the three media executives.³⁴¹ Many have labelled the language used in the genocide as hate speech³⁴² in nature but since the

³³⁴ International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

³³⁵ *Nahimana, Barayagwiza & Ngeze v Prosecutor* (ICTR 99-52-A) 28 November 2007 (ICTR).

³³⁶ *Nahimana, Barayagwiza & Ngeze v Prosecutor* (ICTR 99-52-A) 28 November 2007 (ICTR).

³³⁷ Translated as Free Radio/Television Channel for Mille Collines.

³³⁸ Trial Judgment, cited in CA MacKinnon “Prosecutor v Nahimana, Barayagwiza & Ngezi. Case No ICTR 99-52-A” (January 2009) 103.1 *The American Journal of International Law* 97 at 97.

³³⁹ *Ibid.*

³⁴⁰ Under the Convention, the crime of genocide includes in Article 2 the killing of members of a group, causing serious bodily and mental harm to the group, deliberately inflicting conditions of life calculated to bring about their whole or partial physical destruction, imposing of preventative measures for birth and forcible transfer of children.

³⁴¹ *Nahimana, Barayagwiza & Ngeze v Prosecutor* para 6.

³⁴² WA Schabas “Hate Speech in Rwanda: The Road to Genocide” (2000-2001) 46 *McGill Law Journal* 141 at 147 ascribes hate speech as the tool for creating “Rwanda’s willing executioners.” Schabas quotes RTML as broadcasting hate speech regularly, in particular this message in July 1994: “Let us rejoice, friends! The *inkotanyi* (Tutsi political party) have been exterminated! God is just! ... These criminals have without a doubt been exterminated... I (the speaker) have duly seen the bodies at Nyamirambo... Nonetheless, we continue. We

Convention does not expressly provide for this type of violent language, the Appeals Chamber was compelled to explore the relationship between “hate speech” and “direct and public incitement to commit genocide.”

In the appeal decision, the tribunal viewed hate speech as a general term employed to denote the incitement of discrimination or violence.³⁴³ The crime of direct and public incitement to commit genocide, as stipulated under the Convention, is more focused in that it indicates a direct appeal to mass slaughter and not a vague or indirect suggestion.³⁴⁴ The Appeals Chamber noted that hate speech is a common precursor or symptom of the crime of genocide, but not synonymous with the crime of incitement to genocide as prohibited by the Convention.³⁴⁵ As such, the Appeals Chamber cautioned against consulting general hate speech or discrimination jurisprudence when considering a charge of direct and public incitement to genocide under the Genocide Convention.³⁴⁶ The Appeals Chamber employed the forum of first instance’s reasoning to explain the point: messages that solely propagated ethnic hatred were insufficient on their own to warrant a conviction, unless they called listeners to action.³⁴⁷ The earlier tribunal cited an example by the RTLM that denigrated and vilified the Tutsi and called for their extermination as an instance of direct and public incitement to genocide.³⁴⁸ The Appeals Chamber held that the test for such expression is in a consideration of the particular context of the utterances.³⁴⁹ It cautioned that such speech will not necessarily exist as explicit calls to genocide, and therefore “it (is) open to the Trial Chamber” to include ambiguous calls to constitute a direct incitement to commit genocide.³⁵⁰ An “ambiguous direct call for genocide” is a seemingly contradictory statement, but the Appeals Chamber has widened the ambit of this particular crime in the hopes that perpetrators will not evade sanction on the mere technicalities and nuances of language.

must endure and exterminate them... so that our children, our grandchildren and the children of our grandchildren never hear the name “*inkotanyi!*” ” Schabas also makes reference to the *Kangura* newspaper’s publication of the “10 Commandments of the Hutu” in which various interactions with Tutsis would render a Hutu a “traitor,” such as taking a Tutsi wife, secretary or concubine; having business dealings with a Tutsi; even showing a Tutsi mercy was forbidden.

³⁴³ *Nahimana, Barayagwiza & Ngeze v Prosecutor* para 692.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Nahimana, Barayagwiza & Ngeze v Prosecutor* para 693.

³⁴⁷ *Nahimana, Barayagwiza & Ngeze v Prosecutor* para 696.

³⁴⁸ *Nahimana, Barayagwiza & Ngeze v Prosecutor* para 696.

³⁴⁹ *Nahimana, Barayagwiza & Ngeze v Prosecutor* para 701.

³⁵⁰ *Nahimana, Barayagwiza & Ngeze v Prosecutor* para 703.

This case was considered with the purview of prosecuting genocide through the use of language and, as such, was compelled to consider the issues pertaining to hate speech, which as violent speech, can be employed effectively in mass annihilation. Though the Appeals Chamber declined to hold that hate speech can incite genocide on its own and requires additional calls for violence,³⁵¹ the link between violent language such as hate speech in creating a climate for mass murder is clear. However, the crime of direct and public incitement requires a more direct cause and effect of “calling to action” than “creating a climate,” which is more indirect. Therefore, what can be taken from this decision is that direct and public incitement to genocide is often hate speech in nature, but hate speech will not necessarily be direct and public incitement to commit genocide.

Schabas³⁵² notes that “direct and public incitement” to genocide is a controversial clause of the article 3 as its wording makes it especially hard to prove this crime. The qualifiers, “direct” and “public,” will result in violent language, such as hate speech, evading sanction under the Convention as hate speech more indirect means of achieving genocide and will often lack the blatant and unconcealed formulation of a call to arms. This is unfortunate as, after all, genocidal language could be hate speech in its worst form of dehumanising groups to the point of their annihilation. However, one can also view the stringent articulation of article 3 as an attempt to protect the right of free expression as much as possible while also permitting prosecution for violent speech. Be that as it may, hate speech is still a useful indication of genocidal designs and can be used as tangible proof thereof, as in the case of *Nahimana*. The Genocide Convention is thus relevant to the international norms on hate speech as it demonstrates why such measures are needed and creates the possibility for hate speech to be used in proving the greater international crime of inciting genocide.

3.3.4 African Charter on Human and Peoples’ Rights

³⁵¹ See the South African approach 4.3.3, where it is reasoned that hate speech is offensive to human dignity as well as transformative constitutionalism on a state-wide level because it is not only hateful in nature, but conveys a message of violence, be it physical or psychological, that hampers the constitutional mandate to transform and improve quality of life. This broad South African approach is often linked to the institutionalised racism that persisted during the apartheid era and is thus justified.

³⁵² WA Schabas “Convention for the Prevention and Punishment of the Crime of Genocide” (2008) United Nations Audiovisual Library of International Law <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html> (Accessed 05 November 2012).

South Africa has additionally shown regional support for the African Charter on Human and Peoples' Rights of 1981 by ratifying it on 7th September 1996.³⁵³ This instrument, like the UDHR, does not have an outright condemnation of hate speech. There is no listed limitation to Article 9's provision of freedom of expression, nor is there any provision for speech that incites violence,³⁵⁴ as with the ICERD and the Genocide Convention. Hate speech prohibitions can, however, be implied in the right to be free from discrimination in the Charter,³⁵⁵ integrity of person,³⁵⁶ not to be dominated by another,³⁵⁷ equality³⁵⁸ and dignity,³⁵⁹ all of which can be said to constrain the right to freedom of expression contained in Article 9.

3.3.5 The International Standard on Hate Speech That Emerges

The above exposition of the various instruments that prohibit hate speech is necessary to obtain a clear international standard that is binding on South Africa. International law has consistently condemned violent and hateful speech and obliges its member states to incorporate this stance into their domestic legal frameworks. Of the international instruments examined, there is some variation as to the exact framing of hate speech but a common concept can be articulated from these provisions.

The ICCPR conceptualises hate speech as the advocacy of hatred that incites discrimination, hostility or violence on national, racial or religious grounds.³⁶⁰ The ICCPR thus envisions hate speech as having two unique markers, one of advocacy of hatred on a particular listed ground, and a second of the effect of hate speech. This result may manifest as one of three options, ranging in increments of severity, from discrimination, hostility to violence. The effects of these three options can, however, be potentially very different, with discrimination causing dissatisfaction and a feeling of injustice; hostility threatening one's safety and security; and violence that can result in physical or emotional harm. Nonetheless, what is common to all of these possible outcomes of hate speech is some form of prejudice and, significantly, harm accrues, be it in the form of discrimination, hostility or violence. The

³⁵³ Russell-Brown 2002-2003 *Hastings International and Comparative Law Review* 229 (ft 18).

³⁵⁴ Maina *et al* (2011) ARTICLE 19 Study pp3.

³⁵⁵ Article 2 and 18(3) of the African Charter on Human and Peoples' Rights.

³⁵⁶ Article 4 of the African Charter on Human and Peoples' Rights.

³⁵⁷ Article 19 of the African Charter on Human and Peoples' Rights.

³⁵⁸ Article 3 of the African Charter on Human and Peoples' Rights.

³⁵⁹ Article 5 of the African Charter on Human and Peoples' Rights.

³⁶⁰ Article 20(2) of International Covenant on Civil and Political Rights.

ICERD operates from the premise of guarding against racial discrimination and accordingly also creates two distinct markers of hate speech.³⁶¹ It is the dissemination of racial hatred, or the incitement thereof, as well as racial violence, or the incitement to these ends that is condemned. The Genocide Convention does not prohibit hate speech specifically,³⁶² but will only act on this type of discourse when it is coupled with overt calls to commit genocide.³⁶³ It has been acknowledged, in terms of this Convention, hate speech is usually a precursor of regime of genocide and therefore hate speech is contemplated in this piece of international law, albeit under the guise of direct and public incitement to commit genocide.

A tangible standard that therefore permeates through these examples is in an advocacy or dissemination of racial hatred, coupled with incitement to cause some form of prejudice or harm, whether it be in the form of discrimination, hostility or violence, or incitement to this effect. Expression that is no more than mere offense hurtful comments or remarks made in bad taste is therefore excluded from the ambit of hate speech condemnation under international law. How South Africa ultimately incorporates and interprets this standard is what must be determined and assessed.

3.4 Achieving the International Standard

The findings of the UN Human Rights and ICERD Committees demonstrate that there are clear norms on hate speech prohibitions and how these measures are to be applied domestically. The constitutional mandate on South Africa to consider international law when interpreting fundamental rights, coupled with the general obligation placed on it as a member state, demands that this standard infuse national legislation and frameworks. Therefore what is required in South African measures is a two-pronged definition of hate speech as a phenomenon that not only advocates racial hate but also brings about some harm to its victims, be it in the form of discrimination, hostility or violence, or incitement to this effect. The ICERD places further obligations on South Africa to create offences to these ends, serving as a clear message that hate speech will not be tolerated in any open and democratic state founded on the notion of fundamental human rights. What is additionally required of hate speech regulation is a balance to be struck between upholding the right to freedom of

³⁶¹ Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination.

³⁶² Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide.

³⁶³ *Nahimana, Barayagwiza & Ngeze v Prosecutor* para 692.

expression and limiting this right in terms of racial hate speech measures. Given the fact that language is so fluid and that it can be shaped to nefarious and hateful ends, the domestic regulation must cater to these aspects and produce a framework that is applicable and suitable to the South African experience.

As regards hate speech regulation, the CERD Committee has acknowledged the enactment of the relevant constitutional and legislative provisions on hate speech in South Africa³⁶⁴ but has voiced concern at the inadequacy of these measures in preventing the high numbers of hate crimes and hate speech in the country.³⁶⁵ It was therefore recommended that South Africa find more effective ways of realising Article 4 of the Convention to address hate speech in the country in terms of prevention and penalty.³⁶⁶ The South African Human Rights Commission shadow report on ICERD Compliance³⁶⁷ further criticises the state for the gap between policy and practice in relation to combatting racial discrimination.³⁶⁸

The obligations tied to being party to international conventions do not end at the mere signatory or even ratification phase. The fervour of the 1994 government to reengage with the international community and law has faded with the trials of governance,³⁶⁹ evidenced by the country's unenthusiastic approach to periodic reporting on its compliance with international instruments. Reporting is a vital feature of commitment to international treaties as it is an account of the implementation of the aspirational goals espoused in international law and serves as a yardstick for further work to be done in this regard.³⁷⁰ Sustained commitment to international norms and agreements is key to a prolonged and serious commitment to human rights and this can be assessed through reporting mechanisms. After

³⁶⁴ CERD Committee "Concluding Observations of the Committee on the Elimination of Racial Discrimination – South Africa" para 14; See a later discussion on the South African legislative measures against hate speech at 5.2.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

³⁶⁷ As requested by the CERD Committee, the SAHRC delivered a shadow report on the country's compliance with the ICERD. Its remarks are found at: South African Human Rights Commission "Shadow Report on South Africa's Compliance with the Provisions of the International Convention Against All Forms of Racial Discrimination" (2006) pp30. Accessed on 9 July 2012 at www2.ohchr.org/english/bodies/cerd/docs/south_african_HRC_report_English.doc - 2007-10-22

³⁶⁸ At pp30-31 of the Shadow Report, the SAHRC criticizes the distinct lack of hate speech jurisprudence, statistical data and a notably one-sided view of the perpetrators of contemporary racist hate speech and associated violence as it does not paint a realistic and comprehensive picture of the South African reality. The SAHRC called on the South African government to detail specifics in its plan to combat these apartheid-related ills, such as hate speech. The SAHRC called on the South African government to detail specifics in its plan to combat these apartheid-related ills, such as hate speech. See a further discussions on Equality Act at 5.2.3.

³⁶⁹ Olivier (part 1) 2003 TSAR 307.

³⁷⁰ Olivier (part 1) 2003 TSAR 308.

all, the only manner in which to measure the State compliance and monitor ratification progress is through a process of self-criticism and detailing. If states fail to ratify or enforce its content domestically, or at least have the goodwill to demonstrate attempts to do so, international law lacks authority. Most human rights conventions oblige member states to submit periodic, comprehensive reports to independent bodies that record, discuss and make recommendations as to the level of achievement attained in practice. South Africa's outward commitment to human rights is certainly noteworthy but it has proved less than conscientious in submitting regular reports to the various monitoring bodies. For instance, after failing to submit its first two reports to the CERD Committee, South Africa finally submitted a consolidated third report on 2 December 2004,³⁷¹ after a five-year delay. The report was generally well received, though thoroughly scrutinised. The Committee rebuked the State for not respecting the submission deadlines, failing to consult the South African Human Rights Commission sufficiently in the drafting of the report and probed several distinct areas in need of attention.³⁷² The next consolidated report (fourth to sixth period reports) to the CERD Committee was due on the 9 January 2010³⁷³ but the Department of Justice and Constitutional Development has yet to submit the document.³⁷⁴

Despite international directives on hate speech prohibition, it must be borne mind that the inherent limitations of international law present several challenges to seeing international law reflected in domestic contexts. The act of nations uniting to agree on shared values and common practice has great symbolic and aspirational significance. The challenge with international law, however, is that it is largely dependent on the good will, acquiescence and compliance of its signatories.³⁷⁵ For instance, the Preamble of the UN Charter, partly drafted by then Prime Minister General Smuts,³⁷⁶ reaffirms nations' faith in fundamental human rights and yet South Africa blatantly violated its content for the next forty years after its inception. Dominant forces during the era viewed international law as extraneous and

³⁷¹ Community Law Centre Parliamentary Programme "The State of State Reporting - Seminar Research Paper" (2010) pp32. Accessed 9 July 2012 at: http://peopletoparliament.org.za/events/past-events/seminar-on-south-africas-reporting-on-international-obligations/State_ResearchPaper/view?searchterm=state+to+state+reporting

³⁷² Committee on the Elimination of Racial Discrimination, 69th Session "Consideration of Reports Submitted by States Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination – South Africa" (2006). Accessed on 9 July 2012 at:

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CERD.C.ZAF.CO.3.En?Opendocument>

³⁷³ CERD Committee "Concluding Observations of the Committee on the Elimination of Racial Discrimination – South Africa" para 34.

³⁷⁴ Failure to submit noted as of February 2013.

³⁷⁵ J Dugard, DL Bethlehem and M du Plessis *International Law: a South African Perspective* 3ed (2008) 3.

³⁷⁶ Dugard *et al International Law* 322.

unrelated³⁷⁷ to the country, or at least to portions of it and that considerations of national sovereignty trumped all. This approach has by and large been rectified though Olivier still believes that international law is regarded as “foreign”³⁷⁸ to the South African courts.³⁷⁹ However, the international standard is still a useful and appropriate benchmark for domestic law and set an aspirational goal to countries such as South Africa who have emerged out of previously unequal societies and are striving to transform.

3.5 Concluding Remarks

The standard that emerges is that racial hate speech must be conceptualised as an advocacy of racial hatred coupled with the incitement of some form of harm. There is an array of international instruments that inform this standard on the prohibition of violent and hateful language that must be considered when a South African court interprets the Bill of Rights. However, these instruments exist as footnotes to the main event, which is the South African legal framework on the issue. Though international law must permeate through national understandings of hate speech, the inherent problems of international law are practical impediments to its successful application domestically. Grossly overdue reporting on its compliance with the international instruments detected across the board³⁸⁰ puts South Africa in a precarious position with regard to its compliance. With recommendations voiced that South Africa find more effective ways of realising its commitment to article 4 of the

³⁷⁷ Dugard *et al International Law* 23.

³⁷⁸ ME Olivier “International human rights agreements: procedure, policy and practice (part 2)” (2003) 3 *TSAR* 490 at 510 cites the noticeable trend in referentially, mechanically and superficially referring to international conventions in passing to the point that they lack effect as indications that South African courts regard international law as “foreign” and only persuasive.

³⁷⁹ There are two distinct approaches to the relationship between international and municipal law. The dualist school sees these two spheres as clearly defined and different systems of law that may only converge if a domestic court specifically adopts international law into local law by way of statute and therefore do not need any further legislative endorsement to use international law domestically. The provisions of the Constitution indicate a dualist-monist “hybrid” approach in that while section 39 mandates consideration of international law when interpreting the Bill of Rights, this is qualified by section 231, which lays out a dualist means of approving international agreements by approving them in the National Assembly and National Council of Provinces, unless they are self-executing in nature. The monist approach is found in section 232 which states that customary international law is law unless found to be in conflict with any South African legislation or generally unconstitutional. See Dugard *International Law* 47, Devenish *Constitution* 416.

³⁸⁰ The first ICERD Report was submitted late and the second has yet to materialize, while no reports have been submitted at all, to date, to the Human Rights Committee in compliance with the ICCPR, according to the Community Law Centre Parliamentary Programme “The State of State Reporting” pp8; Centre for Civil and Political Rights, accessed on 9 July 2012 at <http://www.cccprcentre.org/state-reporting/overdue-reports/>.

ICERD,³⁸¹ one must question whether spirit and purport of international law has been filtered through into domestic legal frameworks, in compliance with South Africa's duty to implement these instruments.

³⁸¹ CERD Committee "Concluding Observations of the Committee on the Elimination of Racial Discrimination – South Africa" para 14.

CHAPTER 4

THE LEGAL FRAMEWORK GOVERNING HATE SPEECH IN SOUTH AFRICAN CONSTITUTION

4.1 Introduction

For it to be wholly appropriate, the South African standpoint on hate speech prohibition must be informed by its history as well as its commitment to overarching international standards on speech regulation. In a country emerging from a violently racist past, there is an imperative to reconcile the inevitable tension that arises through the former entrenched use of language to harm, and the current enlightened employment of language as a means of reconciliation and healing. This tension is further compounded through the mandate to liberate expression and foster a nation that rejects censure, encourages debate and values diversity in opinion. This is particularly poignant, given the rampant suppression of ideas that characterised the previous regime. However, competing fundamental rights of human dignity and equality demand that hate speech cannot pass constitutional muster for its rejection of the core values that shape the South African state today.

4.2 Towards Transformative Constitutionalism

“...We adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...”³⁸²

In a constitutional state, founded on the recognition and entrenchment of fundamental rights, a social ill such as hate speech will not find safe harbour. With the overt rejection of the past and the mandate to heal and pave the way for a united future, violently divisive and harmful language does not serve any transformative purpose in the new South Africa. It is thus a course of transformative constitutionalism that has been charted for the journey towards a

³⁸² Preamble of The Constitution of the Republic of South Africa, 1996.

renewed state through large-scale change.³⁸³ More than mere “reform” and just short of “revolution,” transformative constitutionalism³⁸⁴ seeks to achieve these ends and convert South African society into a new and improved model committed to human dignity, equality and improving quality of life, driven by the Constitution.³⁸⁵ The betterment of lives is not only achieved through socio-economic ventures; it is also achieved through nurturing tolerance and respect.³⁸⁶ As such, hate speech is a particularly relevant aspect of South African life; a “transition(al) blind spot,”³⁸⁷ that the law must contend with.

Baines argues that the era for censure of that which one finds offensive is over and that hate speech provisions are simply an apartheid-esque solution to a larger problem of buried hate.³⁸⁸ However, from a legal standpoint, it is not merely as simple as accepting hate speech to be a mere form of communication as the constitutional mandate to uphold dignity and equality are paramount. The denouncement of the brand of violent and oppressive language that characterised the previous regime is a fundamentally important aspect of transformative constitutionalism and as such, measures to tackle violent language have been incorporated into South African law in various areas. Such considerations are however bound to the overarching constitutional standard set for freedom of expression.

4.3 Constitutional Guarantees and Provisions Relevant in the Regulation of Speech

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government... it is a ‘mirror reflecting the national soul,’ the identification of the ideals and aspirations of a nation; the articulation of the values binding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.”³⁸⁹

³⁸³ Klare 1998 *SAJHR* 150.

³⁸⁴ *Ibid.*

³⁸⁵ Preamble of the Constitution of the Republic of South Africa sets out the country’s direction towards constitutional rebirth, healing and improving quality of life. Klare terms this new legal culture “transformative constitutionalism” defines his iconic term as “a long-term project of constitutional enactment, interpretation and enforcement committed... to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction” at 150.

³⁸⁶ *S v Makwanyane* 1995 (2) SACR 125 (CC) para 391.

³⁸⁷ South African Human Rights Commission, Eastern Cape Provincial Dialogue on Hate Speech: “Transition Blind spot: navigating the balance between freedom of expression and hate speech in shaping a common or shared identity, heritage and moral consensus in South Africa” 17 November 2011.

³⁸⁸ G Baines “Racist Hate Speech in South Africa’s Fragile Democracy: the Case of Ngema’s ‘AmaNdiya’” in M Drewett and M Cloonan (eds) *Popular Music Censorship in Africa* (2006) 61.

³⁸⁹ *S v Acheson* 1991 (2) SA 805 (NmHC) 813A-B.

The constitutional imperative to work towards a renewed society³⁹⁰ demands that the issue of hate speech be adequately addressed in the law. The post-1994 societal *renaissance* entails transformation on a multitude of levels, ranging from politics, the racial agenda and quality of life and must therefore include a change in how we view and use language. A state professing transformation “on paper” cannot be said to be fully achieving these ends if the practice of its citizens is anchored in the use and proliferation of racial hate speech. It is this new use of language that creates tension in the present-day South Africa and demands constitutional and legislative attention so as to create viable means of addressing hate speech. After all, transformation must be achieved through a personal pledge to the constitutional culture as well as state-level commitment to the cause, notably in the form of legal intervention. Hate speech undercuts core constitutional values and impedes the mental transformation necessary for one to be a constitutionally compliant citizen today.³⁹¹ Although there has been fierce debate in foreign jurisprudence on whether banning hate speech is an effective or even appropriate legal act, the South African history of hate and violence leaves little choice but to put safeguards in place in law. We have become a nation deeply sensitive to all things racial, to the point of being labelled “obsessed” with race.³⁹² With this in mind, there is no choice other than to legislate to uphold the constitutional values of human dignity and equality by providing for measures to combat hate speech. The problem, however, seems to lie in how this is to be done and with what consequence.

4.3.1 Interim Constitution

This precursory constitution sets the tone for the fundamental rights to equality, human dignity and freedom of expression that the Final Constitution now entrenches. The move towards a transformed society demands more than a mere piece of legislation but a social contract containing a set of ideas on which base a new society upon.³⁹³ In its postamble, the Interim Constitution states its desire to serve as “a historic bridge between the past of a deeply divided society... and a future founded on the recognition of human rights.” Mureinik³⁹⁴ succinctly describes this as a journey from a culture of authority to one of justification and, in

³⁹⁰Preamble of The Constitution of the Republic of South Africa, 1996; Klare 1998 *SAJHR* 149.

³⁹¹ See the definition of hate speech offered at 1.1.

³⁹² KA Bentley “If Baboons Could Talk...JS Mill on Freedom of Speech and the Limits of Racial Discourse” (April 2006) 33 *Politikon* 31 at 33.

³⁹³ Devenish *Constitution* 1-2.

³⁹⁴ E Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *SAJHR* 31.

continuing the bridge metaphor, one that is chiefly supported by a justiciable Bill of Rights.³⁹⁵ The right to dignity, equality and freedom are ingrained in this Interim Constitution and are developed in the Final Constitution.

For the current purposes, the right to freedom of expression articulated in the Interim Constitution is of particular relevance. Section 15 of this Constitution grants a general right to freedom of speech and expression, extending into the domain of the press media, artistic creativity and scientific research. This section marked a good starting point in entrenching freedoms in a newly established society and this right was built on even further in the Final Constitution. For instance, what is absent from this Interim Constitution is any specific outline of the justifiable limitations on free expression we now recognise as necessary and justified, such as the prohibition on hate speech.³⁹⁶ There was no explicit prohibition of hate speech, only an implicit denouncement of this form of expression through the entrenchment of human dignity and equality in the Interim Constitution. This was no doubt to be subsumed under the then section 33 limitations clause in terms of a law of general application. The absence of a specific formulation on hate speech does not mean to convey that the offence was acceptable in the transition period, only that the drafters of the Final Constitution recognised the real need in the historical, political and socio-linguistic context of this country to more precisely safeguard against violent and hateful speech.³⁹⁷ After all, apartheid discourse has endured and continues to determine the way in which we relate to each other by entrenching divisions through language.³⁹⁸ A free speech-specific limiting provision is now contained in the Final Constitution and hate speech is excluded from the realm of free speech protection.³⁹⁹

4.3.2 Freedom of Expression

³⁹⁵ Mureinik 1994 *SAJHR* 32.

³⁹⁶ See 4.3.2.1 for an outline of the constitutional prohibition of hate speech and the justifications for doing so at 4.2.

³⁹⁷ Johannessen 1997 *SAJHR* 137-8 tracks the evolution of the drafting of the constitutional prohibition of hate speech and states that the election to include such provisions in the Final Constitution was not the result of any major controversies in the interim period, but in the desire to make a political statement in that speech “calculated to cause hostility and acrimony, and, racial, ethnic or even religious antagonism and division” would not be abided.

³⁹⁸ Gqola 2001 *Transformation* 95.

³⁹⁹ Section 16(2)(c) of the Final Constitution specifically excludes the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. This provision is widely considered to be “the hate speech provision.” See 4.3.2.1 for an exposition of Section 16(2).

The Constitution⁴⁰⁰ upholds freedom of expression as a fundamental right and the reasons for doing so are eminently clear, given the South African past. Freedom of expression is far more than sanction for a person to say and act as they wish with indemnity and no State interference; rather, it is both a symbol and foundation for democracy.⁴⁰¹ After all, the marker of a true democracy, as compared to a dictatorship, is that of persuasion, not coercion and the right to freedom of expression is the guarantor of unbridled and autonomous thought and action.⁴⁰² Accordingly, this right deserves the utmost protection as it concretises the right to communicate thoughts and to do so freely, thereby entrenching the right to dignity⁴⁰³ in an individual's right to self-fulfilment and personality. Undiluted and boundless freedom of expression, however, can severely undermine the dignity in others⁴⁰⁴ and the South African Constitution has endeavoured to address this polarisation. Hate speech additionally flies in the face of a society built on equality through non-discrimination by clinging to apartheid notions of racial superiority.

The South African approach departs from revered position that this right enjoys in Western liberal theory⁴⁰⁵ as summarised by John Stuart Mill, who calls for "the fullest liberty of professing and discussing... any doctrine, however immoral it may be considered."⁴⁰⁶ Section 16(1) of the Constitution, modelled after the formulation in the International

⁴⁰⁰ The Constitution of the Republic of South Africa, 1996.

⁴⁰¹ Devenish *Constitution* 96.

⁴⁰² Mureinik 1994 *SAJHR* 34.

⁴⁰³ RF Haigh "South Africa's Criminalization of 'Hurtful' Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression" (2006) 5 *Washington University Global Studies Law Review* 187 at 208.

⁴⁰⁴ Hate speech violates the right to dignity though the fact that it degrades and dehumanises and, furthermore, can result in serious physical and psychological effects that plague its victims. See 4.3.3 for a discussion on the impairment of dignity in relation to hate speech.

⁴⁰⁵ Currie and De Waal *The Bill of Rights Handbook* 359.

⁴⁰⁶ JS Mill *On Liberty* (1860) Harvard Classics Volume 25 pp15 ft2. Accessed on 20 June at: <http://www.constitution.org/jsm/liberty.htm#2-01>. The most well-known example of this approach to freedom of expression can be found in the American First Amendment, prohibiting any law that, *inter alia*, bridges free speech, establishing the US system as the pinnacle of boundless and unrestricted expression. The absolutism of the American approach is unmatched and its Supreme Court has been unyielding in its faithful application of the constitutional guarantee of free speech. See the recent case of *Snyder v Phelps* 562 US__ (2011), where the Westboro Baptist Church was indemnified for their distasteful protest and hate speech slogans against homosexuals in the military outside the funeral of an American soldier killed in Iraq. The Court traced its previous decisions with regard to freedom of speech and confirmed that this right "occupies the highest rung of hierarchy of the First Amendment values and is entitled to special protection" as it ensures vigorous and open public debate. The Court elected not to stifle public debate in favour of the pain inflicted on the mourning family, holding that "(they) cannot react to pain by punishing the speaker... as a nation, (they) have chosen a different path." The distinction between the South African and American positions is thus not simply in the value placed on speech, but the weight given to the effect of speech in each country.

Covenant on Civil and Political Rights,⁴⁰⁷ grants a general right to freedom of expression to all, while section 16(2) serves as an internal limitation to this right.⁴⁰⁸ As Teichner affirms, the dual nature of section 16 is indeed conceivable for South Africa as the nation strives to be a dynamic and active democracy, while also shielding its society from abuse.⁴⁰⁹

The importance of the right to free expression is never so strongly felt as when it is under threat of expulsion. This fundamental right is a necessary tool to keep government accountable as well as having concrete value as a tool of individual growth and development.⁴¹⁰ These two important features of the right to freedom of expression are why it is a necessary implement as well as important consequence of a functioning democratic state. To this end, the constitutional safeguard of the right to free expression serves three ostensible goals; namely, to underpin and uphold a stable democracy;⁴¹¹ ensure individual growth and autonomy of citizens; and to interlink between other fundamental rights as a means to uphold them.⁴¹² The first goal fosters a larger, societal aim and can be viewed as a means to the end of the constitutional state. Freedom of expression is in many ways what distinguishes a democracy from a dictatorial regime and as such is often viewed as the bulwark of the constitutional state by guaranteeing freedom of thought and speech,⁴¹³ permitting “robust and vigorous”⁴¹⁴ criticism of the State. It is thus regarded as the “guarantor”⁴¹⁵ of democracy, licensing an unobstructed search for truth and in doing so, acknowledges that importance of allowing individuals to hear, form and express their opinions freely on any matter.⁴¹⁶ This leads to the second and more personal purpose and value of the right in nurturing and fulfilling human personality.⁴¹⁷ It is key for one’s own advancement,⁴¹⁸ the growth of like-minded individuals, as well the evolution of humankind to

⁴⁰⁷ Articles 19 and 20 of the ICCPR set out the permissible and mandatory limitations of the right to freedom of expression, respectively. See 3.3.1 on the relevant provisions of the ICCPR and 3.3.5 on the international standard that has emerged on the prohibition of hate speech.

⁴⁰⁸ Currie and de Waal *The Bill of Rights* 359.

⁴⁰⁹ S Teichner “The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2002: the Good, the Bad and the Ugly” (2003) 1 *SAJHR* 349 at 350.

⁴¹⁰ E Neisser “Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence” (1994) 5 *Constitutional Law Journal* 103 at 117.

⁴¹¹ *Kauesa v Minister of Home Affairs, Namibia* 1995 11 BCLR 1540 (NmS); *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751(CC) para 66.

⁴¹² *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751(CC) para 66.

⁴¹³ *Palco v Connecticut* 302 US 326-7 in *Mandela v Falati* 1995 (1) SA 251 (W) 7F.

⁴¹⁴ *Holomisa v Argus* [1996] 1 All SA 478 (W) 855.

⁴¹⁵ *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) para 7.

⁴¹⁶ *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) para 7.

⁴¹⁷ *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC) para 26.

⁴¹⁸ Neisser 1994 *Constitutional Law Journal* 117.

promote and foster an “open market-place of ideas.”⁴¹⁹ It matters not whether these ideas are popular or accepted but rather that they are endured;⁴²⁰ or, as one author puts it that “everyone has the right to be obnoxious or wrong.”⁴²¹ Importantly, and finally, the right to freedom of expression is valuable in that it is innately and inextricably linked to other fundamental rights. This “web of mutually supporting rights,”⁴²² includes freedom of religion, belief and opinion, dignity, association, assembly and political rights, such as voting and standing for public office. As Devenish correctly points out, there is no hierarchy of rights, however, freedom of expression informs many of these rights⁴²³ and as such must be safeguarded. The mere knowledge that one has the freedom to speak their own mind is what underpins democracy⁴²⁴ and is an attribute of the type of society transformative constitutionalism sets about to achieve. The provisions in section 16(1) are designed to achieve this “open market place of ideas” that was so foreign during the apartheid era, given the fact that censored expression existed in various forms, be it speech, art, ideas, universal adult suffrage or conduct. Be that as it may, there is also the niche where tension abounds in recognising the important benefits of freedom of expression in an open and democratic state, while also recognising that it is not an absolute right. This is especially problematic in the South African experience, where we are attempting to change the way in which language is used from being a force for oppression and means of violence, to ushering in a “new vocabulary... of nationhood, unity, racial harmony and reconciliation.”⁴²⁵

In terms of section 16(1), this right expressly incorporates the realms of press and media non-censure,⁴²⁶ the free receipt or reporting of information and ideas,⁴²⁷ unbridled artistic creativity⁴²⁸ and unconstrained academic and scientific research⁴²⁹ insofar as it is constitutionally compatible.⁴³⁰ Sections 16(1)(b) and (d) pose no great conceptual difficulties

⁴¹⁹ *S v Mamabolo (E TV and Freedom of Expression Institute Intervening)* 2001 (5) BCLR 449 (CC).

⁴²⁰ C Van Wyk “Hate Speech in South Africa” The XV1th Congress of the International Academy of Comparative Law, Brisbane, 14-20 July 2002. Accessed on 14 March 2012 at: <http://www.stopracism.ca/content/hate-speech-south-africa>.

⁴²¹ R Delgado “Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey” (1998) 146 *University of Pennsylvania Law Review* 865 at 872.

⁴²² *South African National Defence Union v Minister of Defence* para 8.

⁴²³ Devenish *Constitution* 96.

⁴²⁴ *S v Mamabolo* para 28.

⁴²⁵ Harris *et al* 2004 *The Race and Citizenship in Transition Series* 3.

⁴²⁶ Section 16(1)(a).

⁴²⁷ Section 16(1)(b).

⁴²⁸ Section 16(1)(c).

⁴²⁹ Section 16(1)(d).

⁴³⁰ The extent of the freedom provided for in section 16(1) is subject to the constraints enumerated in section 16(2) and the general, overarching limitations clause in section 36 which are discussed at 4.3.2.1 of this chapter.

and have been generally accepted as features of expression worthy of protection. Section 16(1)(c) too would appear clear-cut on the face of it but for the recent controversy surrounding the satirical portrayal of current President Jacob Zuma by artist Brett Murray, entitled “The Spear.”⁴³¹ The artwork has prompted the ANC to try to obtain an interdict to ban the image, despite it having reached viral heights on the Internet, calling the painting an abuse of artistic freedom, unconstitutional and defamatory.⁴³² The difficulty, however, in making such a case lies in the well-established law that *bona fide* art is generally precluded from sanction⁴³³ and additionally that public figures trade-in a certain degree of their liberty for celebrity and the recompense it garners.⁴³⁴ As such, artists generally protected under section 16(1) are consequently afforded protracted indemnity when their work touches those in the public eye, thereby extending their right to freedom of expression. What has not yet come before any court of tribunal and which poses an important question is whether a painting, or any artistic form of expression, could be considered to be hate speech. While the term “hate speech” connotes words and dialogue, the actual constitutional provision condemns expression that advocates hatred and incites harm, which could be broadly said of a painting, play or any piece of artistic work.⁴³⁵

Section 16(1)(a), conferring independence of the media, is at the global forefront of freedom of expression and censorship issues.⁴³⁶ Essentially, the press is endowed with *carte blanche*

⁴³¹ The full-length portrait depicting the President striking a Lenin-esque pose with his genitals exposed, provocatively entitled “The Spear,” has met with mixed reviews since its unveiling. In this charged debate, some have hailed it an inspired piece of resistance art, while others have condemned it as a crude, undignified, offensive and humiliating attack. One newspaper editor who published the artwork has allegedly received death threats and political pressure to remove the picture of the painting from their website. The newspaper has bowed to pressure out of “care” for the dignity of the subject as well as fear of the reprisals that have followed. Immediate reactions to “The Spear” were an official age restriction by the Film and Publication Board (which has since been overturned) and as well as an unofficial censorship in the form of vigilantes armed with black paint.

⁴³² N Gules “Zuma ‘Spear:’ Constitution entitles City Press to publish.” Article published by City Press on 21 May 2012. <http://www.citypress.co.za/SouthAfrica/News/Zuma-Spear-Constitution-entitles-City-Press-to-publish-20120521> (Accessed on 7 November 2012). This attempt proved unsuccessful and a settlement was reached out of court between the parties, per “ ‘The Spear’ Classification Overturned” Webber Wentzel Website <http://www.webberwentzel.com/web/content/en/ww/ww-press-releases?oid=37612&sn=Detail-2011&pid=32711> (Accessed 7 November 2012).

⁴³³ Protection for artistic freedom is encapsulated in freedom of expression in section 16(1)(c) of the Constitution; section 12(b) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; and in section 29(4)(a) of the Films and Publications Act 65 of 1996.

⁴³⁴ *The Citizen 1978 (Pty) Ltd v McBride* 2010 (4) SA 148 (SCA) para 68 states that “Where one is dealing with the criticism of a public figure a measure of leeway is allowed by our courts and the limits of public criticism are wider as compared to a private individual.” This approach is however tempered with in *Mthembu-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) para 50 where the court held that the press should be given free reign in this regard and must be constrained by reasonableness.

⁴³⁵ See 4.3.2.1 on the limitations on the right to freedom of expression

⁴³⁶ See Chapter 6 for a discussion on media regulation.

to report on all matters, prosaic or provocative, but symbolically, is vested with this duty as means of manifestly endorsing freedom of expression in the best interests of the broader of society so that society too may inform and exercise its right to free expression.⁴³⁷ With the “contested terrain”⁴³⁸ that language negotiates in the new South Africa, there is a considerable amount of controversy over what can be deemed free speech and what is actually hate speech that is covered by the media.⁴³⁹ As pointed out by the Constitutional Court, “the ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate.”⁴⁴⁰ There is an inevitable conflict between the government and the media that arises in such an arrangement and this disquiet has never been as loud as in the South African contemporary realities.⁴⁴¹

Section 16(1) satisfies the three main goals that this right seeks to achieve: supporting the democratic state, ensuring individual fulfilment and complementing other interlinking rights. The guarantee of freedom of expression in section 16(1) seeks to realise the concept of creating and engaging in the “open market-place of ideas,” that is the epitome of what freedom of expression permits and encourages. However, as Parekh⁴⁴² observes, the concept of an “open market-place of ideas” is inherently flawed.⁴⁴³ Parekh cautions that this trading post of viewpoints is partial, preferential and prejudiced and that racist and xenophobic views are often at the forefront because they are the accepted and popular views that benefit the majority of the population.⁴⁴⁴ It must also be borne in mind that language is a powerful means of influencer and facilitator of violence and hatred⁴⁴⁵ and therefore the right to freedom of expression cannot be absolute. Language can give rise to great injustices, such as hate speech and oppression, which must not be thought of at a cost to be borne for the benefit of

⁴³⁷ Currie and de Waal *The Bill of Rights* 364.

⁴³⁸ Gqola 2001 *Transformation* 95.

⁴³⁹ See Chapter 6 generally for an account of how hate speech is prohibited in media. See 6.2.1.2 for the hate speech complaints before ICASA, 6.2.2.2 for the BCCSA decisions and 6.3.1.2 for the matters before the Press Ombudsman.

⁴⁴⁰ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 22.

⁴⁴¹ The role language plays in South Africa presents a challenge to reconciling how language is to be used today. (See 2.4.3) In addition to this ever-present tension, the current controversy over the Protection of Information Bill 6 of 2010, Government Gazette No 3299 centres around the difficult balance in protecting national security while avoided apartheid era-like media censorship. The notable absence of a redeeming “public interest clause” has caused many to question the state of the right to freedom of the media and expression in general in South Africa. (See D Smith “ANC’s secrecy bill seen as assault on South African press freedom” (6 June 2012) *The Guardian*.)

⁴⁴² B Parekh “Hate Speech – Is there a case for banning?” (2005-2006) *Public Policy Research* 213.

⁴⁴³ Parekh 2005-2006 *Public Policy Research* 219.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ See 2.2.1 for an excursus on the violent potential of language and 2.3 detailing how hate speech achieves these violent ends.

freedom of expression⁴⁴⁶ but rather as a cautionary tale. The complacency in accepting hate-mongering as a by-product of the right to freedom of expression approaches the problem from the incorrect angle: rather, disseminating hate through language is unacceptable because it denies the right of free expression in others who are silenced and dehumanised from its vile effects. It has been the tradition in this country to use language as a tool of violence but this has now been rejected in favour of reconciliatory discourse, focused on uniting and moving forward.⁴⁴⁷ It is from this framework of competing rights that the South African constitutional protections against hate speech operate: section 16(1) details what is protected and 16(2) refines what is not. Accordingly, hate speech, is excluded from the right to freedom of expression, informed by a layer of context established by the section 16(1) inclusions to this right.

4.3.2.1 Exclusions on the Right to Free Expression

For all the benefits of unbridled expression, one cannot exercise this right in isolation in a manner that denies rights to others.⁴⁴⁸ In this vein, section 16(2) expressly excludes expression that operates as;

- (a) “propaganda for war;
- (b) incitement to imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

Section 16(2)(a) sanctions any expression that can be manipulated to incite war. “Propaganda for war” is said to refer to acts of external aggression and not violent internal resistance to government.⁴⁴⁹ The immense capabilities of words and slogans to generate propaganda for war was infamously documented in regimes such as Nazi Germany and Rwanda⁴⁵⁰ and prohibiting such propaganda has thus been identified by the ICCPR as a justifiable limitation on the right to free expression.⁴⁵¹ Subsection (b) protects against the capacity of violent

⁴⁴⁶ Neisser 1994 *Constitutional Law Journal* 120.

⁴⁴⁷ See 2.4 for a discussion on the dual role of language at present in South Africa and the tension that emerges as a result.

⁴⁴⁸ D Glaser “The Media Inquiry Reports of the South African Human Rights Commission: a Critique” (2000) 99 *African Affairs* 373 at 390.

⁴⁴⁹ I Currie, J De Waal and G Erasmus *The Bill of Rights Handbook* (2001) 373.

⁴⁵⁰ Earlier references to Nazi Germany can be found at 2.2.1 and Rwanda at 2.2.1 and 3.3.3.1.

⁴⁵¹ Article 20(1) of the International Covenant on Civil and Political Rights.

language to be used as a vehicle to physical violence and thus incitement to harm. There is a definite link between inciting imminent violence and hate speech as hate speech encompasses the notion of intending some form of harm to come to its targets through the advocacy of hatred.⁴⁵²

In outlawing language that advocates hatred and incites harm, section 16(2)(c) is the provision that prohibits hate speech in the Constitution. This provision entails two component elements: promoting and disseminating hatred along with causing some form of harm. Van Wyk writes that advocating hate “implies more than merely a statement and includes an element of exhortation, pleading for, supporting or coercion.”⁴⁵³ What is proscribed is the advocating of “hate”⁴⁵⁴ in subsection (c) and not mere offense, or a lesser emotion. It is the endorsement and diffusion of this hate that is constitutionally problematic when coupled with the effect of inciting harm. This “harm criterion”⁴⁵⁵ demands that there be an adverse effect caused by the perpetuation of hate and demonstrates that it is not mere words but quantifiable disadvantage that abounds. Harm in its traditional sense is limited to tangible, physical harm⁴⁵⁶ but a broader definition of harm is now generally supported to include any form of physical trauma, mental anguish⁴⁵⁷ or even financial loss.⁴⁵⁸ This approach takes the cue from the landmark Canadian case of *R v Keegstra*⁴⁵⁹ in identifying the wider implications hate

⁴⁵² *ANC v Harmse: In re: Harmse v Vawda* [2011] 4 All SA 80 (GSJ) prosecuted the chanting of “shoot the Boer” as an incitement to commit murder. This chant has been widely deemed to be an instance of hate speech.

⁴⁵³ Van Wyk “Hate Speech in South Africa” The XVIth Congress of the International Academy of Comparative Law, Brisbane (2002) 5.1.

⁴⁵⁴ See the definition of hate offered at 1.1.

⁴⁵⁵ Glaser 2000 *African Affairs* 390.

⁴⁵⁶ S Teichner “The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2002: the Good, the Bad and the Ugly” (2003) 1 *SAJHR* 349 at 356.

⁴⁵⁷ See *Afriforum v Malema* [2010] JOL 25566 (GNP) para 29; *Human Rights Commission of South Africa v SABC* 2003 (1) BCLR 92 (BCCSA); I Currie, J De Waal and G Erasmus *The Bill of Rights Handbook* (2001) 320-321; R Krüger “Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts” (2008) Rhodes University Doctoral Thesis at 5.3.1.4.2; Van Wyk “Hate Speech in South Africa” The XVIth Congress of the International Academy of Comparative Law, Brisbane (2002) 5.2.

⁴⁵⁸ Van Wyk “Hate Speech in South Africa” The XVIth Congress of the International Academy of Comparative Law, Brisbane (2002) 5.2. Van Wyl includes physical and financial harm and discusses the possibilities of psychological and social harm as also existing within the realm of section 16(2)(c). Van Wyk cites the writing of critical race theory as grounds to include psychological and social harm in section 16(2)(c) as the harm of hate speech “matters to individuals, to the groups they belong to, to society generally, and to democracy.” (Mahoney “Hate Speech” Affirmation or Contradiction of Freedom of Expression” (1996) *University of Illinois UP* 789 at 792). See also Neisser 1994 *Constitutional Law Journal* 114 for a comprehensive detailing of the societal impact of hate speech.

⁴⁵⁹ *R v Keegstra* [1990] 3 S.C.R. 697. In this case, a high school teacher was charged under the Canadian Criminal Code for communicating anti-Semitic statements to his students and mandating that they reproduce his teachings for fear being adversely affected during class assessment. The court thoroughly traced the guarantee of freedom of expression in the Canadian jurisprudence and reiterated that this right is the epitome of a free and democratic society. However, it cautioned that the import of this right cannot overcome the necessity to protect against hate propaganda and the court conceded that individuals’ rights could be justifiably inhibited in this

speech can have not only on the physical integrity of a victim, but their on emotion and mental state as well, extending to an even greater harm inflicted on society through the entrenchment of hateful and violent language. The Canadian Supreme Court ruled that in the absence of physical violence, the primary source of harm done by hate speech is to the individual members of the target group in diminishing their sense of self-worth and acceptance” through the “derision, hostility and abuse” that hate speech fosters.⁴⁶⁰ The effects of this type of harm ripple through society in that not only does it isolate individuals and traumatise them, but also prompts them to take drastic measures⁴⁶¹ such as avoiding activities, work or moving to another city. It also reinforces repressive power relations⁴⁶² within society that are hard to dismantle once entrenched. Thus, harm is also inflicted on society at large as hateful ideas spread to others and create discord between racial groups, resulting in entrenched discrimination within a society.⁴⁶³ The inevitable challenge, however, is quantifying this harm.⁴⁶⁴ Furthermore, it is not only the harm caused that is safeguarded against, but also “incitement” to cause that harm, including influencing, persuading, stimulating or rousing to action.⁴⁶⁵ This grants section 16(2)(c) considerable latitude in allowing for hate speech to be sanctioned without necessarily demonstrating the actual harm caused but at least evidence of an urging to create such harm.

While there are some who argue that section 16(2) goes too far and gives government too much leeway to stifle dissent,⁴⁶⁶ most find that the constitutional bounds are reasonable in our national context and the harm it safeguards against and that no further legislative measures are needed in this regard.⁴⁶⁷ Glaser praises the spirit of section 16(2) in precluding only the most “extreme” forms of expression in outlawing that which causes war and violence. Section

regard. The unchecked promotion of hate must be “tempered” insofar as it disseminates a message of intolerance and prejudice for such expression, the court held, is deplorable in the process of individual growth and betterment of society. The degree of limitation thus placed on the speaker is less than the infringement on the part of the victim and the damage done to democratic values through hate speech. The court attached a caveat to this ruling however that freedom of expression must not be thoughtlessly repressed and there must be particular care taken when limiting speech. In this vein, the Supreme Court confirmed the constitutionality the Canadian hate speech provisions.

⁴⁶⁰ *R v Keegstra* [1990] 3 S.C.R 697 at 746-747.

⁴⁶¹ *Ibid.*

⁴⁶² R Krüger “Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts” (2008) Rhodes University Doctoral Thesis at 5.3.1.4.2; G Cowan, M Resendez, E Marshall and R Quist “Hate Speech and Constitutional Protection: Priming Values of Equality and Freedom” (2002) 58 *JSI* 247 at 248.

⁴⁶³ *R v Keegstra* [1990] 3 S.C.R 697 at 746-747.

⁴⁶⁴ Glaser 2000 *African Affairs* 391.

⁴⁶⁵ Van Wyk “Hate Speech in South Africa” The XVIth Congress of the International Academy of Comparative Law, Brisbane (2002) 5.2

⁴⁶⁶ Johannessen 1997 *SAJHR* 136.

⁴⁶⁷ Haigh 2006 *Washington University Global Studies Law Review* 207.

16(2) thus creates categories of expression that will not be tolerated in the new democratic state but with a view to acknowledging that certain expression may be protected through its realisation of the valued expression found in section 16(1). A consideration of context through the establishment of section 16(1) is thus an important consideration in assessing hate speech complaints.⁴⁶⁸ To illustrate, the importance of section 16(2) and its role in adjudicating matters of freedom of expression were set out in the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority*.⁴⁶⁹ Though this case was not tried as an instance of hate speech specifically but as an assessment of the constitutionality of clause 2(a) of the Code of Good Conduct for Broadcasting Services,⁴⁷⁰ *Islamic Unity Convention* sets the tone for the import and interpretation of section 16(2) in a constitutional democracy.

4.3.2.2 Interpretation of this Right

Section 16(2)(c) has been considered in the Constitutional Court in the context of permissible broadcasting content in *Islamic Unity Convention*. Following the broadcast of an interview with a historian and author who disputed the legitimacy of the state of Israel, Zionism and the veracity of the Holocaust on air, the South African Jewish Board of Deputies lodged a formal with the broadcasting authority. The Board invoked clause 2(a) of the Broadcasting Code of Conduct,⁴⁷¹ claiming that the content was “likely to prejudice relations between sections of the population.” The Islamic Unity Convention countered that their guest was fully protected under the constitutional guarantee of the right to freedom of expression. The pivotal issue in this case accordingly involved an appraisal and balancing of whether the Code was effectively trumped by the blanket guarantee in section 16(1) to receive and impart ideas. The clause of the Code cites grounds to disallow broadcast of material that is;

“indecent or obscene or offensive to public morals or to the religious convictions or feelings of any section of a population or likely to prejudice the safety of the State or the public order or relations between sections of the population”

⁴⁶⁸ This is supported by the fact that section 36 essentially invokes the question of context in its analysis of the limitation of any fundamental right through its proportionality test.

⁴⁶⁹ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (5) BCLR 433 (CC).

⁴⁷⁰ The Broadcasting Codes are discussed in detail in 6.2.

⁴⁷¹ *Islamic Unity Convention v IBA* para 1-2.

The court noted the dichotomy in the justificatory phrase “in the public interest” in that it justifies the free communication of ideas but also rationalises limiting certain information that is deemed exceedingly harmful or too dangerous for public dissemination.⁴⁷² The court observed that the wide and replicating instances of speech listed in the Code are possible outcomes of any judiciously delineated grounds listed in the Constitution, namely propaganda for war, incitement of imminent violence and advocacy of hatred.⁴⁷³ The content of the Code was therefore deemed superfluous to both the provisions of section 16(1) and 16(2) of the Constitution. The dissonance of the clause in the Code with the standard section 16(2) limitations required the court to engage in a justification enquiry, as set out in section 36, to ultimately rule on whether such encroachments on the right to freedom of expression are constitutionally compatible.

The court prefaced its section 36 analysis by recognising the origins of clause 2(a) in the Broadcasting Code to be part and parcel of the need to curb speech that is “inflammatory or unduly abusive”⁴⁷⁴ and noted its particular relevance in the broadcast media context. In terms of section 36, Langa DCJ noted the parameters of the court to judge the provision as a law of general application that must be reasonable and justifiable in an open and democratic society.⁴⁷⁵ To this end, the court observed that respondents had offered no possible justification for the content of clause 2(a) of the Code.⁴⁷⁶ In terms of the reasonableness of the provision, the court found clause 2(a) lacking in this regard. It held that the phrase “likely to prejudice relations” was comparatively wide in ambit to the clear and specific language of section 16 and to allow it to stand would “unduly strain reasonable interpretation.”⁴⁷⁷ The provision was additionally cast in absolute terms, making it exceedingly difficult to discern the scope of the prohibition and could potentially have the effect of silencing a large amount of material, which would impinge on the not only the right to freedom of expression, but also religion, belief and opinion.⁴⁷⁸ The court accordingly held that there was no justification to endorse this wide-reaching and erroneous provision in the Broadcasting Code.

⁴⁷² *Islamic Unity Convention v IBA* para 37.

⁴⁷³ *Islamic Unity Convention v IBA* para 36.

⁴⁷⁴ *Islamic Unity Convention v IBA* para 29.

⁴⁷⁵ *Islamic Unity Convention v IBA* para 38.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Islamic Unity Convention v IBA* para 43.

⁴⁷⁸ *Islamic Unity Convention v IBA* para 44.

The court ultimately held that the Code went further than what section 16(2) deems to be appropriate constraints for free speech by creating a new category of prohibited speech. The court additionally reminded the respondents that broadcasting licenses are founded on the individual's right to receive information and therefore they must be correspondingly bound by the same restrictions as the individual.⁴⁷⁹ The court ultimately reasoned that the ill clause 2(a) seeks to protect against, whilst noble, goes further than what is expressed in section 16 of the Constitution. Thus, the clause was deemed invalid after failing to clear its final hurdle in satisfying a section 36 justification analysis.⁴⁸⁰ Accordingly, this case sets the bar appropriately high in limiting the right to freedom of expression in a constitutional state.

The impasse arrived at out of trying to balance freedom of expression with the advocacy of hatred has long been an area of great jurisprudential and constitutional debate but Haigh⁴⁸¹ believes section 16(2) overcomes it. He notes that when section 16(1) and 16(2) are read in conjunction, they embody the scope set for freedom of expression in the new constitutional era.⁴⁸² Haigh posits that section 16(2) operates as a direct check on the freedom of expression⁴⁸³ and this, coupled with the interpretations of international conventions, is adequate for the achievement of the right to freedom of expression and any limitation thereof. While the typical route followed when attempting to justify any limitation of a fundamental right is by way of a section 36 analysis,⁴⁸⁴ section 16(2) operates as its own internal limiter. *Islamic Unity Convention* confirms this approach in that section 36 will only come into play where the regulation of expression lies beyond the ambit of section 16(2), as it will require justification for it to be limited in an open and democratic society.⁴⁸⁵ Section 36 is, by all accounts, the definitive, catchall standard for any right to be curtailed in the Bill of Rights. In other words, where the issue clearly falls within the ambit of 16(2), a further section 36

⁴⁷⁹ *Islamic Unity Convention v IBA* para 46.

⁴⁸⁰ *Islamic Unity Convention v IBA* para 51.

⁴⁸¹ RF Haigh "South Africa's Criminalization of 'Hurtful' Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression" (2006) 5 *Washington University Global Studies Law Review* 187 at 207.

⁴⁸² Haigh 2006 *Washington University Global Studies Law Review* 196.

⁴⁸³ Haigh 2006 *Washington University Global Studies Law Review* 196.

⁴⁸⁴ Section 36(1) of the Constitution states that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

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

⁴⁸⁵ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 31-34.

analysis will be redundant as freedom of expression will never exonerate the type of expression encountered in section 16(2). Where the expression goes further than what is outlined in the internal modifier, only then is further justification needed to further impinge on freedom of expression and the test for this justification is located in section 36.⁴⁸⁶

The drafters of the Constitution clearly foresaw the inherent trouble in balancing this particular right and the formulation of section 16 is indicative of the long-standing war South Africa is waging with language. While there is a strong push to celebrate expression and relish an era where there is no longer censorship, freedom of expression can never be absolute by virtue of the fact that language can be moulded to do great harm. Section 16 thus explicitly provides for the right to freedom of expression alongside its exclusions which demands a delicate balance to be sought in an open and democratic state, founded on fundamental human rights and freedoms.

Section 16(2)(c) has also been interpreted by the South African Human Rights Commission, who have provided valuable insight on the bounds of the harm in hate speech. The much-publicised case of *Freedom Front v South African Human Rights Commission*⁴⁸⁷ saw the Commission task an appeal⁴⁸⁸ on its earlier ruling in 2002 concerning the infamous slogan “Kill the Farmer, Kill the Boer.” The original complaint was made after the SABC broadcast footage at ANC Youth League meeting and at ANC leader, Peter Mokaba’s funeral, both containing excerpts of crowds chanting the controversial slogan in 2002. A complaint was subsequently lodged with the SAHRC who ruled that the chant was distasteful, offensive to

⁴⁸⁶ Sachs J in *S v Mamabolo (E TV and Other Intervening)* 2001 (3) SA 409 (CC) at para 72 endorses the value of using this internal modifier in section 16(2) and implies that it parallels the general section 36 stance that not all rights are absolute in nature. In this case, the question of curbing freedom of expression revolved around the common law crime of scandalising the court: an infraction found outside of the ambit section 16(2) for which the court made use of a brief section 36 analysis to conclude that the offence is still justifiable in today’s open and democratic society.

⁴⁸⁷ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC).

⁴⁸⁸ There is no internal structure or guidance in the Constitution or Human Rights Commission Act on how appeals could be dealt with from the SAHRC. A SAHRC manual found online suggests to its employees that courts would have to be approached in this regard.

https://docs.google.com/viewer?a=v&q=cache:dy2KinajFBIJ:www.workinfo.com/free/sub_for_legres/data/poida/Section14Manual.pdf+&hl=en&gl=za&pid=bl&srcid=ADGEESjl4yPV_BQaWVoYojFZjbMlsQ7CiQrO4yqZ3h7ag4hT-qvU_tZNuyhSpXjnciUNUWrELMCKp-pCS6QQ6KdrC1DCMgQjAwKZvBsu-S-2JCxxlbZJrX50brrXQImEbu-tcXj3aGDF&sig=AHIEtbTzEazaxOv1Ee4PYhk_b6Ya79kDtA (Accessed 6

December 2012). This is also the view of CM Peter “Human Rights Commissions on Africa – Lessons and Challenges” (2009)

http://scholar.googleusercontent.com/scholar?q=cache:GLPIw1eYzk0J:scholar.google.com/+appeal+AND+sahrc&hl=en&as_sdt=0,5 (Accessed 6 December 2012). An internal appeal structure has been hard to locate.

dignity and hurtful, but necessary to the realm of public debate and therefore not within the ambit of constitutional prohibition under section 16(2)(c) as hate speech.⁴⁸⁹

On appeal, a panel of 3 members of the Commission set out the constitutional standard on hate speech and noted that this limitation on freedom of expression is justified by virtue of the need to promote the values of human dignity and equality.⁴⁹⁰ Accordingly, the Commission engaged with section 16(2)(c) of the Constitution and found that it espouses a three-part enquiry hinging on an advocacy of hatred, that is based on a listed ground and that incites harm.⁴⁹¹ It found that each leg of this three-pronged enquiry was interrelated and must be considered cumulatively.⁴⁹² Accordingly, the Commission found that calling for the death of members of a particular community or race must amount to an advocacy of race, unless the context dictates otherwise.⁴⁹³ The Commission carefully considered the meaning of “hatred” and ultimately found that its conceptual notions of arousing animosity and ill-will towards others could be easily located in the present situation. Secondly, the Commission could easily determine that a particular group was falling victim based on their ethnicity or race, being the Afrikaners in general as descendants of the Dutch and Huguenot colonists. The final part of the test concerns the incitement of harm. The SAHRC initially found that there was no harm present in these circumstances due to the lack of evidence of actual, physical harm and the fact that the words were used within the heat of the political environment.⁴⁹⁴ On appeal, the Commission noted that it would be too simplistic an assertion that the harm articulated in section 16(2)(c) did not cover all species of harm, ranging from physical and tangible harm to psychological and emotional harm.⁴⁹⁵ The Commission reasoned that the slogan contributed to ethnic marginalisation and thus the impaired dignity of Afrikaans people.⁴⁹⁶ The Commission satisfied the “harm” requirement accordingly by stating that this infringement of dignity demonstrated a “real likelihood that this slogan (would cause) harm.”⁴⁹⁷ The initial ruling was overturned by taking a purposive reading of the Bill of Rights⁴⁹⁸ and examining the section 16(2)(c) test that there must firstly be an advocacy of hatred, that is secondly

⁴⁸⁹ It must be noted that the Equality Act was passed but not yet in operation at the time of the decision (15 July 2001. See 5.2.4.3.1 for a discussion on subsequent SAHRC decisions based on the Equality Act.

⁴⁹⁰ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) 1288.

⁴⁹¹ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) 1290.

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1290-1291.

⁴⁹⁵ *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1295.

⁴⁹⁶ *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1299.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1289.

based on one of the four listed grounds together with the third requirement for an incitement to cause harm to prove hate speech.⁴⁹⁹ In a general remark, the Commission additionally emphasized that this enquiry must be accompanied by an overall consideration of the tone, content and context of expression for a full and proper determination.⁵⁰⁰ On the facts at hand, the Commission held that through this slogan targeting an entire community, it presupposed that they deserved less respect and dignity, thereby objectively causing hurt and injury, and thus a real likelihood of harm, in the wider sense of the word.⁵⁰¹

The result of this decision is that the test for hate speech had taken a different angle in that it “a real likelihood of harm” appears to have replaced that constitutional wording of an “incitement to cause harm.” While this is, admittedly, not a great leap, it points to uncertainty in how to prove hate speech in each case, rather than a definitive and unwavering test for this limitation to the right to freedom of expression. A “real likelihood” indicates that the test is one of probability whereas an “incitement” implies certainty in harm arising from this form of violent and hateful speech. Unfortunately, the SAHRC cases are not readily accessible and those that are do not take this finding any further as they now fall under the ambit of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, and not section 16 of the Constitution.⁵⁰²

4.3.3 Interlinking Rights: Dignity and Equality

As noted in *Islamic Unity Convention*, the problem of hate speech is also intrinsically offensive to other constitutionally entrenched rights.⁵⁰³ It is more than an abuse of the right to freedom of expression but also a violation of the inherent right to dignity and equality guaranteed to all.⁵⁰⁴ Hate speech is particularly problematic due to the fact that it preaches inferiority of groups⁵⁰⁵ and breeds marginalised groups with no societal worth and whose contributions and words lack any authority or significance.⁵⁰⁶ According to Fiss,⁵⁰⁷ this is

⁴⁹⁹ *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1290.

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1299. Also see the earlier discussion in this section of the wide understanding of “harm” in section 16(2)(c) of the Constitution.

⁵⁰² See 5.2.4 for Equality Court cases based on the Act and 5.2.4.3.1 for decisions by the SAHRC on the Act.

⁵⁰³ *Islamic Unity Convention* para 25.

⁵⁰⁴ See B Parekh “Hate Speech – Is there a case for banning?” (2005-2006) *Public Policy Research* 213.

⁵⁰⁵ LW Sumner *The Hateful and the Obscene – Studies in the Limitation of Free Expression* (2004) 160.

⁵⁰⁶ Fiss *Irony of Free Speech* 16. See 1.1 for further discussion on this aspect.

⁵⁰⁷ OM Fiss *The Irony of Free Speech* (1996).

tantamount to censure and is actually the converse of what freedom of expression seeks to achieve. This act of suppression is an impingement of the constitutional right to dignity: a right that captures celebrates humanity and the right to be treated as a human being.⁵⁰⁸ The Constitutional Court has hailed dignity as “an acknowledgment of the intrinsic worth of human beings... worthy of respect and concern.”⁵⁰⁹ The Constitution states that South Africa is founded on the value of human dignity⁵¹⁰ and recognises that it warrants protection and respect in the Bill of Rights in section 10. Dignity is a recurrent theme in the Constitution and is tied to the individual as much as to society at large.⁵¹¹ In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*,⁵¹² the Constitutional Court reaffirmed that:

“The value of dignity in our Constitutional framework cannot... be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.... Human dignity is also a constitutional value that is of central significance in the limitation analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.”⁵¹³

In recognising the inherent value and significance of a person, human dignity rejects notions of inferiority that hate speech communicates. After all, racial hate speech is a manifestation of violent and oppressive language that dehumanises and is an affront to the right to dignity.⁵¹⁴ It threatens the lives and standing of those targeted, reducing them to the ranks of second class citizens or even subhuman.⁵¹⁵ As such, the corresponding right to equality is also inextricably linked to considerations of discriminatory and demeaning expression as it treats people differently by preaching inferiority. Such differentiation is automatically

⁵⁰⁸ Devenish *Constitution* 61.

⁵⁰⁹ O'Reagan J in *S v Makwanyane* 1995 (3) SA 391 (CC) para 328.

⁵¹⁰ Section 1(a) of the Constitution of the Republic of South Africa, 1996.

⁵¹¹ Devenish *Constitution* 61.

⁵¹² *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC).

⁵¹³ *Dawood v Minister of Home Affairs* para 35.

⁵¹⁴ A Neier “Talking Trash: What’s more Important, human dignity or freedom of speech?” Book Review of J Waldron *The Harm in Hate Speech* (September/October 2012) *Columbia Journalism Review* cites Waldron’s view that in protecting against hate speech, we safeguard the dignity of vulnerable groups.

⁵¹⁵ See 1.1 for an earlier discussion on the effects of hate speech as a means of dehumanisation.

deemed unfair discrimination by virtue of the fact that race is a listed ground upon which discrimination is *prima facie* unconstitutional.⁵¹⁶ Section 9 of the Constitution provides that everyone is equal before the law and may not be unfairly discriminated against, directly or indirectly,⁵¹⁷ on the basis on race, as well as many other listed and analogous grounds. The right to equality is foundational to the Constitution,⁵¹⁸ which dictates that this right involves equivalent interest and regard in favour of mere of superficial standardising and uniformity.”⁵¹⁹ The fact is that racially violent or oppressive language goes to the heart of what it means to be perceived and treated as equal in that it preaches inferiority.⁵²⁰

As a means to guarantee equality and non-discrimination to all, the Constitution expressly directs that national legislation⁵²¹ be enacted to elucidate and reinforce this area of the law. Subsidiary legislation⁵²² therefore exists to further the right to equality through establishing clear directives for courts and fora to interpret. In this way, constitutional rights are taken “from paper, to practice” in meaningful ways.

4.3.4 Upholding Fundamental Rights

The right to freedom of expression and its interlinking rights are upheld and protected by various means.⁵²³ The courts, in particular the Equality Courts,⁵²⁴ that were established to enforce the provisions of the Promotion of Equality and the Prevention of Unfair Discrimination Act, are perhaps the most obvious forum for the enforcement of fundamental rights⁵²⁵ but recourse can also be found in the various Chapter 9 Institutions, established to

⁵¹⁶ Section 9(3) of the Constitution of the Republic of South Africa, 1996.

⁵¹⁷ Section 9(3-4) of the Constitution of the Republic of South Africa, 1996

⁵¹⁸ Section 1 of the Constitution lists the “achievement of equality” and “non-racialism and non-sexism” as founding values.

⁵¹⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 132.

⁵²⁰ See Neisser 1994 *Constitutional Law Journal* generally.

⁵²¹ This is the constitutional directive for the drafting of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which is set out and discussed at length in Chapter 5.

⁵²² L du Plessis “The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Explanatory Observations” (2011) 14.4 *PER/PELJ* 92 at 95-96 explains that “the Constitution explicitly anticipates, authorizes and indeed requires the enactment of subsidiary statute law... to give effect to rights (contained in the Bill of Rights).” The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is therefore a product of the constitutional mandate to promulgate legislation dedicated to furthering and elucidating the right to equality. See Chapter 5 generally on how this is set out and how it has been applied.

⁵²³ See 5.2.4.1 on the jurisdiction of hate speech complaints.

⁵²⁴ See 5.2.4 for a discussion on the Equality Courts and Chapter 5 generally for an exposition of the relevant sections of this Act.

⁵²⁵ I return to the establishment and work of the Equality Courts at 5.2.2 and 5.2.4.2, respectively.

uphold an open and democratic state, founded on the values espoused in the Constitution.⁵²⁶ These bodies are significant to the constitutional state as they represent an overt and meaningful commitment to transparency and social justice and they use the constitutional framework as a basis on which to monitor state compliance.⁵²⁷

Identified as “state institutions supporting democracy,”⁵²⁸ these regulators of the constitutional state are mandated to be independent and impartial guarantors of fundamental rights through their monitoring of government and overall impact on transformation.⁵²⁹ Their work is enhanced by the fact that Chapter 9 institutions enjoy the benefits of being a state organisation yet they are independent and external to government.⁵³⁰ As such, they are required to be impartial⁵³¹ auditors of state activity and constitutional compliance, divorced from party politics.⁵³² This is evidenced through the independent selection of their members.⁵³³ These features attract a certain degree of public confidence in these institutions and permit them to serve as arbitrators between the government and its constituency⁵³⁴ in facilitating public involvement, investigating complaints and adjudicating disputes.⁵³⁵ They additionally deliver annual reports to the National Assembly on their work in fostering a culture of human rights. The South African Human Rights Commission (SAHRC) and the Independent Communication Authority of South Africa (ICASA) are two such institutions that are specifically tasked with upholding the rights to free expression, equality and dignity that hate speech endangers.⁵³⁶ They each evaluate violent and hateful speech through their interpretation of their applicable legal frameworks⁵³⁷ and measure complaints in terms of their compliance to the constitutional framework outlined.⁵³⁸ In addition to these constitutionally mandated entities, self-regulation also exists in areas such as the media so as to provide

⁵²⁶ Devenish *Constitution* 351.

⁵²⁷ *Ibid.*

⁵²⁸ Section 181 of the Constitution of the Republic of South Africa, 1996.

⁵²⁹ C Murray “The Human Rights Commission et al: what is the role of South Africa’s Chapter 9 Institutions?” (2006) 9.2 *PER/PELJ* 122 at 125.

⁵³⁰ Murray 2006 *PER/PELJ* 126.

⁵³¹ *Ibid.*

⁵³² *Ibid.*

⁵³³ Murray 2006 *PER/PELJ* 127.

⁵³⁴ Murray 2006 *PER/PELJ* 126.

⁵³⁵ Murray 2006 *PER/PELJ* 127.

⁵³⁶ See the decisions of the SAHRC on hate speech at 4.3.2.2 and 5.2.4.3.1; Also see ICASA decisions on hate speech at 6.2.1.2.

⁵³⁷ The SAHRC applies the Equality Act (See 5.2.4.3) and ICASA applies its Code of Conduct (see 6.2.1.1) for Broadcasters in relation to hate speech cases. Both must measure up to the constitutional standards in this regard.

⁵³⁸ The SAHRC and ICASA are discussed at length at 5.2.4.3 and 6.2.1, respectively.

platforms to hear complaints of rights violation and to have them investigated and addressed to ensure fundamental rights are upheld.⁵³⁹

In its work, the SAHRC has had to investigate infringements of the right to freedom of expression, including hate speech allegations. Though this forum is not a court and therefore its findings will only be of only persuasive value, it is nonetheless still useful to examine how section 16(2)(c) has been interpreted in this forum dedicated to the advancement and fulfilment of human rights. The SAHRC is clearly not a court, yet it performs adjudication and settles disputes. It monitors and makes recommendations on national frameworks but does not purport to make law. As former Commissioner Leon Wessels succinctly put it, “it doesn’t fit neatly into the architecture.”⁵⁴⁰ Perhaps the blur lies in the fact that the SAHRC cannot decide on whether it wishes to focus its energies on being known as a litigator or mediator of disputes.⁵⁴¹ Not only does this blur the mandate of the SAHRC considerably, it impacts on the weight its findings have.⁵⁴² For an independent monitor and quasi-judicial body, the SAHRC considers a wealth of constitutional issues but its work is only deemed to be of persuasive value. Govender asserts that definitive constitutional interpretations are the work of the courts and as such, the SAHRC does not make legally binding decisions.⁵⁴³ This, according to Govender, should not detract from the worth of the decisions as government is mandated not to interfere with the work of the Commission and in failing to abide by a SAHRC ruling, government would be seen to be hindering the Commission in its work.⁵⁴⁴ It is doubtful, however, that this rationale is the most convincing argument. Govender certainly highlights government’s incentives to implement the SAHRC’s findings to some degree, but it fails to speculate on whether the courts would consider themselves obliged to consult or even apply other findings of the Commission. Furthermore, it is unclear as to whether the decisions of the Commission are binding on their own fora. In the absence of the availability of contempt proceedings, there appears to be no tangible, legal method to enforce a decision of the SAHRC. It is understood that the Commission must rely solely on the

⁵³⁹ See the discussion on the Broadcasting Complaints Commission and Press Council at 6.2.2 and 6.3.1, respectively.

⁵⁴⁰ Report by Outgoing SAHRC Commissioners “Critically Reflecting on an Institutional Journey: The South African Human Rights Commission” (2009) 27.

⁵⁴¹ Report by Outgoing SAHRC Commissioners “Critically Reflecting on an Institutional Journey: The South African Human Rights Commission” (2009) 59.

⁵⁴² Murray 2006 *PER/PELJ* 128 raises the credibility of the SAHRC and the reports it writes. One could infer a certain credulity extended to its decisions but the status of its findings remain unsure.

⁵⁴³ K Govender “The Reappraisal and Restructuring of Chapter 9 Institutions” (2007) 22 *SAPR/PL* 190 at 208.

⁵⁴⁴ *Ibid.*

cooperation of parties in achieving the fulfilment of fundamental rights.⁵⁴⁵ An additional point of comparison between the Commission and courts is that the former lacks the legal clout to enforce its findings or sanction perpetrators of hate speech, whereas the latter can order apologies, declaratory orders or even damages.⁵⁴⁶

National human rights institutes are, conceptually, to be defined as enduring, advisory authorities on human rights.⁵⁴⁷ One can only conclude that the SAHRC must be viewed as a vital tool in the public perception, a mere educational tool for litigants and a consultative aid for fora that share its jurisdiction in the realm of enforcing fundamental rights. This would be commensurate to Murray's assertion that one of the mandates of the Chapter 9 institutions, especially the SAHRC, lies in their role in achieving transformation.⁵⁴⁸ Therefore, unless a decision of the SAHRC is reported or gained exceptional popularity it will, in all probability, be relegated to obscurity, especially given the practical difficulties in accessing these findings.⁵⁴⁹

The legal framework that exists in the Constitution for the prohibition of hate speech can be found in the justifiable limitations outlined in the right to freedom of expression and also by virtue of the entrenchment and weight given to upholding the foundational rights to dignity and equality. Accordingly, hate speech is proscribed as it is a transgression of the right to express oneself freely insofar as it is consonant with constitutional aims. Hate speech falls directly under the prohibition of advocating hatred and inciting harm, resulting in violations of the right to human dignity and equality. There is a further element of the national commitment to reconciliation and transformation that is flouted by engaging in hate speech that equally cannot be found to pass muster. There is considerable tension that abounds in promoting expression while also limiting it, which is further complicated by the fact that language is a malleable force that lends itself as easily to messages of destruction as it does to reconciliation and transformative words. Be that as it may, the injunction on hate speech is a justifiable curtailment of the right to freedom of expression under the Constitution in the

⁵⁴⁵ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa" (2007) 167.

⁵⁴⁶ See 6.4 the status of the SAHRC and comparable bodies and the question as to whether they can be classed as administrative tribunals.

⁵⁴⁷ Report by Outgoing SAHRC Commissioners "Critically Reflecting on an Institutional Journey: The South African Human Rights Commission" (2009) 20.

⁵⁴⁸ Murray 2006 *PER/PELJ* 135.

⁵⁴⁹ The SAHRC website only hosts a handful of recent decisions and they are seemingly unavailable elsewhere.

greater aim of moving towards achieving a society that is built upon the entrenchment of fundamental rights in an attempt to distance itself from an abusive and violent past. This move away from apartheid-era behaviour is even more salient when language is considered as a new and democratic state must outlaw hate speech while still promoting the right to free speech. The ability of language to be moulded into weapons of denigration and violence demands that South African society reassess the ways in which it perceives and uses language in the recognition that it can, and has been, used to divide and harm. The constitutional means to achieve this *renaissance* in language are amply provided through the right and limitation to free expression and the entrenchment of human dignity and equality, guided by the need to transform and emerge anew from the vestige of apartheid. These measures afforded in the Constitution must however be compliant with international law if South Africa is to be considered truly renewed and in line with its commitments to incorporate overarching international standards into the interpretation of all fundamental rights.

4.4. Consonance with the International Standard

The South African constitutional standpoint echoes international calls for hate speech prohibition in the law as part of a wider goal of recognition and entrenchment of fundamental human rights. Binding international law requires that freedom of expression be entrenched in so far as it promotes human dignity and equality. Curtailing freedom of expression is thus justified then expression furthers discrimination, hostility or violence that is founded on racial, national or religious hatred.⁵⁵⁰

The constitutional standard to be sought that emerges from South Africa's subscription to various international instruments on the subject⁵⁵¹ is that racial hate speech must be prohibited. It is understood internationally to encompass expression that is an advocacy of racial hatred coupled with the incitement of some form of harm.⁵⁵² The South African constitutional provisions adequately reflect this mandate and authorise an infraction on speech where expression incites harm fuelled by racial, religious, ethnic or gender-based hate. The

⁵⁵⁰ Article 20(2) of the ICCPR and Article 4 of ICERD.

⁵⁵¹ See international obligations on hate speech at 3.3.5 that are to inform the domestic standard.

⁵⁵² *Ibid.*

harm element is left broad enough to encompass various manifestations of harm,⁵⁵³ yet stringent enough to convey that it is not mere offense that is outlawed by section 16(2)(c).⁵⁵⁴ Further, where section 16(2)(c) is insufficient in that it only envisions four grounds on which to encounter hate speech, a broader limitations inquiry is available under section 36 so as to ensure the rights to dignity and equality are upheld. A sound legal framework thus exists for the prohibition of hate speech in the Constitution in terms of the country's commitment to international law. What remains to be seen is how this standard is reflected in further legislation and policy that also prohibits hate speech within its ambit.

4.5 Concluding Remarks

In terms of the unique position language takes in South Africa, the Constitution is similarly successful in its approach. Section 16(2) acknowledges that language is a force that can be used to spread hate and denigration, culminating in violence and harm. The constitutional framework outlaws such speech as an offence to dignity and equality. The added challenge of catering to language as a force for reuniting and reconciling is also upheld through the fact that hate speech does not carry impunity. Navigating the testing terrain of how to use our language in South Africa in this new era is effectively guided by the constitutional framework and its vision for a new, transformed nation built on common values. Whether this approach is translated in subordinate legal framework is what must be examined.

⁵⁵³ See *Human Rights Commission of South Africa v SABC* 2003 (1) BCLR 92 (BCCSA), where “harm” was interpreted to include physical or psychological harm. Also, see Van Wyk’s broad interpretation of “harm” as discussed at 4.3.2.2 to include financial and emotion harm as well.

⁵⁵⁴ See the definition of hate speech at 1.1 as well as the discussion on section 16(2)(c) at 4.3.2.1.

LEGISLATIVE PROHIBITIONS ON HATE SPEECH AND THEIR APPLICATION

5.1 Introduction

The prohibition of hate speech, though primarily an abuse of the right to freedom of expression, is also a violation of the right to human dignity and equality. This is due to the fact that the right to freedom of expression touches “a web of mutually supporting rights”⁵⁵⁵ and therefore any violation of the right to free expression will also encroach on interlinking rights.⁵⁵⁶ This is the reason for the inclusion of a prohibition of hate speech in the Promotion of Equality and Prevention of Unfair Discrimination Act⁵⁵⁷ as hate speech is an aggravated form of unfair discrimination and a related issue.⁵⁵⁸ The Equality Act offers the first tangible step in prohibiting hate speech specifically and thus warrants scrutiny into whether its measures are in fact suitable to not only the South Africa experience, but also the nature of language.

5.2 Statutory Prohibition of Hate Speech: The Promotion of Equality and the Prevention of Unfair Discrimination Act

5.2.1 Constitutional Mandate on Equality

Equality has been recognised as an important foundational right of the new dispensation with particular symbolic aptness, given that the apartheid regime embodied inequality and segregation along racial lines.⁵⁵⁹ It is also a complex right that is difficult to realise.⁵⁶⁰ This accounts for the constitutional mandate to the legislature to expand on what it is to be treated

⁵⁵⁵ *South African National Defence Union v Minister of Defence* para 8.

⁵⁵⁶ See 4.3.3 on hate speech violating the interlinking rights of human dignity and equality.

⁵⁵⁷ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“The Equality Act”).

⁵⁵⁸ The act of degrading and dehumanising a person or group on the grounds of race alone is to not only differentiate but discriminate against them on the basis of their race, which is unfair, until proven otherwise. However, hate speech, while a related issue to discrimination, cannot be said to be entirely equated with discrimination, but rather a concept unto itself. See 5.2.2 further on this aspect.

⁵⁵⁹ *Devenish Constitution* 47.

⁵⁶⁰ South Africa is among the most unequal countries in the world, which will presents a formidable challenge to achieving this right. The right to equality additionally justifies seemingly contradictory notions of “fair” and “unfair” discrimination, which adds to the complexity of achieving this right and justifying limitations thereof.

equally and the various ways in which this right can be violated, resulting in unfair discrimination.⁵⁶¹

The essence of the right to equality is in the consistent treatment of those similarly situated.⁵⁶² Therefore, engaging in oppressive and hateful expression is an affront to what is envisioned by ensuring this right to all.⁵⁶³ By denigrating and dehumanising its victims, racial hate speech flouts the right of all South Africans not be treated as subhuman and racially inferior.⁵⁶⁴ It is for this reason that equality legislation addresses hate speech and outlaws language that is used to foster racial hatred.⁵⁶⁵ Hate speech constitutes an infringement of the right to freedom of expression and the right to equality⁵⁶⁶ and the nuances of this intersect warrant special legislative attention. Hate speech violates the right to freedom of expression, dignity as well as equality and therefore the legislature is warranted in incorporating this dimension of the right to equality in the statute. It is true that the Constitution only insists the issue of equality be probed further in national legislation,⁵⁶⁷ and does not compel the same for section 16, but there is value in expanding on hate speech in legislation, given the tenuous role that language occupies in South Africa. The constitutional requirement is thus that the legislation protects the rights to equality and dignity without unduly infringing on the right to freedom of expression.

5.2.2 Mandate and Provisions

The Promotion of Equality and the Prevention of Unfair Discrimination Act is a feature of transformative constitutionalism and seeks to create a new nation rid of the societal ills of social and economic inequalities.⁵⁶⁸ Under this auspice, hate speech is addressed in Chapter 2 of the Act. Though racial hate speech differentiates or focuses on race as the only relevant

⁵⁶¹ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

⁵⁶² In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 132, Sachs J states that “equality means equal concern and respect across difference... (it) does not imply a levelling or homogenisation of behaviour but an acknowledgement and acceptance of difference.”

⁵⁶³ C Albertyn, B Goldblatt and C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 89 note that fact that hate speech provisions exist is to seek to advance the right to equality and dignity, implying that hate speech violates these two fundamental rights.

⁵⁶⁴ See 2.3 on hate speech as violent and divisive language and a discussion on hate speech as a force for dehumanising at 1.1.

⁵⁶⁵ Teichner 2003 *SAJHR* 352 notes the aim of the Act to establish a link between eliminating unfair discrimination and advancing hate speech measures as both such measures safeguard the right to human dignity.

⁵⁶⁶ See 4.3.3 on hate speech as additionally violating the interlinking right to equality and human dignity.

⁵⁶⁷ Section 9(4) of the Constitution.

⁵⁶⁸ Preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act.

identity marker, it is not racial discrimination *per se*. Hate speech is therefore dealt with in the Equality Act, though separately, indicating that hate speech is social ill unto its own, related to, but not a form, of unfair discrimination as contemplated in the Act.⁵⁶⁹ This distinction, Krüger writes, is due to the fact that unfair discrimination requires comparison of the members of the targeted group with that of non-members under the Act, whereas hate speech does not.⁵⁷⁰ Therefore, what the Equality Act does is to acknowledge the correlation between unfair discrimination and hate speech in that they both violate the right to dignity and equality.⁵⁷¹ Albertyn *et al* note the shared aspiration between legislating against unfair discrimination and hate speech both seeking to in eliminate prejudice and advancing the right to dignity and equality.⁵⁷²

Section 10 of the Act outlaws hate speech and it accordingly prohibits a person to;

(1) ... publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

Section 10 is, however, subject to the proviso in section 12 of the Act, stating that;

“No person may-

- (a) disseminate or broadcast any information:
- (b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: provided that *bona fide* engagement in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.”

⁵⁶⁹ R Krüger “Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts” (2008) Rhodes University Doctoral Thesis at 4.3.1.4.2.

⁵⁷⁰ *Ibid*.

⁵⁷¹ *Ibid*; Van Wyk “Hate Speech in South Africa” The XVIth Congress of the International Academy of Comparative Law, Brisbane (2002) 7; Teichner 2003 *SAJHR* 352.

⁵⁷² C Albertyn, B Goldblatt and C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 89.

The scope of the Act precludes all communication⁵⁷³ of hate speech within the bounds of the prohibited grounds.⁵⁷⁴ Upon closer inspection, these proscribed grounds are effectively an open list that can be included where systemic disadvantage is perpetuated, human dignity is undermined and the equal enjoyment of rights and freedoms, comparable to discrimination, is fostered.⁵⁷⁵ It is indeed true that section 10's reach is significantly wider than that of section 16(2) of the Constitution, which only cites race, ethnicity, gender and religion as grounds on which expression is prohibited.⁵⁷⁶ The Act endeavours to subsume a broad range of expression under the hate speech umbrella by expanding on the constitutional provisions in the hope of elucidating the depth of speech that will not be tolerated in the new dispensation. Whether this statute extends the reach of curtailing expression past what is constitutionally defensible, however, remains to be seen.⁵⁷⁷ What it does do, however, is to send a strong message that hate speech will not be tolerated in the current dispensation by detailing that both civil and criminal sanctions would be acceptable for those who engage in hate speech.⁵⁷⁸ The Equality Act therefore echoes international calls for language to be constrained where hate speech is concerned⁵⁷⁹ but also provides a list of expression that will still promote the right to free expression in section 12.⁵⁸⁰

Hate speech has essentially been defined by section 10 as language that “could reasonably be construed to demonstrate a reasonable intention” to be hurtful, harmful or hateful. This formulation indicates that no clear intention to commit hate speech is needed to satisfy section 10, but rather a lesser precursor to intention, in the form of a reasonable person being able to

⁵⁷³ The online Oxford Dictionaries associate preparing, issuing, spreading, promoting, publicly supporting and transmitting with the language of the Act that prohibits “publishing, propagating, advocating and communicating” hate speech. This would indicate that it is not only vocalising but also the active dissemination and broadcast of hate speech that is forbidden. <http://oxforddictionaries.com/> (Accessed 6th December 2012).

⁵⁷⁴ Section 1(xxii)(a) of the Equality Act sets out the prohibited grounds of unfair discrimination as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, and goes on in subsection (b) to include any analogous ground.

⁵⁷⁵ Section 1(xxii)(b) of the Equality Act.

⁵⁷⁶ Section 16(2)(c) of the Constitution of the Republic of South Africa, 1996. Also see 4.3.2.1 for a discussion on section 16(2).

⁵⁷⁷ In the absence of a court ruling, writers can only surmise what this outcome would be. See my assessment of the constitutionality of section 10 at 5.2.3.

⁵⁷⁸ Section 10(2) states that;

“Without prejudice to any remedies of a civil nature under this Act, the Court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”

⁵⁷⁹ See 5.2.3.2 on the Act's alignment with international obligations.

⁵⁸⁰ See 5.2.3.1 for an assessment of the constitutionality of section 12.

conclude that the conduct could be construed as an intention to commit hate speech.⁵⁸¹ This gives those applying the Act considerable latitude in discerning whether hate speech is present in a particular circumstance.

The courts and tribunals have consistently held that the criteria for hate speech in the Act are to be read disjunctively, in that it is only necessary to establish if expression was hurtful, harmful or hateful, and not a combination of all three.⁵⁸² There appears to be some dissent, however, as to whether the element of intention is to be judged objectively or subjectively. One view is that the views of the recipient community should be the deciding factor as to whether a clear intention could reasonably be construed to engage in hate speech.⁵⁸³ This was a decisive factor in the appeal of the magistrate found to have engaged in hate speech in terms of section 10 for chastising a worker by calling him a baboon.⁵⁸⁴ The court confirmed that the label, “baboon,” implies that a person is of low and subhuman intelligence and is considered hurtful,⁵⁸⁵ coupled with the fact that there is a distinct racial significance in the primate parallel drawn.⁵⁸⁶ To this end, ignorance of such a racial association cannot be borne as, according to the court, it is comparable to labels such as “bantu” or “kaffir.”⁵⁸⁷ The overall consideration of intention to commit hate speech in terms of section 10 is therefore in the objective as it achieves the aims of the Act in eradicating racial discrimination.⁵⁸⁸ A competing view is that the respondent must subjectively and directly intend to be hurtful, harmful or hateful,⁵⁸⁹ a consideration which requires one to foresee the possibility of such hurt, harm or hate, but proceed regardless.⁵⁹⁰

Another relevant consequence of the Equality Act is in its mandate for the establishment of specialised Equality Courts⁵⁹¹ to hold inquiries into allegations pertaining to unfair discrimination, hate speech and harassment.⁵⁹² Designed as a forum specifically tasked with

⁵⁸¹ *Albertyn et al Introduction to the Equality Act* 92-93.

⁵⁸² *Herselman v Geleba* (231/2009) [2011] ZAEQC 1 (1 September 2011) at 20; *Mdabe v Reid* (09/2004) [2004] ZAEQC 2 (1 June 2004) 4.

⁵⁸³ *Herselman v Geleba* 24; *Mdabe v Reid* 4.

⁵⁸⁴ *Herselman v Geleba* (231/2009) [2011] ZAEQC 1 (1 September 2011). The further appeal to the SCA has since been abandoned.

⁵⁸⁵ *Herselman v Geleba* 19, 25.

⁵⁸⁶ *Herselman v Geleba* 12, 25.

⁵⁸⁷ *Herselman v Geleba* 5.

⁵⁸⁸ *Herselman v Geleba* 24.

⁵⁸⁹ *Yusuf Abramjee and Kieno Kammies v Jon Qwelane* GP/2008/0161/L BIOS (SAHRC) para 4.23.

⁵⁹⁰ *Yusuf Abramjee and Kieno Kammies v Jon Qwelane* 7.

⁵⁹¹ Chapter 4 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

⁵⁹² Section 21(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act.

making the enforcement of the right to equality accessible, available and effectual, these courts are viable alternatives to ordinary civil courts, which are not equipped to handle the complex nature of discrimination claims.⁵⁹³ Therefore the Equality Courts represent new channels through which to seek redress for age-old problems.⁵⁹⁴ High Courts double as Equality Courts⁵⁹⁵ in their own right and not as mere extensions of the jurisdiction of the ordinary courts.⁵⁹⁶ Magistrates' Courts have since followed with their designation as Equality Courts per the vision of the Act.⁵⁹⁷ Presiding Equality Court officers also undergo specialised training in line with their expert posts.⁵⁹⁸ There has, however, been some debate over the status of these courts in terms of whether they should be viewed as "high courts exercising equality jurisdiction" or "equality courts with high court jurisdiction."⁵⁹⁹ The SCA in *Manong & Associates v Department of Roads and Transport, Eastern Cape*⁶⁰⁰ considered both sides of the argument but ultimately held that the Equality Court is not an ordinary High Court but a specialist court provided for by the Equality Act.⁶⁰¹ It is so by virtue of the fact that it has its own rules and procedures, with the rules of the Magistrates' and High Courts playing only a "limited part" in their processes.⁶⁰² In fact, the Equality Courts are operationally effective because they use the infrastructure of the ordinary courts⁶⁰³ but their purpose and effect differ significantly. Though it has been argued that their mandate to promote and protect equality does not merit "specialised skill," seeing as the courts are required to uphold this fundamental right in all their work.⁶⁰⁴ However, this forum provides accessible and speedy justice so that this particular right may have no impediment to its realisation in the new South Africa. Per Navsa JA, the Equality Courts can therefore be

⁵⁹³ Albertyn *et al* Introduction to the Equality Act 16.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ Section 16(1)(a) of the Equality Act states that designated Magistrates' Courts and High Courts are Equality Courts for the area of their jurisdiction and it provides, in subsection (b) that any magistrate, additional magistrate and judge may be designated as a presiding officer of the Equality Court. Read with section 31(1)(a-b), presiding officers of the Equality Courts must be designated by reason of their training, experience, expertise and suitability in the field of equality and human rights, with similarly trained clerks.

⁵⁹⁶ J de Jager "Litigating the Rights of Refugees in the Equality Courts" (2011) *Working Paper Series of the University of Cape Town Refugee Rights Unit* pp5.

⁵⁹⁷ Magistrates' Courts designated as Equality Courts in the Government Gazette GG 32616 *28 August 2009).

⁵⁹⁸ Section 31(1)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act.

⁵⁹⁹ Froneman J raised this issue in *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape* (No 2) 2008 (6) SA 434 (EqC) at para 14-16 where he held that the Equality Courts were not separate courts but rather operated as high courts exercising equality court jurisdiction. This view was overturned in the SCA appeal.

⁶⁰⁰ *Manong & Associates v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA 50 (25 May 2009).

⁶⁰¹ *Manong v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA 50 para 54.

⁶⁰² *Manong v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA 50 para 63.

⁶⁰³ *Manong v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA 50 para 57.

⁶⁰⁴ *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape* (No 2) 2008 (6) SA 434 (EqC) para 15.

viewed as “a special purpose vehicle”⁶⁰⁵ for equality-related matters as they are crafted and structured to ensure speedy access to justice as an “added tool to promote the transformation of our society.”⁶⁰⁶ Furthermore, their jurisdiction, powers, procedures are only those stipulated in the Equality Act and therefore they do not have the inherent power of the High Courts to regulate their own processes.⁶⁰⁷ This view was confirmed in another SCA case brought by the same applicant⁶⁰⁸ where the court upheld Navsa JA’s *ratio* but added the clarification that the Equality Court is not an ordinary High Court.⁶⁰⁹ An Equality Court is a statutorily created court that will only have the powers and jurisdiction of the legislation that founded it.

Therefore as specialist courts, the Equality Courts are given a wide reign, ranging from mandating unconditional apologies and interim orders to awarding damages, declaratory orders, structural interdicts and referrals to institute criminal proceedings.⁶¹⁰ What distinguishes these courts is their broad approach to standing,⁶¹¹ innovative procedure and evidentiary rules,⁶¹² creative remedies⁶¹³ and expedited processing of cases⁶¹⁴ that encourage a less formal approach to justice.⁶¹⁵ The judicial officer also assumes a different role of part “passive adjudicator” in an adversarial system and part leader of an inquisitorial process.⁶¹⁶ This serves to encourage unrepresented litigants to approach the Equality Courts so as to “level the playing field” and promote access to justice.⁶¹⁷ Every Equality Court order has the status of an ordinary court, with appeals to follow to the High Court, Supreme Court of Appeal and Constitutional Court, should the need arise.⁶¹⁸

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Manong v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA 50 para 62.

⁶⁰⁷ *Manong v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA 50 para 65.

⁶⁰⁸ *Manong (Pty) Ltd v Department of Roads and Transport, Eastern Cape* (331/08) [2009] ZASCA 59 para 30-31.

⁶⁰⁹ *Manong (Pty) Ltd v Department of Roads and Transport, Eastern Cape* (331/08) [2009] ZASCA 59 para 31.

⁶¹⁰ Section 21(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act.

⁶¹¹ Bohler-Muller 2006 *SAJHR* 385. Section 38 of the Constitution permits five classes of persons who may bring matters before Court, namely, those acting in their own interests; those acting on behalf of another; those instituting class litigation; those instituting public interest; and associations acting on behalf of their members. Section 20(1)(f) of the Equality Act permits a sixth category, being the SAHRC or the Commission for Gender Equality as possible litigants.

⁶¹² De Jager 2011 *Working Paper* 7 notes the aim of hearings to be “informal and participatory.”

⁶¹³ A popular combination has proven to be an order for damages, an unconditional apology and cost order, as seen in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] JOL 22361 (T) when the complainant was dismissed from for failing to submit to a “cure” for his homosexuality.

⁶¹⁴ De Jager 2011 *Working Paper* 14; Bohler-Muller 2006 *SAJHR* 385-386.

⁶¹⁵ Bohler-Muller 2006 *SAJHR* 385.

⁶¹⁶ Bohler-Muller 2006 *SAJHR* 386; De Jager 2011 *Working Paper* 7.

⁶¹⁷ Bohler-Muller 2006 *SAJHR* 386; De Jager 2011 *Working Paper* 8.

⁶¹⁸ Albertyn *et al* *Introduction to the Equality Act* 31.

There is, however, concern as to the efficacy of the Equality Courts in hate speech litigation. Court structure and process,⁶¹⁹ understaffing, logistical impediments and lack of public cognizance⁶²⁰ have all been cited as factors in understanding why the Equality Courts have not lived up to expectations. It is the want of societal awareness however that has been a chief obstacle to the success, or lack thereof, of the Equality Courts and has led to these structures being vastly underused.⁶²¹ After all, their mandate is to be a viable tool for transformation and to voice those previously censored under the previous regime⁶²² but if these courts are seldom taken advantage of in practice, then they are reduced to “paper law” and not real, tangible implements of justice. In 2006, Bohler-Muller appraised these courts as only a distant “hope”⁶²³ but it is questionable as to whether this position has altered greatly. Perhaps with the fact that Malema’s “Shoot the Boer” judgment⁶²⁴ of the Equality Court was televised will increase awareness to some degree amongst civil society, but probably not for those who are vulnerable and are desperately in need of an affordable and accessible forum to achieve recourse for a violation of their right to equality and dignity.

5.2.3 Discussion

5.2.3.1 Constitutional Alignment of the Equality Act

Glaser views section 10 of the Equality Act to have been comprised in “a similar spirit” to its constitutional counterpart,⁶²⁵ securing South Africa a robust version of the right to freedom of expression.⁶²⁶ Unfortunately not all commentators of the Act have been as optimistic of the section 10’s constitutional parity and seek more “watertight safeguards.”⁶²⁷ The Equality Act has met with some controversy and disappointment within the legal fraternity and civil

⁶¹⁹ *Ibid.*

⁶²⁰ R Krüger “Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts” PhD Thesis, Rhodes University pp254.

⁶²¹ De Jager 2011 *Working Paper* 19.

⁶²² De Jager 2011 *Working Paper* 17.

⁶²³ N Bohler-Muller “The Promise of the Equality Courts” (2006) 22 *SAJHR* 380.

⁶²⁴ *Afriforum v Malema* [2010] JOL 25566 (GNP).

⁶²⁵ Section 16(2) of the Constitution of the Republic of South Africa, 1996 details the limitations of the right to freedom of expression as the propaganda for war, incitement to violence and the advocacy of hatred with an incitement to harm. See 4.3.2.1.

⁶²⁶ Glaser 2000 *African Affairs* 388.

⁶²⁷ *Ibid.*

society.⁶²⁸ The great expectation that the Act would be a powerful constitutional weapon in the fight against inequality is perhaps why it is so severely criticised, and section 10 is no exception.⁶²⁹ Section 10 clearly attempts to illuminate the nuances of hate speech by listing its component elements⁶³⁰ but whether it has achieved this with clarity or precision is questionable. The malleable and fluid nature of language does indeed complicate matters in securing a standard and consistent definition of hate speech in general, but this difficulty has been tempered somewhat in the provisions of section 16(2) of the Constitution. Instead, section 10 of the Act has added new and unfounded definitional requirements to those already present in section 16 of the Constitution, leading some to question whether the Equality Act has indeed gone beyond the original intention of section 16.⁶³¹ The “strong version”⁶³² of freedom of expression that Glaser praises in section 10 is, in reality, flawed, weakening the legal understanding of hate speech and affording too much fluidity in the understanding of hate speech.

The Equality Act and section 16 do not share the same listed grounds in their prohibition of hate speech. The Constitution lists race, ethnicity, gender and religion as the only grounds upon which an advocacy of hatred would amount to a violation of the right to freedom of expression whereas the Act effectively lays out an open list. Section 1 of the Equality Act defines a “prohibited ground” for discrimination as “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,” as well as any analogous grounds that would lead to systemic disadvantage, and the undermining of human dignity.⁶³³ Kok defends the inconsistency in listed prohibited grounds as building on from the “minimum level” prescribed by the Constitution.⁶³⁴ One can understand the inclusion of this comprehensive list in the Equality Act as it mirrors the prohibited grounds of section 9(3) of the Constitution as, after all, the purpose of the Act is to further enhance the section 9 right to equality. What is not echoed in the Act however is that section 16 restrictively interprets any limitation of freedom of speech to exclude hate speech in a closed list of grounds. Given that the Act

⁶²⁸ A Kok “The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the Controversy?” (2001) 2 *TSAR* 294 at 309.

⁶²⁹ *Ibid.*

⁶³⁰ According to the Equality Act, the component elements of hate speech are hateful, harmful or hurtful language that could reasonably be construed to demonstrate a intention to engage in hate speech.

⁶³¹ Haigh *Washington University Global Studies Law Review* 201.

⁶³² Glaser 2000 *African Affairs* 388.

⁶³³ Section 1(1)(xxii)(a) of Promotion of Equality and Prevention of Unfair Discrimination Act.

⁶³⁴ Kok 2001 *TSAR* 295.

addresses hate speech by name and prohibits such expression along any of the “prohibited grounds,” the Equality Act in effect widens the ambit of potential hate speech litigation to a far larger extent than what was contemplated by the drafters of the Constitution in this regard. Section 1(1)(xxii)(b) goes on to include make the criteria for a “prohibited grounds” an open list by declaring that “any other ground” may too suffice. “Any other ground” is stated to contemplate anything causing or perpetuating systemic disadvantage, undermining human dignity or adversely affecting the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination.⁶³⁵ Therefore, the conceptual ambit for hate speech is effectively widened by section 10 to include any form of hatred. This would essentially permit hate speech litigation based on listed grounds such as pregnancy, age or marital status, or any other ground that perpetuates systemic disadvantage that are not stipulated in section 16(2) of the Constitution.

By all accounts, section 10 neglects to follow the constitutional lead with regard to hate speech and introduces new and wider, even unconstitutional,⁶³⁶ legal requirements that have remained unexplained and unsubstantiated. Glaser’s view that the Constitution and the Equality Act provide a convincing safeguard to freedom of expression because they bar “extreme forms of behaviour”⁶³⁷ cannot be said to be accurate when examining “hurtful” or “harmful” speech. Even a proponent of the Act, Anton Kok, admits that section 10 “*prima facie* infringes 16 of the Constitution.”⁶³⁸ Kok concludes that the broad steps taken by the statute in relation to hate speech are justifiable due to the value attached to equally far-reaching approach in respect of the right to dignity.⁶³⁹ This argument is hardly compelling as it could be invoked to justify an endless stream of fundamental rights violations. It is not for hate speech provisions to assume the malleable and all-encompassing nature of dignity: such provisions must be certain and consistent to ensure justice is meted out.⁶⁴⁰ The preferred view is Teichner’s as he notes that it is only certain types of speech that are to be prohibited in the young democracy and the four grounds listed in the Constitution (race, ethnicity, gender

⁶³⁵ Section 1(1)(xxii)(b) of Promotion of Equality and Prevention of Unfair Discrimination Act.

⁶³⁶ Viewing certain provisions of section 10 to be erroneous is in light of the fact that hate speech is not mere hurtful speech, which is what the Act potentially permits. See the definition of hate speech at 1.1.

⁶³⁷ Glaser 2000 *African Affairs* 388.

⁶³⁸ Kok 2001 *TSAR* 299.

⁶³⁹ Kok 2001 *TSAR* 300.

⁶⁴⁰ Teichner 2003 *SAJHR* at 357 echoes the main criticism of section 10 in that it is overly broad in articulation, which indicates concern for the fact that its application may be used in inconsistent and innumerable ways to limit freedom of expression.

and religion) are the limit in this regard.⁶⁴¹ Currie *et al* also view section 10's wide stance to be further than anticipated in the constitutional standard that can only be redeemed by a favourable section 36 limitations analysis.⁶⁴² In the absence of a pronouncement on the constitutional validity of this provision, there is no choice but to interpret section 10 in consonance with the Constitution.⁶⁴³

The fact that a finding of hate speech in the Act turns on the criteria that it "could reasonably be construed to demonstrate a clear intention" to be such, the Equality Act significantly extends the scope of the definition of hate speech.⁶⁴⁴ Section 10 goes further than the Constitution, which only requires an advocacy of hate and incitement to cause harm.⁶⁴⁵ The result of this formulation is that one need not actually cause harm, only possess an intention to do so that a reasonable person could reasonably construe it as such, and not necessarily would construe it as such.⁶⁴⁶ This means that it is not that a reasonable person would, but might, interpret speech in such a way as to indicate an intention to commit hate speech.⁶⁴⁷ The word "could" conveys that a reasonable person need only find hate speech a possibility and not a certainty. This "loose form of *mens rea*"⁶⁴⁸ would prosecute those who have no intention to harm. Teichner cautions that such a formulation could result in vengeful litigation or intimidation, due to this vague and malleable criterion and, as such, transcends the constitutional standard.⁶⁴⁹

The all-encompassing and wide construing of a potential violation of the right to freedom of expression in the Act poses a problematic agenda.⁶⁵⁰ Furthermore, the fashioning of section 10 as a weapon to wield against "hurtful" or "harmful" language is equally uncomfortable as these criteria are very broad and ambiguous terms⁶⁵¹ couched in malleable concepts. For instance, language that is "hurtful" is chiefly considered to "cause distress to someone's

⁶⁴¹ Teichner 2003 *SAJHR* at 354.

⁶⁴² I Currie, J De Waal and G Erasmus *The Bill of Rights Handbook* (2001) 228.

⁶⁴³ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40 holds that the only option a court or tribunal has in this regard is to read down in conformity with the Constitution.

⁶⁴⁴ Teichner 2003 *SAJHR* 354.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.*

⁶⁴⁷ Albertyn *et al* *Introduction to the Equality Act* 93; Teichner 2003 *SAJHR* 354.

⁶⁴⁸ Teichner 2003 *SAJHR* 380.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Teichner 2003 *SAJHR* 354-355.

⁶⁵¹ Haigh *Washington University Global Studies Law Review* 202.

feelings.”⁶⁵² This is a highly subjective formulation. “Hurtful” words are therefore potentially very different from those that are considered “hateful” and the language of the Act fails to acknowledge this elementary distinction. The term “harmful” is similarly undefined in the Act and thus uncertainty also exists in this regard, especially given that “harm” in section 16(2)(c) of the Constitution has a specific interpretation which has seemingly not been invoked here.⁶⁵³ “Harmful” in everyday language is considered to be “likely to be damaging”⁶⁵⁴ in a sense that connotes material damage, ill effects or danger,⁶⁵⁵ and is easier to quantify. Although the phrase “could reasonably be construed to demonstrate a clear intention” does give section 10 an air of objectivity, it does not save the provision from effectively sanctioning hate speech litigation for “hurtful” language. What makes this a particularly crucial aspect of the provision is that section 10(2) goes on to invoke the institution of criminal proceedings for such “hurtful” speech. Therefore criminal sanctions would be fitting for “hurtful” language, according to the Act, presumably using the common law offense of *crimen iniuria*,⁶⁵⁶ or any statutory crimes that may still be created in relation to hate speech. This has the effect of marrying *crimen iniuria* with hate speech, which is not an entirely satisfactory match. *Crimen iniuria* requires that an unlawful, intentional and serious infringement of dignity must occur to incur criminal sanctions, but this is only one possible outcome of an instance of hate speech. When considering this combination with *crimen iniuria*, it is clear that the crime only serves to assuage one’s wounded self-worth and dignity, and not the wider societal and linguistic turmoil that hate speech creates. However, hate speech as provided under the Equality Act links more successfully to *crimen iniuria* in sanctioning hateful, hurtful or harmful language.

It is interesting to note that earlier drafts of the Equality Act⁶⁵⁷ included a catalogue of hate speech deemed “hurtful and abusive.” Bill 57 of 1999 prohibited all forms of racial discrimination or racism, including the use of language recognised as intending to be hurtful and abusive, such as “kaffir,” “kaffer,” “kaffermeid,” “coolie,” “hotnot” and their variations.

⁶⁵² As per the definition of “hurtful” in the online Oxford Dictionary <http://oxforddictionaries.com/definition/english/hurtful?q=hurtful> (Accessed 3 September 2012).

⁶⁵³ See 4.3.2.1 for the constitutional understanding of “harm.”

⁶⁵⁴ As per the definition of “harmful” in the online Merriam Webster Dictionary <http://www.merriam-webster.com/dictionary/harmful> (Accessed 3 September 2012).

⁶⁵⁵ As per the definition of “harmful” in the online Oxford Dictionary <http://oxforddictionaries.com/definition/english/harm?q=harm> (Accessed 3 September 2012). Also, see the full extent of the term “harm” as contemplated in the constitutional framing of hate speech in 4.3.2.1.

⁶⁵⁶ See 7.3.2 for common law discussion on *crimen iniuria*.

⁶⁵⁷ The Promotion of Equality and Prevention of Unfair Discrimination Bill 57 of 1999.

The list of offensive terms was not included in the final Act. This is understandable as including these terms and writing the epithets down gives them a sense of recognition and immortality where they should be denied and forgotten. On a purely pragmatic note, it would also be futile to include a reference list of outlawed terms as not only are these slurs constantly growing and evolving, it would also undoubtedly create a “thrill factor” which could boost their popularity and use.⁶⁵⁸ The general prohibition on racism originally contemplated in the Bill has also been omitted from the Act as the undertaking to outlaw offensive thought is conceptually problematic and practically impossible. While, admittedly, analysing a draft version of an Act has somewhat limited scope for contemporary issues, it is curious to note that drafters of the Equality Act intended to rid the nation of hate speech and discrimination by enumerating a list of offensive tags and seeking suppress racist thought. This approach is confining and prescriptive and would only have encouraged new and more creative racial slurs to evolve, making amendments a constant necessity. Though the Bill was careful to not make it an entirely closed list of offensive terms, it suggested a hierarchy of offensive terms, imposing a great burden of proof on any applicant to demonstrate synonymy.⁶⁵⁹ These *travaux préparatoires* are, however, helpful in understanding the current Act as a compromise on its earlier drafts, yet this is no excuse for its tension with the constitutional provisions on freedom of speech and its limitations thereof.

The conceptual bars to section 10 translate into its practical application. In the SAHRC decision on whether the label “coconut” was an instance of hate speech, the Commission compared this provision with its constitutional counterpart. The Commission noted that the Equality Act’s reach is in fact broader than that of section 16(2)⁶⁶⁰ and declared that while “coconut” could not be construed as hate speech via section 16(2), it could be upon an application of the provisions of the Equality Act.⁶⁶¹ At first glance, this seems contradictory, given the fact that Section 10 is supposed to be modelled on the constitutional framework for freedom of expression. However, subsidiary legislation,⁶⁶² such as the Equality Act, is

⁶⁵⁸ The justification for such a statement lies in the comparison between compiling a list of outlawed terms and the argument not to ban hate speech it would only drive hate speech underground and become a “thrill factor” to use it, as noted by Harris *et al* 2004 *The Race and Citizenship in Transition Series* at 62. Moreover, Opatow and McClelland 2007 *Social Justice Research* at 77 identify typical perpetrators of hate crimes (by implication, hate speech) as, *inter alia*, as seeking the thrill of engaging in socially unacceptable conduct.

⁶⁵⁹ Section 8(e) of the Promotion of Equality and Prevention of Unfair Discrimination Bill 57 of 1999.

⁶⁶⁰ Yusuf Abramjee and Kieno Kammies v Jon Qwelane para 4.17-4.19.

⁶⁶¹ Yusuf Abramjee and Kieno Kammies v Jon Qwelane para 4.26.

⁶⁶² L du Plessis “The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Explanatory Observations” (2011) 14.4 *PER/PELJ* 92 at 95-96 explains that “the Constitution explicitly

permitted to expand on fundamental rights so as to enhance their protection but never to limit their scope unjustifiably.⁶⁶³ This range given to the Equality Act is however constrained insofar as measures conform to the Bill of Rights.⁶⁶⁴ The Commission therefore believes that the Equality Act offers courts and tribunals a wider attempt at securing a hate speech finding. The issue, however, lies in the fact that the Equality Act has been widely deemed constitutionally invalid for its excessively wide⁶⁶⁵ approach to limitations on the right to freedom of expression.

Were section 10 to be constitutionally challenged, it would not emerge unscathed from such an enquiry as the criteria of section 10 is clearly incongruent to the constitutional standard articulated in section 16, taking liberties akin to censorship with the inherent right to freedom of expression. Teichner has successfully shown that “an appropriately tailored provision coupled with a responsible judiciary”⁶⁶⁶ is what is needed for a constitutionally compatible hate speech provision that will assuage any risk of abuse of the right to free expression, however section 10 does not fit that bill. The new notions of “hurt” and “harm” advanced by the Act in this enquiry lower the threshold for constitutionally limiting expression significantly, to the point of possibly leading to, or even encouraging, frivolous and vengeful litigation.⁶⁶⁷ Moreover, the Act’s treatment of “harm” differs from the constitutional understanding of the term: the Act equates harmful speech with hate speech, whereas the Constitution prohibits hateful speech that culminates in a harmful effect, be it physical, psychological or financial anguish.⁶⁶⁸ It also appears that the legislature has endorsed the possibility to civil, if not criminal, sanctions for merely offensive words, rather than destructive, “severe and deeply-felt form(s) of opprobrium.”⁶⁶⁹ After all, the only requirement is that a reasonable person *could* interpret the conduct as demonstrating a clear intention engage in hate speech, not that they *would* do so.⁶⁷⁰

anticipates, authorizes and indeed requires the enactment of subsidiary statute law... to give effect to rights (contained in the Bill of Rights).”

⁶⁶³ L du Plessis 2011PER/PELJ 97; *Department of Land Affairs v Goedgelegen Tropical Fruit Pty (Ltd)* 2007 (6) SA 199 (CC).

⁶⁶⁴ L du Plessis 2011PER/PELJ 97; *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 43.

⁶⁶⁵ Teichner 2003 SAJHR 357.

⁶⁶⁶ Teichner 2003 SAJHR 378.

⁶⁶⁷ Teichner 2003 SAJHR 354.

⁶⁶⁸ See the constitutional treatment of “harm” at 4.3.2.1.

⁶⁶⁹ Teichner 2003 SAJHR 380.

⁶⁷⁰ Teichner 2003 SAJHR 354.

There is one way that is suggested for section 10 to pass constitutional muster and this is in relation to section 12. Woolman *et al*⁶⁷¹ note the proviso to read section 10 in conjunction with section 12 in protecting certain expression. This would protect “*bona fide* engagement in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution” from being declared hate speech under section 10 and thus counter much criticism on the unconstitutionality of the Equality Act.⁶⁷² However, Woolman *et al* agree that regardless of how one interprets section 12 in relation to section 10, the result is still unsatisfactory as it leads to uncertainty and the authors call on the legislature to intervene and provide clarity on this issue.⁶⁷³ Albertyn *et al* suggest that section 10 can be saved through its reliance on section 12. The authors attempt to establish parallels with section 12 of the Act and section 16(1) of the Constitution in that the Act serves to expand on the categories of protected expression in the Constitution.⁶⁷⁴ Albertyn *et al* accordingly suggest that one must first consider whether the expression in question is protected by section 12 and section 16(1) of the Constitution and if yes, then it may still be prohibited in terms of section 16(2) but regulated in terms of section 10 of the Equality Act in practice.⁶⁷⁵ If the expression is not protected, only then does a section 10 analysis come into play.⁶⁷⁶ The line of reasoning of these authors is circuitous and offers an unworkable interpretation of the hate speech provision in the Equality Act. Teichner provides another interpretation in that section 12 is the gateway to balancing exercise that must ensue in terms of a section 36 analysis to determine whether a justifiable limitation on freedom of expression can be found through a particular hate speech ruling.⁶⁷⁷ This interpretation is not entirely satisfactory as it fails to acknowledge that section 12 is specifically incorporated into the wording of section 10, solidifying the link between the two provisions that cannot be ignored. The only possible conclusion to draw from the unfortunate drafting of section 12 is that section 12 was intended to mirror section 16(1) of the Constitution in creating a list of protected speech where a hate speech complaint is concerned. Thus, a balancing exercise must ensue where the context

⁶⁷¹ S Woolman, T Roux, J Klaaren, A Stein and M Chaskalson (eds) *Constitutional Law of South Africa* 2ed (2009) Original Service 42-88.

⁶⁷² Teichner 2003 *SAJHR* 358 notes that many arguments on the constitutionality of section would be redundant were section 12 to be read in this fashion or in following the test posited by Albertyn *et al*, as discussed earlier in this section.

⁶⁷³ Woolman *et al* *Constitutional Law of South Africa* 42-88.

⁶⁷⁴ Albertyn *et al* *Introduction to the Equality Act* 93-94.

⁶⁷⁵ Albertyn *et al* *Introduction to the Equality Act* 94.

⁶⁷⁶ *Ibid.*

⁶⁷⁷ Teichner 2003 *SAJHR* at 358.

indicates that certain expression should be protected so as to further the right to freedom of expression.

5.2.3.2 Alignment with International Obligations

The Equality Act is the result of the constitutional directive and international obligations to honour and ratify the ICERD.⁶⁷⁸ This having been said, the position it occupies in relation to international instruments is somewhat precarious in its inconsistency. Olivier⁶⁷⁹ points out that, despite the constitutional imperative⁶⁸⁰ to consider international law when applying the Bill of Rights, the Equality Act only asks its interpreters to be “mindful”⁶⁸¹ of international law. Though perhaps a result an oversight during drafting, this inclusion certainly gives the impression of an ambivalent and noncommittal legislature on the issue of applying international law domestically. This “dual role”⁶⁸² of a merely consultative device, on one hand, and binding law, on the other, that international law now plays in the sphere of discrimination legislation is potentially problematic if one is to view South Africa’s membership to international human rights conventions, such as the ICERD, as serious and meaningful. With eight years having elapsed since South Africa last reported to the CERD Committee⁶⁸³ it remains to be seen what will be made of this incongruity in the Equality Act.

5.2.3.3 The Verdict on the Equality Act

The inevitable question that consequently arises from this predicament is how to make sense of section 10. The only choice is to take a cue from *Islamic Unity Convention*, Pillay and Teichner and to read the provision in line with section 16(2) in the absence so far of a constitutional challenge to section 10. How the courts have interpreted the provision, however, is the ultimate test as to the efficacy of the provisions.

⁶⁷⁸ Olivier (part 1) 2003 TSAR 299.

⁶⁷⁹ ME Olivier “South Africa and international human rights agreements: procedure, policy and practice (part 1)” (2003) 2 TSAR 293.

⁶⁸⁰ Section 39(1)(b) of the Constitution of the Republic of South Africa.

⁶⁸¹ Section 3(2)(b) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁶⁸² Olivier (part 1) 2003 TSAR 300.

⁶⁸³ See a discussion of South Africa’s reporting on its compliance with international instruments at 3.4.

5.2.4 The Equality Act Applied

Being specifically tasked with the realisation of the Equality Act, the Equality Courts are an appropriate forum for hate speech litigation using section 10. However, on exploring the jurisprudence of the Equality Courts, a word on jurisdiction is a necessary starting point, on account of the fact that there are matters pertaining to section 10 that favour High Court jurisdiction over the Equality Court.

5.2.4.1 Jurisdiction

It is generally accepted that the Equality Court is the appropriate forum for adjudication and interpretation of the Equality Act, due to its specialised personnel and processes designed to achieve this right in the most effective manner possible. This view was entrenched in the High Court judgment of *Afriforum v Malema*.⁶⁸⁴ The case was lodged in the High Court as an urgent application for a provisional interdict on Malema singing the chant “Shoot the Boer” while proceedings were pending in the Equality Court. Bertelsmann J expressed confusion as to why the Equality Court was not approached in the matter, seeing as the remedy sought would also be available at that forum, but ultimately proceeded to hear and give judgment on the matter.⁶⁸⁵ The court situated the facts as pertaining to the constitutional stance on hate speech and listed section 10 as the applicable legislation in this regard.⁶⁸⁶ The court held that the applicants were “offended and alarmed, if not threatened” by the chant and as such this was *prima facie* proof of hate speech, as per section 10 of the Equality Act.⁶⁸⁷ The matter was referred to the Equality Court for further adjudication as this specialised court was the appropriate forum to hear the full complaint. The High Court cautioned that given the urgent and temporary nature of the application, its findings were only provisional and not binding on any other court.⁶⁸⁸ This case demonstrates that it is the Equality Court that should ultimately have jurisdiction in hate speech matters.

⁶⁸⁴ *Afriforum v Malema* [2010] JOL 25566 (GNP). The matter was referred to the Equality Court, as discussed further at 5.2.4.2.1.

⁶⁸⁵ *Afriforum v Malema* [2010] JOL 25566 (GNP) 5.

⁶⁸⁶ *Afriforum v Malema* [2010] JOL 25566 (GNP) 8.

⁶⁸⁷ *Afriforum v Malema* [2010] JOL 25566 (GNP) 9.

⁶⁸⁸ *Ibid.*

Though the High Court would usually only deal with section 10 cases on appeal and not as a court of first instance, the High Court has declared that its reach extends beyond urgent applications such as *Afriforum*. In *ANC v Harmse: In re: Harmse v Vawda*,⁶⁸⁹ incidentally decided three days after Bertelsmann J's judgment above was delivered, the court held that the existence of the Equality Courts do not oust the jurisdiction of the High Courts in hate speech matters under section 10 of the Act. Therefore, according to *Harmse*, a litigant could approach the High Court instead of the Equality Court. In this matter, Harmse obtained an interdict to prevent Vawda and others from chanting "*Dubula ibhunu*" at a peaceful march arranged by the Protection of Our Constitution Society. The court outlined the constitutional framework on prohibited speech and the provisions of the Equality Act on hate speech but stated that it was unclear as to which was to be considered, or if both frameworks were to be applied.⁶⁹⁰ The court held that this issue, however, was unnecessary to probe as the chant failed in terms of both section 16 and section 10.⁶⁹¹ The court explored the provisions of the former, but declined to engage with the latter as it could not see how the requirements of section 10 would not be met in this case.⁶⁹² It found there to be a *prima facie* case for hate speech in that the chant constituted an incitement to commit murder.⁶⁹³ It cited the High Court case of *Afriforum v Malema* as authority in this regard. The appeal was accordingly dismissed with costs.

Though this matter did not allege hate speech specifically, the court held that the chant was indeed prohibited as such under section 10 of the Equality Act. However, the court raised concerns over where the Equality Act fitted in, given the existence of the constitutional stance on hate speech. In fact, most of the court's engagement with the law was in terms of section 16(2)(c) of the Constitution. It held that its reliance on the Constitution primarily over the Equality Act was justified as the statute was not promulgated to give effect to section 16(2)(c) and does not supersede or replace the constitutional provision in this regard.⁶⁹⁴ The court thus held that a litigant is open to approach the court on either provision to adjudicate a hate speech allegation.⁶⁹⁵ Similarly, the court held that the existence of hate speech provisions under the Equality Act did not mean that the Equality Courts enjoyed exclusive jurisdiction as

⁶⁸⁹ *ANC v Harmse: In re: Harmse v Vawda* [2011] 4 All SA 80 (GSJ).

⁶⁹⁰ *ANC v Harmse: In re: Harmse v Vawda* [2011] 4 All SA 80 (GSJ) para 58.

⁶⁹¹ *Ibid.*

⁶⁹² *ANC v Harmse: In re: Harmse v Vawda* [2011] 4 All SA 80 (GSJ) para 71.

⁶⁹³ *ANC v Harmse: In re: Harmse v Vawda* [2011] 4 All SA 80 (GSJ) para 139.

⁶⁹⁴ *ANC v Harmse: In re: Harmse v Vawda* [2011] 4 All SA 80 (GSJ) para 120.

⁶⁹⁵ *Ibid.*

the Act does not oust the High Court's jurisdiction at all.⁶⁹⁶ The approach taken by Halgryn AJ in *Harmse* in respect of Equality Court jurisdiction is incorrect as the Equality Act clearly mandates that hate speech matters be adjudicated upon in Equality Courts in the light of their association with equality matters as specialised courts. Further, *Pillay* confirms that sidestepping the Equality Act in favour of reliance on the constitutional limitation of freedom of expression is incorrect.⁶⁹⁷ The implication of *Harmse* is that the law is uncertain on the point of jurisdiction as both this case and *Afriforum* are decisions of the High Court.

While *Afriforum v Malema* in the High Court suggests that a High Court would be equally competent to rule on a hate speech case, it did so reluctantly and with the order that the case be referred to the Equality Court for the ultimate ruling. *Strydom v Chiloane*⁶⁹⁸ has confirmed at that a particular set of facts could give rise to a variety of options for a litigant in various courts,⁶⁹⁹ but did not mention whether the High Court and the Equality Court could share jurisdiction with claims based on the Equality Act. It is, however, implied through the creation of specialised Equality Courts that they would be best suited for the interpretation of the Equality Act. What these two High Court cases therefore demonstrate is that the High Courts are empowered to interpret the Equality Act but that the more appropriate platform to do so is in the specialised fora in human rights issues.

5.2.4.2 Equality Court Decisions

The pool from which to obtain section 10 jurisprudence is, unfortunately, very limited.⁷⁰⁰ Of the relatively few judgments available, most deal with racial hate speech allegations and a small portion with hate speech under other grounds, such as gender and religion.⁷⁰¹ These hate speech cases vary in approach and paint an overall picture of a consideration for the violent nature of language. However, their inconsistency suggests a worrying trend in how the

⁶⁹⁶ *ANC v Harmse: In re: Harmse v Vawda* [2011] 4 All SA 80 (GSJ) para 121.

⁶⁹⁷ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 43.

⁶⁹⁸ *Strydom v Chiloane* 2008 (2) SA 247 (TPD).

⁶⁹⁹ *Strydom v Chiloane* 2008 (2) SA 247 (TPD) at para 12-17, held that a claim based on an employee calling a worker a "baboon" could be filed in a civil *iniuria* suit, as hate speech in the Equality Court or as a violation of the Employment Equity Act's prohibition of racial discrimination in the Labour Court.

⁷⁰⁰ The BCLR and All SA databases each yielded 4 cases on section 10 of the Equality Act, the same 2 of each were relevant to this chapter. The SALR database search produced 1 match for a section 10 case. Further, a key phrase search for "hate speech" in SAFLII's Equality Court database has yielded only 13 cases dealing with the subject, of which 8 were relevant to this thesis. The JOL database search produced 11 results, 4 of which were relevant to this chapter. (Accessed 8 February 2013).

⁷⁰¹ See 4.3.2.1 on section 16(2)'s prohibition of hate speech on the grounds of race, gender, religion or ethnicity.

Equality Act is applied in practice. There is the added issue of the Magistrates' Courts operating as non-precedent setting courts in the hate speech complaints, thereby reducing the possibility of creating strong and consistent jurisprudence on section 10. Therefore, the cases considered must be viewed in terms of precedent-setting decisions and non-precedent-setting decisions.

5.2.4.2.1 Precedent-Setting Decisions

Judgments of the High Courts sitting as Equality Courts set precedent. Relatively few precedent-setting judgments have been delivered and/or are freely accessible. The most publicised of these cases was the 2011 case of *Afriforum v Malema*,⁷⁰² which is the current authority on section 10. The now infamous incidents where former ANC Youth League President, Julius Malema, chanted variations of the slogan “*Dhubul’ibhunu*” at public meetings caused a complaint of hate speech to be lodged at the Equality Court. There, Malema defended his words as a mere struggle song, reminiscent of a time when unity was needed and as part of his right to freedom of expression, as guaranteed by the Constitution. Afriforum countered that the Equality Act limits this right where hate speech is concerned that the call to shoot white Afrikaners is an act of advocating hatred and inciting harm. Lamont J outlined the issues in the case: firstly, the meaning of the words in their appropriate context and audience; secondly, the actual audience of the song and whether this distinction was relevant; thirdly, whether different audiences ascribed varying meanings to the words is a worthy consideration; fourthly, whether the repeated singing of the song is a decisive factor; whether, fifthly, the words constitute hate speech; and finally, if so, does the fact that the words have a place in the country’s heritage vest an overriding right in the singer to perform this song?⁷⁰³

As to the first issue on the meaning of the song in relation to its context and audience, the court traced the song’s history as a struggle song performed to dehumanise the enemy and to psychologically bond warriors⁷⁰⁴ but has since morphed into a popular political chant.⁷⁰⁵ Decisive factors, accordingly to Lamont J, were that the song today receives a high degree of

⁷⁰² *Afriforum v Malema* [2010] JOL 25566 (GNP).

⁷⁰³ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 55.

⁷⁰⁴ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 62-63.

⁷⁰⁵ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 80.

publicity that outrages society by virtue of the fact that its translated title appears as “shoot the Boer/farmer.”⁷⁰⁶ Lamont J also engaged extensively with the second, third and fourth issues simultaneously and translated the song to demonstrate that the song in question was fairly innocuous before Malema and the Press drew attention to it, thereby significantly increasing the scope of the potential audience to the public at large and not just those who attended the rallies.⁷⁰⁷ The fifth, and arguably most pertinent of all issues laid out by Lamont J, was whether Malema’s words can be considered to be “hate speech.” Lamont J however held the lyrics to be hate speech⁷⁰⁸ without outlining any test or engaging in any discussion specifically attached to this singular enquiry. He ordered the song banned on the part of the respondents and for society at large.⁷⁰⁹

In my view, the controversy surrounding this judgment is the result of the line of reasoning followed by the court. Lamont J set about tracing an extensive history of the Boers, the ANC, the meaning of *Ubuntu* and the chronology of news reports of the song in contention in an all-inclusive and sweeping judgment⁷¹⁰ but did not explore any tests developed to measure hate speech. The legislative and constitutional provisions were laid down in the early paragraphs of the judgment⁷¹¹ but they are not adequately engaged with, making the declaration that the words in question constitute hate speech quite sudden. The sole rationale for the finding was that the words “could reasonably be construed to demonstrate an intention to be hurtful, to incite harm and promote hatred against the White Afrikaans-speaking community, including the farmers who belongs (*sic*) to that group.”⁷¹² No explanation was offered to clarify how this decision was reached, which makes determining a consistent test for hate speech difficult. What this judgment indicates is that the legal and social concept of hate speech is still unsettled in society and the judiciary’s consideration. The court appears to have considered publication of the words, their meaning and audience as decisive factors in his ruling but appears to be conflicted when it comes to the element of intention.⁷¹³ In its summation, the court initially notes that “the intention of the person who utters the words is irrelevant” but later that states that “once meaning is ascertained, a decision must be made as to whether or

⁷⁰⁶ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 77.

⁷⁰⁷ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 85.

⁷⁰⁸ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 108.

⁷⁰⁹ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 120.

⁷¹⁰ *Afriforum v Malema* [2010] JOL 25566 (GNP) 5 at para 2-10.

⁷¹¹ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 19-48.

⁷¹² *Ibid.*

⁷¹³ *Afriforum v Malema* [2010] JOL 25566 (GNP) para 109.

not the meaning is reasonably capable of demonstrating an intention to commit hate speech.”⁷¹⁴ This formulation indicates that intention is indeed applicable as, after all, common sense dictates that for the words to demonstrate an intention, the speaker must surely possess that same intention. In applying this test fashioned by the court, it was held that the first leg of the test is concerned with the perception of a reasonable listener, equipped with common knowledge and skill, to decide what the words mean. The second enquiry is equally objective in that it is an assessment as to whether it is reasonably possible to find some intention to commit hate speech. It would appear that this test was formulated with section 10 of the Equality Act in mind but this is of little use to a field with limited continuity in approach independent to the section 16(2)(c) test of advocacy of hate with incitement to cause harm.

The Equality Court recognised the need to protect against violent and hateful language and recognised it in the words chanted by Malema. The court could not, however, find suitable tools to work with offered in the Act. The idea of section 16(2) being more adequately equipped to deal with hate speech recurs when reading the *Afriforum* and, in light of this, it would have been satisfying to see an attempt to read down, if not a mere obiter statement,⁷¹⁵ on the suspected constitutional dissonance present in section 10 of the Equality Act. The fact that the Supreme Court of Appeal granted leave to appeal and that many saw this fact as an opportunity to probe section 10 demonstrates that there is legal certainty needed in terms of this provision.⁷¹⁶ However, a settlement has been reached between the parties and we will have to await section 10’s challenge in another case before the courts.⁷¹⁷

⁷¹⁴ *Ibid.*

⁷¹⁵ In terms of the Equality Act, it had a confined jurisdiction and selection of remedies at its disposal, unlike an ordinary High Court. However, section 21(2) grants an Equality Court the power to make an appropriate order that could include a variety of options. Perhaps it is a stretch to include reading down in this list, but certainly obiter statements would not be amiss.

⁷¹⁶ The Freedom of Expression Institute and Section 16 applied to be admitted as *amici curiae* in their capacity to present on the state of the hate speech regulations in South Africa, with particular reference to section 10. (SAPA “FXI To Join Malema Hate Speech Case” (5 June 2012) <http://www.iol.co.za/news/crime-courts/fxi-to-join-malema-hate-speech-case1.1312350#.T89hQr8t1PM> (Accessed 5 June 2012)).

⁷¹⁷ *Julius Sello Malema v Afriforum* A.815/2011 Filing Sheet: Mediation Agreement. The settlement reached between the parties in lieu of an appeal by the SCA that certain words in struggle songs may be experienced as hurtful by members of minority communities and that in the interests of promoting reconciliation, parties should avoid inflicting such hurt. (At clause 3(b-c) of Mediation Agreement). The Agreement will be made an Order of Court substituting the Equality Court Order upon the signing of it by Lamont J, failing which the parties will abandon the Equality Court Order and apply for the Mediation Agreement to be made an Order of Court. (At clause 3(g) of the Mediation Agreement).

If the settlement agreement ultimately replaces the Equality Court Order, Lamont J's ruling will be of very limited use to hate speech jurisprudence in the future. The Equality Court judgment will outline how the words were hate speech in nature but will ultimately conclude that it is only "hurtful" in certain groups and actually hate speech. The Agreement refers to the contentious song only by indistinct reference to "certain words in certain struggle songs" and that such expression "may be experienced as hurtful" to minorities.⁷¹⁸ Such formulation is vague owing to the fact that it uses the criterion of section 10 of the Equality Act in condemning "hurtful" language. This agreement therefore does not acknowledge any advocacy of hatred at the very least, which is part of what distinguishes hate speech from mere offensive language. The language of the settlement agreement does advance the notions of reconciliation and dialogue over litigation and blame, which is precisely the role the language is mandated to play to facilitate reconciliation in a post-apartheid setting.⁷¹⁹ However, this settlement agreement is not entirely faithful to the fact that what is in contention is that the song in question advances hatred and incites imminent harm on a racial level, which is prohibited by the Constitution, making it an instance of hate speech. This fact has been substituted for "hurtful" language in the settlement agreement, thereby changing the nature of the language in contention. It remains to be seen how this order will play out.

With all eyes on the Court, it missed a vital opportunity try to confirm the correct approach and engage with the provisions of the Equality Act and suggest a possible solution to the controversial provisions of section 10, be it in the form of criticism or even reading down in conformity with the Constitution. Instead, it can be said to have formulated yet another unclear test, informed by considerations outside of the expected parameters seen thus far in the case law and decisions of tribunals.⁷²⁰

5.2.4.2.2 Non-Precedent-Setting Decisions

With the provision that designated Magistrates' Courts may serve as Equality Courts, these fora are an accessible platform for hate speech complaints. Unfortunately, the majority of

⁷¹⁸ *Julius Sello Malema v Afriforum* A.815/2011 Filing Sheet: Mediation Agreement para 3(b).

⁷¹⁹ See 2.4.2 for a wider discussion on the policy of reconciliation adopted in South Africa in the wake of the new democracy and the effect this has on the new use of language as a means of healing, and not harm.

⁷²⁰ See the SAHRC decisions at 4.3.4 and 5.2.4.3.1, as well as ICASA decisions at 6.2.1.2, BCCSA decisions at 6.2.2.2 and Press Ombudsman decisions at 6.3.1.2.

these decisions are inaccessible,⁷²¹ and those available are almost exclusively from a single magistrate sitting as a presiding officer in the Durban Magistrates' Court. This fact has the potential to paint a decidedly one-dimensional view of the application of section 10, however, due to the fact that Magistrates' Courts are only regionally binding,⁷²² their findings are only of persuasive value. Nonetheless, how these courts perceive the provisions of the Equality Act on hate speech is still of value in assessing how section 10 is currently being interpreted.

In *Mdabe v Reid*,⁷²³ a man made the following remark to his co-workers: "Look at your government now. That government is a real monkey government and does not provide anything for you. Thabo Mbeki is the biggest baboon that is controlling the other monkeys like Jacob Zuma who is stealing his money." A complaint was lodged in the Equality Court in terms of section 10 to which the respondent alleged that the remark was only made in jest. The court held that in considering the merits of such a claim, the respondent's subjective intention is not an important consideration but rather it is the impact and effect the words have on the complainant.⁷²⁴ The court held that it is not only the words uttered that are relevant, but also the innuendo that accompanies them.⁷²⁵ In this case, the court held that the implication of the complainant's words was that it was a racial slur extending to the entire group, including the complainant and the fellow workers. The court accordingly held that the respondent was liable in terms of section 10 for the racial slur and for the "hurtful effect" of the words and was ordered to furnish an unconditional apology to the complainant. The judgment does not claim that the effect of the words were "hateful," only "hurtful," which is problematic for how hate speech is to be understood. While the Act does in fact provide for "hurtful" language to be condemned as hate speech, the overall effect points to a worrying outcome that the Act permits: a finding of hate speech for speech that is not hateful. It points to the term "hate speech" being considerably diluted⁷²⁶ and points to the wider problem of how to effectively legislate against hate speech.

⁷²¹ The Magistrates' Court Equality Court judgments are not regularly reported in the official law reports or published on online databases, such as SAFLII, making them inaccessible.

⁷²² Section 12(1)(a) of the Magistrates Courts Act 32 of 1944.

⁷²³ *Mdabe v Reid* (09/2004) [2004] ZAEQC 2 (1 June 2004).

⁷²⁴ *Mdabe v Reid* (09/2004) [2004] ZAEQC 2 (1 June 2004) 4.

⁷²⁵ *Ibid.*

⁷²⁶ See 5.2.3.1 for a discussion on the constitutionality of section 10, in particular hurtful versus hateful speech.

In a similar case, the court ordered an unconditional apology for “hurtful and harmful words.” In *Smith v Mgoqi*,⁷²⁷ a dispute arose between neighbours about a building being erected that would obstruct the respondent’s view that culminated in a claim in the Equality Court. The complainant alleged that the remarks that “this is a black man’s country... no white man is going to rule here” and that she was “Satan” constituted hate speech in terms of section 10. The court echoed the view that the respondent’s intention was irrelevant and rather that the objective intention to engage in hate speech was decisive.⁷²⁸ However, the court does not go any further in linking this applicable law to the facts and merely states that, on a balance of probabilities, the “offending words” were directed at the complainant and therefore her claim succeeded. The respondent was ordered to issue the apology. The language used in the judgment to describe the words in contention points to offense and hurt, not hateful, violent expression.⁷²⁹ Again, the Act blurs these lines and litigants cannot be blamed for proceeding with such claims when the language of the legislation accommodates them.

Other Equality Court hate speech judgments make no mention of the pertinent sections of the Act on hate speech, and not even the Act itself. In 2006, an Equality Court handed down a decision in which it was found that the respondent had used hate speech when he called the complainant a “kaffir.” The court in *Magubane v Smith*⁷³⁰ stated that it accepts the evidence of the complainants and witnesses in this matter and that the event took place.⁷³¹ On this basis, the court held the “offending words” to be hate speech and ordered an unconditional apology for the “hurtful and harmful words.” It is true that the very use of the term in contention is an expression of hate speech⁷³² but the court made the finding without any analysis of the provisions of the Act or interrogation of the term and its use. Neither the Equality Act nor section 16 of the Constitution are mentioned in this judgment, which is concerning. While certain terms are perhaps more overtly recognised as hate speech,⁷³³ some reference needs to be made to legal standards or provisions so as to legitimise the process at the

⁷²⁷ *Smith v Mgoqi* (60/2007) [2007] ZAEQC 2 (23 November 2007).

⁷²⁸ *Smith v Mgoqi* (60/2007) [2007] ZAEQC 2 (23 November 2007) 5.

⁷²⁹ See the definition of hate speech in 1.1 and the constitutional formulation of hate speech in 4.3.2.1.

⁷³⁰ *Magubane v Smith* (01/2006) [2006] ZAEQC 5 (3 March 2006).

⁷³¹ *Magubane v Smith* (01/2006) [2006] ZAEQC 5 (3 March 2006) 4.

⁷³² The BCCSA has acknowledged that the use of “kaffir” constitutes hate speech in *Ferraz v TV2* Case No-39-A-2010. Further, the term was included in an earlier version of the Equality Act as an instance of *prima facie* hate speech (See the discussion of this case at 6.2.2.2.6)

⁷³³ Using the list of prohibited terms listed in the Equality Bill as an indication as a benchmark. (See an earlier reference to this at 5.2).

Equality Court. This was also seen in *Mdladla v Smith*⁷³⁴ where the court held that the respondent was guilty of hate speech for saying the following when a neighbour complained of noise by saying, “... you are a kaffir-bitch... you must go and stay in Umlazi with other kaffirs like you.” While no one would dispute the hateful message conveyed, again, no mention is made of the statutory or constitutional bounds of acceptable speech. To an untrained eye, it appears that “hurtful and harmful”⁷³⁵ words are punished as hate speech. In *Khoza v Saeed*,⁷³⁶ the respondent was found guilty of hate speech for calling the complainant a pig, dog and “kaffir” and was ordered to pay damages. Reference was made to the Equality Act this time, but none to section 10 specifically as the framework for the ruling. Again, by virtue only of the fact that the event occurred, hate speech was proved without any mention of how far the facts were applicable to the legislation on the matter.

5.2.4.2.3 Discussion

The jurisprudence of the Equality Courts available is a small pool of material to work with to gauge a discernable trend in approach for hate speech complaints. What is available must be viewed in light of whether it is of persuasive or binding value, so as to ascertain its weight in relation to all section 10 decisions. It appears that *Afriforum v Malema* is the most authoritative case on section 10, yet the future of this decision is unclear. What remains of the section 10 jurisprudence is a host of decisions, primarily from one Magistrates’ Court in Durban. It is clear that these cases paint a varied picture of how section 10 is to be applied. This demonstrates the over-breadth and thus potential for disparate interpretations of the hate speech provision in the Equality Act. Hate speech is being diluted into “hurtful” or “harmful” language⁷³⁷ as opposed to language that advocates hate and incites harm, as per section 16 of the Constitution.

Another concern stemming from Equality Courts, operating from both the High Court and Magistrates’ Court, is the fact that they devote very little time to analysing the Equality Act in relation to the facts at hand. The impression given is that the courts believe the provisions of

⁷³⁴ *Mdladla v Smith* (40/05) [2006] ZAEQC 3 (3 March 2006).

⁷³⁵ *Mdladla v Smith* (40/05) [2006] ZAEQC 3 (3 March 2006) 3.

⁷³⁶ *Khoza v Saeed* (07/05) [2006] ZAEQC 2 (24 February 2006).

⁷³⁷ See *Mdabe v Reid* (09/2004) [2004] ZAEQC 2 (1 June 2004) for hate speech as “hurtful;” see *Smith v Mgoqi* (60/2007) [2007] ZAEQC 2 (23 November 2007) for offensive language being classified as hate speech; see *Magubane v Smith* (01/2006) [2006] ZAEQC 5 (3 March 2006) and *Mdladla v Smith* (40/05) [2006] ZAEQC 3 (3 March 2006) for hate speech as offensive, hurtful and harmful language.

the Act to be crystal clear and that there is no need to link the law to the facts, as they are self-explanatory. While the inquiry in the most instance is essentially a dispute of fact and not a question of law, the rudimentary exercise of showing how and why a verdict of hate speech is applicable to the facts at hand would aid in evaluating the efficacy and suitability of section 10. The presiding officers in these cases cannot be solely blamed for this as the provision they are applying is very wide and wanting in constitutional compliance with the standard on hate speech.

5.2.4.3 South African Human Rights Commission

The South African Human Rights Commission⁷³⁸ is a Chapter 9 institution mandated to promote and protect human rights on a national level⁷³⁹ as well and monitor and assess observance in this regard.⁷⁴⁰ Its mission is towards the progressive realisation of human rights through assessing compliance, facilitating training and engaging with claims of human rights violations and seeking their effective redress.⁷⁴¹ The Commission is empowered to research, investigate, report, and secure redress of all human rights violations,⁷⁴² making it a “soft check” on government.⁷⁴³ Its mandate is to investigate the observance of human rights and one can assume that the benchmark for this fulfilment of fundamental rights can be found in the constitutional provisions as well as any subsidiary legislation enacted to give effect to these rights. Therefore, its mandate would permit the SAHRC to resolve hate speech complaints based on section 10 of the Equality Act.⁷⁴⁴ Unfortunately, many of the decisions of this forum are not readily available in the public realm and, consequently, there are limited findings to be presented here for consideration and analysis.

⁷³⁸ See 4.3.3 for an earlier discussions on the SAHRC as a forum for the entrenchment of fundamental rights and the dual role it plays in adjudicating as well as litigating. (Note the provisions for standing in the Equality Courts in section 20(1)(f) of the Act as amenable to the SAHRC litigating on behalf of victims).

⁷³⁹ Section 184(1)(a-b) of the Constitution of the Republic of South Africa, 1996.

⁷⁴⁰ Section 184(1)(c) of the Constitution of the Republic of South Africa, 1996. The SAHRC is mandated through the Constitution and established by the enactment of the Human Rights Commission Act 54 of 1994.

⁷⁴¹ SAHRC Annual Report 2011 pp3.

⁷⁴² Section 184(2)(a-c) of the Constitution of the Republic of South Africa, 1996; Section 8 of the Human Rights Commission Act.

⁷⁴³ C Murray “The Human Rights Commission et al: what is the role of South Africa’s Chapter 9 Institutions?” (2006) 9.2 *PER/PELJ* 122 at 130-131.

⁷⁴⁴ The principle of subsidiarity obliges engagement with the Equality Act’s provisions on hate speech instead of solely relying on section 16 of the Constitution. This is due to the fact that the Equality Act has included hate speech within its grasp and therefore is the applicable statute in hate speech claims. On the principle of subsidiarity see *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) and *L du Plessis* 2011 *PER/PELJ* 97. Therefore, all SAHRC decisions on hate speech from 16 June 2003⁷⁴⁴ onwards are guided by section 10 of the Equality Act.

5.2.4.3.1 Decisions

A controversial and much publicised case was brought before the SAHRC concerning the popular label of a “coconut” and whether it should be termed hate speech or mere offense.⁷⁴⁵ In contemporary language, a “coconut” refers to a person who is racially conflicted, as the colour scheme of the fruit suggests. Two journalists who attended the inaugural *imbizo* of the Forum of Black Journalists brought the complaint after they were called “coconuts” for leaving the function in protest with the white journalists who were denied entry to the event. The complaint alleged that Jon Qwelane, amongst others, had perpetrated a “harmful, hurtful, derogatory and an attack on dignity” of the black journalists by labelling them “coconuts.”⁷⁴⁶

The Commission cited section 16 of the Constitution as the overarching standard for hate speech and section 10 of the Equality Act as the applicable law. As a general remark, the Commission noted that by virtue of that fact that the prohibition of hate speech makes inroads into the right to freedom of expression, “expression must go a long way before it qualifies (as hate speech).”⁷⁴⁷ With this framework in mind, the Commission reasoned that while the term “coconut” may “evoke feelings of indignity” and it would be apt to discourage the public from using it, in the circumstances, there was no subjective intention to be hurtful, harmful or hateful, as required by the Equality Act. What is conflicting about this decision is the strong reliance on section 16. The Commission explored the requirements of section 16(2)(c) and stated that while the term “coconut” is not constitutionally offensive, the Commission found it necessary to examine whether the term can be defined as hate speech under section 10 of the Equality Act. The impression created by this statement is that there are two standards – a standard in terms of section 16 to determine whether hate speech is constitutional and a standard in terms of section 10 to determine whether speech amounts to hate speech. In view of the application of the principle of subsidiarity, the Commission (or any other forum concerned with a complaint of hate speech) is obliged to apply section 10 in consonance with the Constitution.

⁷⁴⁵ Yusuf Abramjee and Kieno Kammies v Jon Qwelane GP/2008/0161/L BIOS (SAHRC).

⁷⁴⁶ Yusuf Abramjee and Kieno Kammies v Jon Qwelane para 2.9.

⁷⁴⁷ R v Andrews in Yusuf Abramjee and Kieno Kammies v Jon Qwelane para 4.14.

5.2.4.3.2 The SAHRC Assessed as a Forum Implementing the Equality Act

Though the Commission holds a strong reputation as a fervent defender of human rights among activists and the international community,⁷⁴⁸ cases such as the “coconut” affair reveal some of the inherent limitations of institutions such as the SAHRC. They have the potential to have an impact on realising the transformative aspirations of the Constitution but they require resources, adequate staffing and finances to do so.⁷⁴⁹ While their work is designed to facilitate drawing government attention to any aspect found wanting in the progressive realisation of human rights, whether they succeed in attracting the judiciary’s attention in this regard is another matter entirely. It is ultimately the courts that audit the remaining branches of government and that can have a meaningful role in ensuring that constitutional guarantees are being progressively met, within the dictates of the separation of powers. Fora such as the SAHRC do not fall squarely into the judicial system but are classed as “intermediary institutions”⁷⁵⁰ and with limited influence.

The SAHRC is a creature of statute that performs the role of a court in resolving hate speech complaints but it is not a court. This has implications for the status of the decisions it hands down on the parties involved but also on other courts and tribunals who consult its findings. Whether the Commission can be termed a tribunal depends on specific criteria in that it delivers final, legally binding decisions; operates independently from government; holds public hearing of a judicial nature; espouses members of a specific expertise; releases clear reasons for the decisions they reach; and, the right to appeal to a higher court of points of law is guaranteed after a tribunal has ruled on a matter.⁷⁵¹ Burns offers four tests in this regard: firstly, a test of procedure and composition; secondly, a material test; thirdly, a formal test; and finally, an enforceability test.⁷⁵² While the Commission fulfils certain indicators, such as resolving legal disputes according to set procedure akin to a court,⁷⁵³ applying the law to

⁷⁴⁸ Parliament of the Republic of South Africa “Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South African, Cape Town, South Africa” (2007) 172.

⁷⁴⁹ Devenish *Constitution* 364.

⁷⁵⁰ Murray 2006 *PER/PELJ* 127 views them as institutions that link the public and mechanisms to achieve the realisation of human rights. K Govender “The Reappraisal and Restructuring of Chapter 9 Institutions” (2007) 22 *SAPR/PL* 190 at 207 notes that the SAHRC does not fit neatly into the organisation of state power, existing “in the penumbra” between the executive and judiciary.

⁷⁵¹ Armstrong 2011 University of Stellenbosch Master of Laws Thesis 56.

⁷⁵² Burns *Administrative Law* 277.

⁷⁵³ Note the powers of search and seizure the SAHRC possesses per section 18(j) of the Human Rights Commission Act.

facts, dealing in rights and duties, and being independent and accessible, it fails one decisive factor. The SAHRC does not deliver legally enforceable decisions,⁷⁵⁴ but mere findings as to human rights violations. There is no way in which to enforce its findings, making the exercise of determining whether hate speech has occurred is purely academic and symbolic. However, this degree of flexibility that the SAHRC offers has a certain appeal in that its processes are more in line with conciliation than litigation, which furthers transformative ends.⁷⁵⁵

The relevance of establishing a body such as the SAHRC as a tribunal, or not, is that its status and force can be known and respected. It is useful to be able to gauge the success of one's case in terms of those similar that have preceded it in such a forum. There is also tremendous value in approaching a forum that can deliver binding decisions as they can ensure that fundamental rights are being realised and enforce their findings. However, a hate speech complaint to the SAHRC will potentially deliver a finding of hate speech but no binding order can be given as the SAHRC relies solely on the co-operation of parties in this respect.⁷⁵⁶ Failure to adhere to the findings may be viewed as hindering the Commission in its work⁷⁵⁷ but ultimately, SAHRC rulings are only as meaningful as the import attached to them by the public and the parties concerned. This is part of what makes mediation an attractive option for hate speech complaints.⁷⁵⁸

5.2.4.4 Discussion: The Equality Act Applied

While many criticise the fact that the matter even came before a court, one must nonetheless take *Afriforum v Malema* for what it is: a noble, yet ill-conceived, attempt at making sense of the uncertain legal and social position South Africans inhabit towards hate speech. It is perhaps the inevitable result of a blend of uncertain legislation and variable case law, coupled with a noble attempt to compel a transformative attitude in society at whatever the rational

⁷⁵⁴ The Human Rights Commission Act does not list any proceedings analogous to contempt proceedings to enforce the findings of the SAHRC.

⁷⁵⁵ See 8.4.2 on the question of litigating hate speech complaints as opposed to making use of mediation as a more long-lasting and transformative solution to the problem of hate speech in South Africa.

⁷⁵⁶ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South African, Cape Town, South Africa" (2007) 167.

⁷⁵⁷ K Govender "The Reappraisal and Restructuring of Chapter 9 Institutions" (2007) 22 *SAPR/PL* 190 at 208.

⁷⁵⁸ See 8.4.2.

cost. With no pronouncement from the High Courts and above, or the specialised Equality Courts with High Court status, on a logical and sound test for hate speech, this Equality Court judgment occupies the uneasy position of being the most authoritative decision while equally a confusing and dissatisfying attempt at making sense of the constitutional provisions in relation to the Equality Act. Further, it is the impression that all decisions, be it in the Equality Courts or the SAHRC, lack parity and consistency. There is the added challenge that these fora produce many non-binding decisions, which has created questionable hate speech findings based on section 10. However, there are no efforts currently to address the unconstitutional provisions of the section 10, only moves to attempt to create hate crime laws that also lack adherence to the constitutional standard. The only solution in the interim is to read section 10 down in conformity with the constitutional benchmark⁷⁵⁹ until the provision is eventually challenged.

5.3 Beyond the Equality Act: The Draft Prohibition of Hate Speech Bill

5.3.1 Mandate and Provisions

Despite no constitutional call for further hate speech legislation, a draft Bill on the subject was released in 2004. The Draft Prohibition of Hate Speech Bill⁷⁶⁰ was greeted with much controversy. It resurfaced briefly again in 2010 but, to date,⁷⁶¹ it is unclear what the progress has been. From the submissions and academic writing on the Draft Bill,⁷⁶² it appears not only constitutionally offensive but also largely unnecessary.

The Draft Bill, in its most recent form, seeks to give effect to South Africa's ICERD commitments in terms of international law to create punishable offences for the dissemination of ideas of racial superiority,⁷⁶³ as well as to enhance the national pledge to promote non-

⁷⁵⁹ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40 holds that the only option a court or tribunal has in this regard is to read down in conformity with the Constitution.

⁷⁶⁰ The Draft Prohibition of Hate Speech Bill, 2004. www.info.gov.za/bills/2004/hatespeech.pdf Accessed on 16 November 2012.

⁷⁶¹ The Bill is valid as of 16 November 2012.

⁷⁶² KA Bentley "If Baboons Could Talk...JS Mill on Freedom of Speech and the Limits of Racial Discourse" (April 2006) 33 *Politikon* 31; RF Haigh "South Africa's Criminalization of 'Hurtful' Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression" (2006) 5 *Washington University Global Studies Law Review* 187. See also the remarks from the Freedom of Expression Institute that the Bill is reminiscent of draconian censorship laws in Zimbabwe in LegalBrief Today, 3 June 2004, <http://www.legalbrief.co.za/article.php?story=20040603159569999> (accessed on 16 November 2012).

⁷⁶³ See 3.3.2 on the requirements of the ICERD and to 3.4 for an account of whether these have been achieved.

discrimination legislation.⁷⁶⁴ The Draft Bill acknowledges the need to transform society and explicitly incorporates section 16 of the Constitution by reference, indicating a strong will, on the face of it, to follow the constitutional lead on the justifiable limitations on free expression.⁷⁶⁵ The central aim of this legislation, if enacted, would be to criminalise the participation or promotion of hate speech based on race, ethnicity, gender or religion⁷⁶⁶ and it lists eight criteria for such a determination. In section 2(1), the Draft Bill establishes its scope in covering a broad range of speech that could be reasonably construed to demonstrate an intention to engage in hate speech. The categories enumerated cover expression that is;

- (a) hurtful;
- (b) harmful, or an incitement thereof;
- (c) intimidates or threatens;
- (d) promotes or propagates racial, ethnic, gender or religious superiority;
- (e) incites imminent violence;
- (f) causes or perpetuates systemic disadvantage;
- (g) undermines human dignity; or,
- (h) adversely effects the equal enjoyment of any person's or group's rights and freedoms in a serious manner.⁷⁶⁷

As the Draft Bill envisions engaging in hate speech as a criminal offence, the penalties are listed as a fine or maximum imprisonment of three years for first offenders,⁷⁶⁸ which is raised to a fine or imprisonment of up to six years or both for subsequent offenders.⁷⁶⁹ It is also important to note that the Draft Bill only covers public speech, which constitutes expression in the sight or hearing of the public, in a public place, or a combination of both elements.⁷⁷⁰ Possible defences are listed in section 3 as *bona fide* artistic creativity, academic enquiry, fair and accurate reporting in the public interest or any publication in accordance with section 16 of the Constitution.⁷⁷¹

⁷⁶⁴ Explanatory document by the Department of Justice and Constitutional Development attached to the Bill. www.info.gov.za/bills/2004/hatespeech.pdf (Accessed on 16 November 2012).

⁷⁶⁵ Preamble of the Draft Prohibition of Hate Speech Bill, 2004.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Section 2(1)(a-h) of the Draft Prohibition of Hate Speech Bill, 2004.

⁷⁶⁸ Section 2(2)(a) of the Draft Prohibition of Hate Speech Bill, 2004.

⁷⁶⁹ Section 2(2)(b) of the Draft Prohibition of Hate Speech Bill, 2004.

⁷⁷⁰ Section 2(3)(a)(i-iii) of the Draft Prohibition of Hate Speech Bill, 2004.

⁷⁷¹ Section 3(a-d) of the Draft Prohibition of Hate Speech Bill, 2004.

5.3.2 Discussion

This Draft Bill exists as an attempt to acquiesce the CERD Committee's calls⁷⁷² for further South African commitment in criminalising hate speech.⁷⁷³ The Draft Bill acknowledges the constitutional parameters on speech but does not refer to section 10 of the Equality Act, particularly section 10(2) that provides for possible criminal charges for engaging in hate speech. It is uncertain as to whether the Draft Bill is intended to complement existing civil remedies for hate speech in the Equality Act or whether a rework of hate speech is being attempted in line with the calls for the criminalisation of hate speech by the CERD Committee. If the goal is to permit both a civil and a criminal choice, then the Draft Bill would be expected to share common content with the Equality Act: rather, the threshold for hate speech is effectively lowered in the Draft Bill. It is even more vague than the Equality Act and introduces even more new and undefined terms.⁷⁷⁴ The consequence is that the Draft Bill further blurs the legal understanding of what hate speech encompasses, giving the term too much fluidity. To demonstrate, the Draft Bill lists eight broad categories of expression that would be hate speech, none of which contain the word "hate" in them.

The Draft Bill additionally reverts to the four basic listed grounds of hate speech in section 16(2) to qualify an "advocacy of hatred," which is an improvement on the Equality Act, but then goes further than "incitement of harm" to an intention to commit a variety of offences.⁷⁷⁵ The effect of this is that the Draft Bill could effectively create an offence based in the intention to "be hurtful" or an offence of "affecting a person's rights in a serious manner." The result is that the provision goes far further than section 16's original purpose to curb certain expression to the point of illogicality. The Draft Bill also proposes serious penalties on conviction ranging from three to six years imprisonment and/or a fine. The inclusion of vicarious liability is also deeply problematic⁷⁷⁶ as it is unexplained and can only suggest that one could be found guilty of another's "intention to be hurtful," for example. The inconsistency of the proposed legislation as compared to section 10 of the Equality Act, and that in turn with section 16 of the Constitution, is alarming.

⁷⁷² See 3.4 on South Africa's achievement of international standards on hate speech.

⁷⁷³ The Preamble of the Draft Bill cites South Africa's commitment to Article 4(a) of the ICERD as the impetus to criminalise hate speech.

⁷⁷⁴ For example, hate speech could be proven as anything that "adversely affect(s) the equal enjoyment of rights in a serious manner."

⁷⁷⁵ Haigh *Washington University Global Studies Law Review* 204.

⁷⁷⁶ Haigh *Washington University Global Studies Law Review* 205.

Legislating against hate speech in general, according to Haigh, is moving further and further from the yardstick the Constitution provides. Section 16 never envisaged criminalisation of hate speech⁷⁷⁷ yet it is a feature of the Equality Act as well as the Draft Prohibition of Hate Speech Bill. The ICERD, however, demands that member states create offences punishable by law to “the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.”⁷⁷⁸ Be that as it may, one can argue that the existence of *crimen iniuria* in the common law is sufficient to meet international obligations.⁷⁷⁹ While this common law crime is not hate speech specific, it would more than encompass the harm hate speech inflicts in its sanction of an unlawful, intentional and serious impairing of one’s dignity.⁷⁸⁰

It is clear that this Draft Bill espouses a noble attempt to adhere to international law and provide a tangible pledge to safeguard against hate speech, but practically speaking, the Act is unnecessary⁷⁸¹ and does little to concretise what the new standards for expression in society are.⁷⁸² With the current hate speech provisions in the Equality Act a constant source of contention, it would be better served to attend to the problematic elements of this piece of legislation rather than embarking on a new Bill. The result of following through with this Draft Bill would be not one, but two unsatisfactory representations of the conflict waged with hate speech in South Africa and still no answers on how the ambivalent nature of language is to be accommodated in a nation built on reconciliatory words but ravaged by verbal violence.

5.4 Proposed Hate Crimes Policy

In recent news reports, the Department of Justice and Constitutional Development has indicated that it intends to draw up a policy on hate crime that will lead to the drafting of

⁷⁷⁷ *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1289. See M Vosloo “When Political Expression Turns into Hate Speech: Is limitation Through Legislative Criminalisation The Answer?” (2011) University of South Africa Master of Laws Thesis generally on the view that the criminalisation of hate speech is the best course of action in addressing hate speech in South Africa.

⁷⁷⁷ See 5.3-5.4 hate speech legislation and suggested hate crimes policy.

⁷⁷⁸ Article 4(a) of the ICERD.

⁷⁷⁹ See 7.3.2-7.3.3 for a discussion of *crimen iniuria* and hate speech.

⁷⁸⁰ *Ibid.*

⁷⁸¹ Haigh *Washington University Global Studies Law Review* 205.

⁷⁸² Haigh *Washington University Global Studies Law Review* 209.

proposed legislation on the subject.⁷⁸³ As a product of the growing problem of homophobic violence and killings, the project seems to be driven by the Minister of Women, Children and People With Disabilities⁷⁸⁴ and will map out a blueprint for dealing with hate crime in South Africa. Though this policy is in its infancy and not much is known about its content, isolated reports have indicated that the Department of Justice and Constitutional Development is eager to introduce the concept of “hate crime” into South African law, which has been said to include hate speech and also seeks to criminalise hate speech.⁷⁸⁵ However, an Institute for Security Studies Memorandum addressed to the Department of Justice and Constitutional Development on “Hate Crime” fails to make mention of hate speech at all.⁷⁸⁶ This could be due to the fact that the Equality Act already deals with hate speech, albeit civilly and controversially. In any event, it remains to be seen whether this proposed legislation will complement existing hate speech measures, duplicate matters or entirely neglect to acknowledge hate speech at all as a symptom, if not manifestation, of hate crime.

5.5 Concluding Remarks

The Equality Act recognises the harm that hate speech embodies in respect of proliferating the disparate and discriminatory treatment of people. In its aim to eradicate unfair discrimination, the Act sets its sights on the uneasy area of hate speech and makes a noble, yet unsuccessful, attempt to further develop the constitutional position on the justifiable limitations of free expression. Section 10 is highly ambitious in attempting to define hate speech through outlawing hateful and merely offensive expression within its scope. The problem with this in practice is that the overly broad definition it promotes lends itself to results not envisioned by section 16(2) of the Constitution, which is the embodiment of the national standard of

⁷⁸³ S Aboobaker “Departments to target hate crimes” (23 November 2012) iOL News Website <http://www.iol.co.za/news/crime-courts/departments-to-target-hate-crimes-1.1429374#.UK87L6Vl-xo> (Accessed 6 December 2012).

⁷⁸⁴ *Ibid.*

⁷⁸⁵ SabinetLaw “Policy Framework on Hate Crime Under Construction” (9 March 2012) <http://www.sabinetlaw.co.za/defence-and-security/articles/policy-framework-hate-crime-under-construction> (Accessed 6 December 2012).

⁷⁸⁶ Institute for Security Studies “Memo for the Department of Justice and Constitutional Development on Hate Crimes in South Africa” https://docs.google.com/viewer?a=v&q=cache:vImcCnSoecAJ:www.issafrica.org/crimehub/uploads/Hate_Crimes_Memo_for_DoJCD_final.pdf+&hl=en&gl=za&pid=bl&srcid=ADGEESiHO8uBrvgqWBUYmO90k9tL5F5wbARXIXtcL38rh5WAebQ004cKrfUslq2LfdvDnH1TzukSw44HpojTz7JLWlFglRuu2eRe7Qyj1XJ_JlaP1kFV_S_IH_c9Lseeyx9tnSQOdEii3&sig=AHIEtbRWZXQS9euOmbD3ECF5b49s96wS4Q (Accessed 26 November 2012).

transformation as well as the internationally endorsed stance on violent and hateful language. The seemingly boundless application of the statute is relevant by virtue of the fact that it is the primary legal framework applied in various fora, from the ordinary courts, the SAHRC and the Equality Court. However, there is only a small pool that has emerged from which to glean knowledge on how section 10 is being interpreted by these fora. However, in the absence of a constitutional challenge to section 10, the Equality Act is the definitive requirement for hate speech litigation in South Africa and it must be read down in conformity with the Constitution.

The trajectory of hate speech legislation is equally worrying when one examines the content of the Draft Hate Speech Bill. Instead of clarifying the uncertainties created by the Equality Act, it fashions broad, new and confusing criteria and seeks to criminalise racist hate speech. The current and proposed legislative provisions on hate speech highlight the tension that South Africa occupies in its perception of language and how expression is to be constitutionally limited. There is an unquestionable need to outlaw certain forms of speech, yet these current and proposed legislative measures take this mandate too far, overcompensating for past linguistic injustices by outlawing offensive and “hurtful” language. The aim of the Constitution is not to create hypersensitive and alarmist citizens that turn to the courts for offensive speech complaints, but rather to transform citizens with a new respect for fundamental rights and ingrain a tradition of reconciliatory language and denouncement of hate speech. This cannot be achieved if the legislature is conflicted as to what hate speech encompasses.

While there is limited jurisprudence arising out of hate speech legislation from which to glean a discernable trend or approach to hate speech, there are other sectors where hate speech is similarly prohibited and complaints are adjudicated upon frequently. The media, for example, uses a different framework to regulate speech and offers further insight into how hate speech is perceived in South Africa and whether the constitutional standard is being filtered down successfully.

CHAPTER 6

THE PROHIBITION OF HATE SPEECH IN THE CONTEXT OF THE MEDIA

6.1 Introduction: Media Regulation

The parameters for expression are set by the constitutional standard in section 16, which sets the tone for regulating the media in the democratic state. The regulation of speech is an area that receives much attention in the realm of print and broadcasting and, accordingly, hate speech complaints are a common feature of the monitoring bodies linked to this industry. The world remembers the potential damage that can be caused by an abuse of the media with the dissemination of hate speech and language used to incite the genocide in Rwanda in 1994⁷⁸⁷ and therefore it is important that there be limitations to the right of free expression in this industry.

In the South African media, regulation occurs by independent regulation through a legislative body and through self-regulation. The broadcast media industry engages in both forms of regulation, while print media is entirely self-regulatory. Self-regulation is therefore becoming more and more popular, with this trend signifying an important move away from the apartheid era control of the industry⁷⁸⁸ and embracing “negotiated normative frameworks to coincide with the new constitutional notion of a balance of rights.”⁷⁸⁹ It is also evident from the difficulties that arise in media complaints that the task of regulating language presents many difficulties and showcases the malleable nature of language. Constraining language so that it does not denigrate and dehumanise requires a delicate balance of preserving free speech on one hand, while recognising the propensity of language to injure that it achieves with considerable facility, with the added dimension of not wanting to censure the media in an open and democratic state.

⁷⁸⁷ See 2.2.1 and 3.3.3.1 for an example of the violent language in the Rwandan genocide.

⁷⁸⁸ H Wasserman and A de Beer “Which Public? Whose Interest? The South African Media and its Role in the First Ten Years of Democracy” (2005) 19.1-2 *Critical Arts: North-South Cultural and Media Studies* 40-41.

⁷⁸⁹ Wasserman and De Beer 2005 *Critical Arts: North-South Cultural and Media Studies* 41.

The media sector provides more room to analyse the trend in hate speech regulation in South Africa. This section that follows has been divided into two broad categories, broadcast and print media, and I explore their respective regulatory bodies and framework explored accordingly so as to determine the approach and its constitutional parity.

6.2 Broadcast Media

The importance of regulating and upholding the independence and integrity of the media sector is confirmed by the fact that the Constitution mandates that a further Chapter 9 institution⁷⁹⁰ be established by law and dedicated to achieving this end in broadcasting. The *raison d'être* for the body is to secure media autonomy, which is a marker of a transparent, democratic state, but also to regulate the sphere through industry-wide standards on content. In this regard, investigation and adjudication of complaints of inappropriate and unacceptable dissemination of expression⁷⁹¹ are handled through an independent regulatory institution. The criteria of fairness, diversity of views, public interest and constitutionalism were therefore the impetus for the creation of the Independent Communication Authority of South Africa (ICASA).⁷⁹²

Broadcasters are regulated by virtue of the fact that they are broadcasting service licence holders. All public electronic communication⁷⁹³ requires a broadcasting service licence, per the stipulations and regulations of the Electronic Communications Act.⁷⁹⁴ As a licensee, broadcasters are conferred many powers and privileges, but also certain obligations,⁷⁹⁵ including their adherence to a Code of Conduct in relation to material that is transmitted to the public.⁷⁹⁶ Any content of a broadcast that a member of the public finds to be in conflict with industry standards may be housed in a complaint brought to a regulatory body for investigation, hearing or adjudication, as elaborated on below.

⁷⁹⁰ See 4.3.4 for an exposition of Chapter 9 Institutions.

⁷⁹¹ See Murray 2006 *PER/PELJ* 122.

⁷⁹² Section 192 of the Constitution mandates the creation of ICASA. See earlier discussion on Chapter 9 Institutions at 4.3.4.

⁷⁹³ The definition of “broadcasting” in section 1 of the Electronic Communications Act 36 of 2005 is “any form of unidirectional electronic communications intended for reception by the public, sections of the public or subscribers to any broadcasting service, whether conveyed by means of radio frequency spectrum or any electronic communications network or any combination thereof, and broadcast” is construed accordingly.”

⁷⁹⁴ The Electronic Communications Act 36 of 2005.

⁷⁹⁵ Section 5(12) of the Electronic Communications Act.

⁷⁹⁶ Section 54(2) of the Electronic Communications Act.

As it stands currently, the Electronic Communications Act essentially recognises two ways in which to launch complaints procedures in an instance of hate speech broadcast on television or radio.⁷⁹⁷ ICASA sets itself up as an industry regulator but also provides that any equivalent body that already operates can enforce their own Code of Conduct on their members and this will suffice for regulation purposes, provided the body and code of conduct meets with ICASA approval.⁷⁹⁸ Therefore, the first option is ICASA, the product of statutory directive for the provision of broadcast regulation, and the second is the Broadcast Complaints Commission of South Africa, an ICASA-approved self-regulatory board established by members who opted for self-regulation. It is estimated that only 10% of broadcasters do not self-regulate and therefore that 10% fall under the jurisdiction of state, that is ICASA and its Broadcasting Code.⁷⁹⁹

6.2.1 The Independent Communication Authority of South Africa

The eponymously named⁸⁰⁰ ICASA was established in July 2000 as the result of the merger of its predecessor, the Independent Broadcasting Authority (IBA) with the South African Telecommunications Regulatory Authority (SATRA).⁸⁰¹ The Electronic Communications Act requires that ICASA serve the greater end of preserving and supporting democracy through its regulation of broadcasting in a constitutional fashion. Its namesake statute establishes ICASA⁸⁰² and sets out the parameters for its effective governance as a licensing body, regulator and quasi-judicial body.⁸⁰³ ICASA therefore reviews any existing regulations

⁷⁹⁷ Section 54(3) of the Electronic Communications Act.

⁷⁹⁸ Section 54(3) states that the regulations pertaining to ICASA regulation “do not apply to a broadcasting service licensee who is a member of a body which has proved to the satisfaction of (ICASA) that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, provided such code of conduct and disciplinary measures are acceptable to (ICASA).” This provision for both state-mandated and self-regulation exists by virtue of the fact that there are already two recognised industry broadcast regulators, each with their own Code of Conduct to which their members are bound. (Survey by the African Governance Monitoring and Advocacy Project (AfriMAP), Open Society Foundation for South Africa (OSF-SA) and Open Society Media Program (OSMP) “South Africa” (2010) *Public Broadcasting in Africa Series* at pp 117 <http://www.scribd.com/doc/111566398/34/Complaints-procedures> (Accessed 11 December 2012)).

⁷⁹⁹ K Van Rooyen “The Broadcasting Complaints Commission: A Quest for Balance, Freedom and Informed Choices” (2007) 33.2 *Communicatio: South African Journal for Communication Theory and Research* 171 at 171.

⁸⁰⁰ The Independent Communication Authority of South Africa Act 13 of 2000 establishes ICASA.

⁸⁰¹ ICASA Overview/Mandate <https://www.icasa.org.za/AboutUs/OverviewMandate/tabid/631/Default.aspx> (Accessed on 21 August 2012).

⁸⁰² Section 2 of the Independent Communication Authority of South Africa Act 13 of 2000.

⁸⁰³ Section 34 of Independent Communication Authority of South Africa Act 13 of 2000.

and sets out its own Code of Conduct governing all broadcast service licenses,⁸⁰⁴ to which all holders must adhere⁸⁰⁵ for fear of sanctions to determined by ICASA.⁸⁰⁶ The Complaints and Compliance Committee (CCC)⁸⁰⁷ was established to hear and preside over all breaches of the Code.⁸⁰⁸ Made up of not more than seven members and chaired by a judge of the High Court, advocate or attorney or magistrate with ten years' appropriate experience,⁸⁰⁹ the CCC investigates and makes findings on, *inter alia*, complaints of non-compliance.⁸¹⁰ Its findings and recommendations can range from a direction to desist from further contraventions of the Code or Act, fines or other remedial steps.⁸¹¹

6.2.1.1 ICASA Code of Conduct

6.2.1.1.1 Mandate and Provisions

The current version of the ICASA Code of Conduct⁸¹² was developed after consultation with the public and relevant industry stakeholders⁸¹³ and sets standards according to which broadcasting service licensees who are monitored by ICASA must abide by. It details, in particular, what content is impermissible on television screens or on radio waves and cites “hate speech” as offensive to the industry-wide norms the Code espouses. Clause 3 of the Code prohibits hate speech by name and defines it as “the advocacy of hatred that is based on race, ethnicity, religion or gender that constitutes incitement to cause harm,” as laid out in the Constitution. Clause 4 of the Code subsequently states that the hate speech ban does not apply to broadcast which;

⁸⁰⁴ Section 54(1) of the Independent Communication Authority of South Africa Act.

⁸⁰⁵ Section 54(2) of the Independent Communication Authority of South Africa Act.

⁸⁰⁶ Section 54(3) of the Independent Communication Authority of South Africa Act.

⁸⁰⁷ The ICASA Amendment Bill (Government Gazette 23 November 2012) has been published for comment by the Department of Communications. In it, it seeks to replace the Complaints and Compliance Committee with a Complaints and Compliance Commission, and details and clarifies its duties and powers. While the Bill has been met with criticism, there has not been reproach for the idea of further solidifying the CCC and enhancing its power and structure, only for the fact that the independence of the panel is jeopardised by the fact that the Minister of Communications elects its members. See N Mawson “Bill Strips ICASA of Power” (12 December 2012) *ITWeb* http://www.itweb.co.za/index.php?option=com_content&view=article&id=60730:Bill-strips-ICASA-of-power&catid=69 (Accessed 12 December 2012).

⁸⁰⁸ Section 55(2) of the Independent Communication Authority of South Africa Act.

⁸⁰⁹ Section 17A(2) of the Independent Communication Authority of South Africa Act.

⁸¹⁰ Section 17B(a) of the Independent Communication Authority of South Africa Act.

⁸¹¹ Section 17E(2) of the Independent Communication Authority of South Africa Act.

⁸¹² The Regulations Regarding the Code of Conduct for Broadcasting Service Licensees Issued in terms of Section 54 of the Electronic Communications Act 36 of 2005 (“The ICASA Code of Conduct”).

⁸¹³ Survey by the African Governance Monitoring and Advocacy Project (AfriMAP), Open Society Foundation for South Africa (OSF-SA) and Open Society Media Program (OSMP) “South Africa” (2010) *Public Broadcasting in Africa Series* pp 118.

- (1) judged within context, amounts to a *bona fide* scientific, documentary, dramatic, artistic or religious broadcast;
- (2) amounts to a discussion, argument or opinion on a matter of public interest; or
- (3) amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.

6.2.1.1.2 Discussion

The clause 3 of the Code defines hate speech, which is a positive step in recognising it as a social ill and instance of violent, unconstitutional expression. The Code adheres to the constitutional framing of hate speech and similarly outlaws its use in the broadcasting arena. One discrepancy between ICASA's Code and the Constitution, however, lies in the fact that hate speech can seemingly be excused under auspice of *bona fide* religious broadcast, discussion or opinion on public interest matters in its wording of the Code. One interpretation of the constitutional framing of limitations is that the right to free expression states that hate speech is precluded from its protection, irrespective of context. Such an interpretation will prohibit reports on hate speech in totality. The only conclusion that I can come to is that a balancing exercise must be performed when hate speech is encountered in artistic, scientific, academic or public interest opinion as these areas are upheld in equal proportion to the denouncement of hate speech. As such, considerations of context and common sense must prevail in such an enquiry. The difficulty however is maintaining consistency in this regard, which must be analysed in the cases considered by the CCC. It is evident that the Constitution (and the Code) strive to find a balance between free expression (and reporting in the public interest) and the regulation of expression, however, the fallibility of language in regulating language⁸¹⁴ has led to this situation of seemingly conflicting stances on hate speech.

6.2.1.2 The Code in Action: Decisions of the CCC

In practice, the CCC hardly deals with complaints of hate speech. Though the Electronic Communication Act provides that all broadcasting service licensees adhere to the ICASA Code,⁸¹⁵ it also provides for licensees to opt out of the ICASA Code in favour of self-

⁸¹⁴ See 2.5 on the fallibility of language as a malleable medium in regulating the use of language itself.

⁸¹⁵ Section 54(2) of the Electronic Communications Act.

regulation through a parallel procedure.⁸¹⁶ The only requirement is that ICASA approve the self-regulatory body and its Code of Conduct.⁸¹⁷ As such, ICASA delegates much of the complaints it receives to the Broadcasting Complaints Commission of South Africa (BCCSA),⁸¹⁸ which has firmly established itself as a reputable forum for such matters.⁸¹⁹ Much of the broadcasting industry has chosen the BCCSA as its regulatory board and has signed up to its Code of Conduct. Therefore, it is only several community radio stations that are bound directly by the ICASA Code of Conduct. This accounts for the fact, of the 50 decisions of the CCC listed on the ICASA website,⁸²⁰ none pertain to hate speech. It is unclear as to whether more decisions exist, but the only ascertainable CCC hate speech case is the matter between Radio 786 and the Jewish Board of Deputies.⁸²¹ As Radio 786 is regulated by ICASA as a community radio station, the CCC is the appropriate forum to hear this matter.

The Radio 786 complaint has been on-going since 1998 and has even reached the Constitutional Court in the case of *Islamic Unity Convention*.⁸²² The radio station in question broadcast a programme entitled “Zionism and the state of Israel – an in-depth analysis,” which alleged that the Jewish race has been at the root of most of the troubles of the previous century, including the two World Wars, and preached a revisionist version of the plight of the Jews in Nazi Germany.⁸²³ The South African Jewish Board of Deputies has called the

⁸¹⁶ Section 54(3) of the Electronic Communications Act.

⁸¹⁷ *Ibid.*

⁸¹⁸ J Bischof “Should print follow model of broadcasting regulation?” Wits Journalism Programme <http://www.journalism.co.za/index.php/news-and-insight/insight/92-ethics2/3431-should-print-follow-model-of-broadcasting-regulation12.html> (Accessed 24 August 2012).

⁸¹⁹ See the exposition of the BCCSA at 6.22 and its findings at 6.2.2.2.

⁸²⁰ <https://www.icasa.org.za/CCC/CCCJudgments/tabid/286/Default.aspx>

⁸²¹ The media has reported that the CCC will hear the matter from the 11-15 December 2012. At the time of writing this thesis, the proceedings were initiated but subsequently postponed. See “BCCSA to hear Jewish Board’s Complaint” *News24 Website* <http://www.news24.com/SouthAfrica/News/BCCSA-to-hear-Jewish-boards-complaint-20121211> (Accessed 11 December 2012); South African Jewish Board of Deputies “Press Statement: Radio 786 Case” (6 December 2012) <http://www.jewishsa.co.za/media/press-releases/press-statement-radio-786-case/> (Accessed 11 December 2012); Islamic Unity Convention/Radio 786 “Press Release: Radio 786 Complaints Hearing” (7 December 2012) http://www.radio786.co.za/index.php?option=com_content&view=article&id=6730&Itemid=1 (Accessed 11 December 2012).

⁸²² See the discussion of *Islamic Unity Convention v Independent Broadcasting Authority* at 4.3.2.2. The Constitutional Court held that the provision relied upon in the Code to challenge the hate speech (“expression would likely prejudice relations between sections of the population”) was too broad and therefore unconstitutional. The SA Jewish Board of Deputies appear to be relying on the current hate speech provision of broadcast content that “amount to advocating hatred that is based on race, ethnicity, religion or gender that constitutes incitement to cause harm.”

⁸²³ See “BCCSA to hear Jewish Board’s Complaint” *News24 Website* <http://www.news24.com/SouthAfrica/News/BCCSA-to-hear-Jewish-boards-complaint-20121211> (Accessed 11 December 2012).

broadcast hate speech,⁸²⁴ as per clause 3 of the Code, to which Islamic Unity Convention has countered that the expression contained in its emission was within its right to air opinions on public interest matters, as stipulated in clause 4.⁸²⁵ Both sides have predicted that the outcome of this matter will assist in clarifying ICASA's stance on hate speech and freedom of expression in the broadcast sphere but what remains to be seen is how clause 4 will be interpreted. An additional spoke in the proverbial wheels of the SA Jewish Deputies' case is that complaints of Code violations must be lodged with ICASA within sixty days of "becoming aware of the alleged non-compliance."⁸²⁶ Whether the CCC will even entertain this matter fourteen years after its initial broadcast and three years after the publication of the current ICASA Code of Conduct remains to be seen.

6.2.2 The Broadcast Complaints Commission of South Africa (BCCSA)

The second method in which a complaint of hate speech on television or radio can be filed is with the Broadcasting Complaints Commission of South Africa. The National Association of Broadcasters (NAB) initially established the BCCSA in 1993 as a body corporate to fulfil the constitutional mandate of regulating broadcasting in South Africa⁸²⁷ through self-regulation.⁸²⁸ Members of the NAB encompass the South African Broadcasting Corporation, all commercial broadcasters, as well as several community stations,⁸²⁹ thereby giving the BCCSA a considerably wide reach.

The BCCSA was duly recognised by the Independent Broadcasting Authority (IBA), and endorsed through section 56(2) of the IBA Act,⁸³⁰ the predecessors of ICASA and the ICASA

⁸²⁴ South African Jewish Board of Deputies "Press Statement: Radio 786 Case" (6 December 2012) <http://www.jewishsa.co.za/media/press-releases/press-statement-radio-786-case/> (Accessed 11 December 2012).

⁸²⁵ Islamic Unity Convention/Radio 786 "Press Release: Radio 786 Complaints Hearing" (7 December 2012) http://www.radio786.co.za/index.php?option=com_content&view=article&id=6730&Itemid=1 (Accessed 11 December 2012).

⁸²⁶ Section 17C(1)(a) of the Independent Communication Authority of South Africa Act.

⁸²⁷ BCCSA "About the BCCSA"

http://www.bccsa.co.za/index.php?option=com_content&view=article&id=18&Itemid=32 (Accessed on 22 August 2012).

⁸²⁸ Broadcast service licensees have the option to opt out of ICASA regulation, per section 54(3) of the Electronic Communications Act, and subscribe to a parallel system of regulation approved by ICASA.

⁸²⁹ National Association of Broadcasters Website "Members" <http://www.nab.org.za/members.asp> (Accessed 11 December 2012); Survey by the African Governance Monitoring and Advocacy Project (AfriMAP), Open Society Foundation for South Africa (OSF-SA) and Open Society Media Program (OSMP) "South Africa" (2010) *Public Broadcasting in Africa Series* pp 121.

⁸³⁰ The Independent Broadcasting Authority Act 153 of 1993.

Act, respectively.⁸³¹ The BCCSA has since distanced itself institutionally from the ICASA to firmly establish itself as an independent industry regulator and tribunal that can hear complaints of broadcast content without fear or prejudice from ICASA.⁸³² A memorandum of understanding was drafted between the BCCSA and the CCC to share content complaints adjudication so as to reduce the CCC workload.⁸³³ Therefore, despite what is legislated,⁸³⁴ the CCC in reality only deals with complaints insofar as election period and non-NAB member grievances are concerned and the BCCSA investigates and adjudicates most content-related complaints.⁸³⁵

Therefore, for the current purposes, it is the BCCSA that is the forum for most hate speech related complaints in broadcasting. The BCCSA is accordingly vested with the power to hear grievances viewers raise over the content of material disseminated on television and over radio⁸³⁶ to uphold the Bill Rights in the prism of high quality broadcasting. The BCCSA has the uneasy task of balancing the interests of the broadcasters with those of the public in the name of media self-regulation. The body is institutionally and financially backed by the broadcasting industry⁸³⁷ yet it asserts its autonomy through the fact that its adjudicators and panels of inquiry are independently selected. The BCCSA Commissioners are appointed by a panel chaired by an external person from nominations from the public and broadcasters, who represent the interests of the media and the viewers/listeners in equal proportions.⁸³⁸ Complaints are to be lodged with the BCCSA within thirty days of their broadcast, which are forwarded to the BCCSA Registrar, who will submit them to the BCCSA Complaints Panel of

⁸³¹ BCCSA “About the BCCSA.”

⁸³² *Ibid.*

⁸³³ J Bischof “Should print follow model of broadcasting regulation?” Wits Journalism Programme <http://www.journalism.co.za/index.php/news-and-insight/insight/92-ethics2/3431-should-print-follow-model-of-broadcasting-regulation12.html> (Accessed 24 August 2012).

⁸³⁴ The CCC is mandated to deal with grievances that include broadcasting content complaints but also range to internet/postal service and telecommunications complaints. See “Procedures for Dealing with Consumer Complaints by ICASA” at <https://www.icasa.org.za/ConsumerProtection/Complaints/ComplaintsProcedure/tabid/529/Default.aspx> (Accessed 24 August 2012).

⁸³⁵ In the 2008-9 reporting period, out of 76 complaints processed by the CCC, 36 were referred to industry self-regulating bodies such as the BCCSA. (National Association of Broadcasters “NAB Submission to the Department of Communications on the ICASA Amendment Bill, 2010” 26 July 2010). The BCCSA is said to have dealt with approximately 1800 per year over the same period. (BCCSA Annual Report 2008-2009)

⁸³⁶ L Venter “Exploring the Assessment of Hate Speech and Other Complaints by the BCCSA” (2007) 28 *Ecquid Novi: African Journalism Studies* 30 at 32.

⁸³⁷ PL Rivers “Governing Sounds: Hate, Race, and Responsibility in Post-Apartheid Broadcasting” (2006) 23.3 *Critical Studies in Media Communication* 219 at 219.

⁸³⁸ Clause 5.3-5.4 of the BCCSA Constitution.

Commissioners if they are appropriate for investigation and/or adjudication.⁸³⁹ The Commissioners then apply their minds to the standard set by the BCCSA in its Code of Conduct for broadcast content.

6.2.2.1 The BCCSA Code of Conduct

The BCCSA Code of Conduct⁸⁴⁰ for broadcasting standards binds the BCCSA in its work. A new and updated Code was accordingly drafted to set a common standard on audience issues spanning matters of violence, hate speech, children's programming and sexual conduct and was disseminated for public comment on 5 January 2009.⁸⁴¹ In July 2009 the new Code was initially confirmed but in-fighting between ICASA and the National Association of Broadcasters (NAB)⁸⁴² over Code content resulted in further delays.⁸⁴³ There initially seemed to be two rival versions of the new Code in circulation but as a compromise all parties have agreed to be bound by the version as of 1 January 2011, and until such time as the Code will be under further review in 2012-13.⁸⁴⁴

6.2.2.1.1 Mandate and Provisions

The BCCSA cannot investigate suspected violations of its Code on its own accord and must wait for a member of the public to approach it with an allegation of hate speech, or the like.⁸⁴⁵

⁸³⁹ Survey by the African Governance Monitoring and Advocacy Project (AfriMAP), Open Society Foundation for South Africa (OSF-SA) and Open Society Media Program (OSMP) "South Africa" (2010) *Public Broadcasting in Africa Series* pp 121.

⁸⁴⁰ BCCSA Free-to-Air Code of Conduct for Broadcasting Service Licensees 2009, abbreviated to "the Code."

⁸⁴¹ ICASA Media Release, 5 January 2009.

<https://www.icasa.org.za/SearchResults/tabid/39/Default.aspx?search=draft+code+media+release> (Accessed 22 August 2012).

⁸⁴² National Association of Broadcasters members include the SABC, all commercial television and sound broadcasting licensees, Sentech, Orbicom and over thirty community sound broadcasting licensees.

⁸⁴³ BCCSA "Notice to Broadcasters which fall under the BCCSA Jurisdiction: New Broadcasting Code Applicable from 1 January 2011" 12 October 2010.

http://www.bccsa.co.za/index.php?option=com_content&view=article&id=617%3Anotice-of-new-code-of-conduct-of-bccsa-for-2011&catid=3%3Anewflash&Itemid=32 (Accessed on 22 August 2012).

⁸⁴⁴ *Ibid.*

⁸⁴⁵ L Venter "Exploring the Assessment of Hate Speech and Other Complaints by the BCCSA" (2007) 28 *Ecquid Novi: African Journalism Studies* 30 at 32. While it is not explicitly stated anywhere that audience members are permitted to file complaints regarding on-air content, this is implied by virtue of the fact that the BCCSA, a Complaints Commission, exists and it is bound by a Code of Conduct

Clause 2(1) of the Code places the onus on broadcast service licensees⁸⁴⁶ to ensure that they are compliant with the Code. In terms of protecting against violent language, clause 4 states that licensees must not broadcast material which, judged within context,

- (2) “amounts to (a) propaganda for war; (b) incitement of imminent violence; or (c) the advocacy of hatred that is based on race ethnicity religion or gender and that constitutes incitement to cause harm.”

Clause 4(2) mirrors the constitutional stance on hate speech. The Code goes on to list “exclusions” to Clause 4 as *bona fide* scientific, documentary, dramatic, artistic or religious in nature; discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or *bona fide* discussion, argument or opinion on a matter of public interest⁸⁴⁷ to the hate speech ban. It would seem that the BCCSA Code, like the ICASA Code, seeks to establish a list of possible defences to an allegation of hate speech in the broadcast sector that would enable the Code to be context-sensitive to the realities of broadcast media.

Cases can be taken on appeal to the BCCSA Tribunal if leave is granted.⁸⁴⁸ No mention is made of taking such complaints further to the courts but the BCCSA Chairman has indicated that this is indeed possible but the judiciary would only review the rationality, accuracy and soundness of the BCCSA’s findings and not the merits of the case.⁸⁴⁹

6.2.2.1.2 Discussion

Like the ICASA Code, the BCCSA Code implies that there is no blanket ban on hate speech in the broadcasting sphere through creating a list of “exceptions”, or defences. At first glance, this formulation differs from the constitutional stance on regulating speech, as with its ICASA counterpart.⁸⁵⁰ Section 16 of the Constitution first establishes what is included under the right to free expression and then states what is excluded from this right, which is where hate speech

⁸⁴⁶ “Broadcast service licensees” are defined in Clause 1 as those South African broadcasters who have agreed to the jurisdiction of the BCCSA and its founding structures in the former IBA and current ICASA. As such, these licensees are bound to the Constitution, Code and Procedural Rules of the BCCSA.

⁸⁴⁷ Clause 5(1-3) of the BCCSA Free-to-air Code of Conduct for Broadcasting Service Licensees 2009.

⁸⁴⁸ Section 4 of Appendix 1 of the BCCSA Constitution.

⁸⁴⁹ Footnote 3 of BCCSA Chairman’s Annual Review Sept 2011 - Sept 2012.

http://www.bccsa.co.za/index.php?option=com_content&view=article&id=16&Itemid=30 (Accessed on 22 October 2012). Van Rooyen 2007 *Communicatio* 172 indicates that by 2007, only one review had been initiated with the courts.

⁸⁵⁰ See the discussion on the ICASA Code in this regard at 6.2.1.1.2.

is outlawed. The BCCSA Code inverts the approach by first outlawing hate speech but then setting up a list of defences that can be read as more lenient in the broadcasting sphere as compared to other realms. As with the ICASA Code, I can only conclude that the result would not be as contradictory as laid out but rather that a balancing exercise will be undertaken with regard to hate speech complaints and whether their context can excuse them. This context-sensitive approach has been what the BCCSA has sought to achieve in the matters it considers but the challenge faced by the Commission is to obtain consistency in its application of the Code.

6.2.2.2 The Code in Action: Decisions of the BCCSA

The BCCSA Constitution cites its objectives as two-fold: ensuring adherence to industry standards in broadcasting and achieving prompt and cost-effective settlement of complaints.⁸⁵¹ To both ends, it is guided by its own Code of Conduct from which to judge complaints and is empowered to levy sanctions against broadcasters who do not abide by the parameters of programming decorum. This forms part of the larger election for the media to self-regulate through a negotiated framework, thereby encouraging the industry to be conscientised to the delicate balance of fundamental rights at stake, to play a role in social responsibility and to enhance greater professionalism in the field of journalism.⁸⁵² It has also been viewed as more of a “co-regulation,” with the industry sanctioning itself along the lines of overarching legal provisions,⁸⁵³ in this case being the relevant provisions of the Constitution relating to freedom of expression, and of religion, belief and opinion. Therefore, any complaint of a transmission of hate speech on television or radio can be brought before the BCCSA for investigation and if necessary, adjudication. It is a complaint driven process that culminates in investigation and adjudication by the BCCSA, who essentially performs an adjudicatory function comparable to that of a court. Notably, it is a complaint against the

⁸⁵¹ Section 2 of the BCCSA Constitution, available at http://www.bccsa.co.za/index.php?option=com_content&view=article&id=12&Itemid=26 (Accessed 22 October 2012).

⁸⁵² H Wasserman and A de Beer “Which Public? Whose Interest? The South African Media and its Role in the First Ten Years of Democracy” (2005) 19.1-2 *Critical Arts: North-South Cultural and Media Studies* 36.

⁸⁵³ Final Report of Hans Bredow Institut/EMR (2006) in G Berger “The Struggle for Press Self-Regulation in Contemporary South Africa: Charting a Course between an Industry Charade and a Government Doormat” (2010) 36.3 *Communicatio* 289 at 290.

broadcaster, rather than the author of the contentious speech that is scrutinised, as the Code places an onus on those disseminating information to ensure that its content is compliant.⁸⁵⁴

The decisions of the BCCSA traverse the realm of hate speech and its approximates and I have grouped them below according to categories of broadcast for ease of consideration and in an attempt to identify trends in the approach of the Commission. The complaints considered are taken from a wide range from media content disseminated over radio and television and are found in formats ranging from coverage of news events, opinion pieces, satire and fictional soap operas. The complaints presented use the expression “hate speech” as the primary basis of the objection but whether this is a true use of the term or a broad employment of a seemingly generic label for offense remains to be seen.

6.2.2.2.1 Opinion

The Commission has been consistent in its stance on instances of hate speech within the *milieu* of opinion pieces.⁸⁵⁵ The Code exempts the broadcast of material amounting to discussion, argument and opinion on matters either within the broad realm of public interest or the even larger ambit of religion, belief or conscience.⁸⁵⁶ The purpose of such provisions is clearly to give meaning to the constitutional right to freedom of expression and the notion that “within (such a) society, one often has to live and tolerate views which anger one.”⁸⁵⁷ For instance, *Hook v Chai FM*⁸⁵⁸ dealt with a Jewish radio presenter’s inflammatory remarks in reaction to the release of Palestinian prisoners. Although the suggestion that the Palestinians are murderous criminals who would hopefully kill each other was offensive, it lacked an incitement of violence to amount of hate speech as those targeted were not privy to the broadcast.⁸⁵⁹ Furthermore, the remark was a more personal and speculative opinion,⁸⁶⁰ falling

⁸⁵⁴ Clause 2(1) of the Code states “broadcasting service licensees must ensure that all broadcasts comply with this Code.”

⁸⁵⁵ For the current purposes, “opinion pieces” represent instances where guests or presenters are accused of engaging in hate speech by expressing their own views. The category of “opinion” is guided by the Commission’s finding and wording in each case where the words in contention amount to the expression of a personal outlook or view.

⁸⁵⁶ See 6.2.2.1.1 on the provisions of the BCCSA Code.

⁸⁵⁷ *South African Jewish Board of Deputies v Cape Talk* Case No-35-1999 at 5.

⁸⁵⁸ *Hook v Chai FM* Case No-39-2011.

⁸⁵⁹ *Hook v Chai FM* Case No-39-2011 at para 5.

⁸⁶⁰ *Hook v Chai FM* Case No-39-2011 at para 6.

under clause 5 of the Code, permitting *bona fide* dialogue on public interest matters,⁸⁶¹ the bounds of which did not exceed the modern standard of tolerance.

This tolerance, however, has its bounds in terms of the Code and section 16(2) of the Constitution. The 1999 decision of the *South African Jewish Board of Deputies v Cape Talk*⁸⁶² demonstrates the point effectively. A local radio show hosted right-wing extremist and revisionist, Keith Johnson, via telephone from Mississippi to speak on the issue of private gun ownership. The discussion soon progressed towards Johnson's personal and political views on Israel. His remarks on the state of Israel being the "litter-box in the Middle East," his interpretation of Jewish scripture to endorse sexual intercourse with three year-old children and his blatant Holocaust denial were objects of most complaints received by the BCCSA in the wake of this broadcast. The Jewish Board of Deputies took the lead in instituting a complaint that the content of the show constituted a breach of paragraph 7 of the (old) Code in that it was offensive to the religious convictions of a section of the population which would likely harm relations between sections of the population. The adjudicators used the Constitution's and the Films and Publications Act's considerations on hate speech to inform the criteria on which to judge paragraph 7 of the (old) Code. The Commission held that Johnson's views were so extreme that most listeners would reject them outright and therefore his words could not amount to inciting harm.⁸⁶³ The adjudicators indicated that the remarks would "probably amount to an advocacy of hatred"⁸⁶⁴ but not any provocation of harm. The Commission then criticised the host for failing to try to manage the situation "do damage control" on the broadcast. This lapse on the part of the host, it was found, aggravated Johnson's statements to the point that they "amounted to advocacy of hatred based on religion which constitutes incitement to harm."⁸⁶⁵ The order of the BCCSA was ultimately a violation of clause 7 of the Code and that an apology be aired.

While this case was not labelled a "hate speech" complaint, a consideration of hate speech clearly informed its ruling. By using the criteria of advocacy of hatred and incitement of violence, the BCCSA effectively suggested that hate speech is synonymous to any broadcast content deemed offensive to the (religious) convictions of a section of the population which

⁸⁶¹ *Hook v Chai FM* Case No-39-2011 at para 7.

⁸⁶² *South African Jewish Board of Deputies v Cape Talk* Case No-35-1999.

⁸⁶³ *Ibid.*

⁸⁶⁴ *Ibid.*

⁸⁶⁵ *South African Jewish Board of Deputies v Cape Talk* Case No-35-1999 at 7.

would likely harm relations between sections of the population. This is conceptually problematic as offensive speech is not necessarily advocating hatred, per se. The Constitution clearly sets the bounds of hate speech in section 16(2) and considerations of “offensiveness” are not contained therein, nor is it a requirement that a section of the population is affected. One must, however, also bear in mind that clause 7 was subsequently deemed unconstitutional by the Constitutional Court in *Islamic Unity Convention* for its lack of consonance with the constitutional ambit of freedom of expression.⁸⁶⁶ Therefore any instrument, such as a Code of Conduct for broadcasting, requires constitutional parity and that which is not compliant will be tested against section 36 of the Constitution.

In a similar case, alleged hateful opinions were disseminated over radio concerning a specific racial group. In *T Labuschagne v YFM Tribunal*,⁸⁶⁷ presenters of a news item detailed the horrific forced bestiality perpetrated on a teenage girl in Kempton Park. The presenters were erroneously under the impression that it was an Afrikaans group of men who had attacked a black girl and launched into a verbal attack on all Afrikaans people, describing them as “varke” (pigs) and insinuating that this was the manner in which Afrikaners treated other people. The BCCSA invoked clauses 16(1) and 17 of the (old) Code, of which clause 16 proscribed the sanctioning, promoting and glamourising of violence on racial, national, ethnic, colour, religious, gender, sexual orientation, age, mental or physical disability grounds. The general exemptions were outlined in clause 17. By this time, *Islamic Unity Convention* had been handed down by the Constitutional Court and thus the usual complaint that the expression negatively affected relations between sections of the populations was no longer available as a “catch-all” clause with which to adjudicate hate speech matters. This is, no doubt, why reliance was placed clauses 16 and 17 of the Code. However, as the BCCSA pointed out, clause 16 of the Code deals with the promotion of violence and not advocating hate speech specifically. The Commission was of a similar view and explained this away by invoking section 39(1)(a) of Constitution, mandating all courts, tribunals and fora to promote the Bill of Rights and constitutional values in all interpretations of fundamental rights contained therein.⁸⁶⁸ On the strength of section 39(1)(a), the BCCSA read in the requirements

⁸⁶⁶ See an earlier discussion on *Islamic Unity Convention* at 4.3.2.2.

⁸⁶⁷ *T Labuschagne v YFM Tribunal* Case No-21-2003.

⁸⁶⁸ *T Labuschagne v YFM Tribunal* Case No-21-2003 at 4.

of section 16 of the Constitution into the section in question in the (old) Code, broadening its scope to include violence in the conventional sense and in violent, hateful language.⁸⁶⁹

On the facts, the Commission held although the hosts were speaking from misinformation, their remarks were “expressive of hatred and were of such a degrading nature that they incited to harm.”⁸⁷⁰ Further, the remarks incited “grave feelings of shock and indignation” and were thus hate speech in nature. The adjudicators relied on their previous ruling in *Human Rights Commission of South Africa v SABC*⁸⁷¹ in extending the ambit of harm to include psychological and other intangible forms of harm to bolster its above statement that degrading words said in hatred fulfilled the requirement of incitement to harm. While the *SABC* ruling has not been challenged, one must pose the question as to whether the BCCSA has gone too far in this case. Remarks that would incite further “grave feelings of shock and indignation” cannot be said to be enough to show impending and plausible harm. Rather, these are sentiments that accompany “hurt feelings.”

6.2.2.2.2 News Programming

This realm of expression is given considerable leeway in terms of what broadcasters can disseminate under the right to freedom of expression and the corresponding right of citizenry to be informed.⁸⁷² This was never more resounding or explicitly laid out than in the case of *Darne v SAFM*.⁸⁷³ Portions of the infamous “Kill the Boer” song were played in a news segment covering the 2010 celebration of Human Rights Day. The report detailed then ANCYL President, Julius Malema, addressing a crowd in Mafikeng that culminated in the singing of the controversial struggle song.

Early on in the decision, the Commission stated that, in isolation, the song in question would undoubtedly prove to be an act of hate speech⁸⁷⁴ but what was required in this case was to judge the expression in its context: as an item of news programming. The merits of this declaration of hate speech were never expanded on in the findings of the BCCSA. However,

⁸⁶⁹ *Ibid.*

⁸⁷⁰ *T Labuschagne v YFM Tribunal* Case No-21-2003 at 7.

⁸⁷¹ See 6.2.2.2.7 for a discussion of *Human Rights Commission of South Africa v SABC*.

⁸⁷² For the current purposes, this category deals with allegations of hate speech during news programming in the form of either a presenter reading hateful speech verbatim or the broadcaster showing footage of the hate speech.

⁸⁷³ *Darne v SAFM* Case No-06-2010.

⁸⁷⁴ *Darne v SAFM* Case No-06-2010 at para 4.

in this vein of its stated approach, the issue at hand was, accordingly, whether SAFM had overstepped the bounds of permissible news programming, in line with the public's right to receive information, by airing portions of the song.⁸⁷⁵

The BCCSA found that where such objectionable context is broadcast with the intention of informing the public of public interest matters in an objective and neutral matter, it cannot be said to be intending to create an incitement towards violence.⁸⁷⁶ The Commission did not find any evidence that SAFM transgressed the bounds of reasonable reporting as it only broadcast enough to inform the public on the background of the debate.⁸⁷⁷ The distinction drawn in this case was informed by referring to the European case of *Jersild v Denmark* in which the content of a *bona fide* newsworthy item, when presented appropriately, does not transgress what is necessary to inform viewers.⁸⁷⁸

To compare, in *Kroese v SABC 2*,⁸⁷⁹ the BCCSA had to consider whether an email read out on air containing derogatory statements about the white community on an edition of *Weekend Live*, a news and current affairs programme, was a breach of the Code as an instance of hate speech. The comments related to decisions taken by white businessmen who own the name “Bafana Bafana” and author of the email stated that various moves by the businessmen were “typical of white people (as) they take what is not theirs.” The Commission declared its approach to be one of assessing the hate speech component as well as the email in the context of comment on news items. This approach differs from that taken in *Darne*, where the Commission operated from the position that the expression was hate speech and did not engage in any exploratory exercise to this end. Perhaps this is because the Commission in *Darne* was dealing with a song that had widely been considered to have been hate speech at that point and did not deem it necessary to interrogate this aspect.

As with *Darne*, the Commission recognised the mandate of the programme to disseminate newsworthy content and the intention of the presenter concerned to inform the nation on topical and relevant issues, taking the wide spectrum of public opinion into account.⁸⁸⁰ The

⁸⁷⁵ *Ibid.*

⁸⁷⁶ *Darne v SAFM* Case No-06-2010 at para 8.

⁸⁷⁷ *Ibid.*

⁸⁷⁸ *Darne v SAFM* Case No-06-2010 at para 9. *Jersild v Denmark* (15890.89) 23 September 1994 (ECHR) is discussed further at 8.3.

⁸⁷⁹ *Kroese v SABC 2* Case 50-A-2010.

⁸⁸⁰ *Kroese v SABC 2* Case 50-A-2010 at para 4.

Commission explored what an advocacy of hatred and incitement to harm actually signify: the former requires more than a mere statement, but a component of “exhortation, pleading for, supporting or coercion” to be present, while the latter necessitates some urging or inspiring to cause harm to others.⁸⁸¹ These qualifications are useful indicators. On the facts, the comment was lacking in both respects. With regard to the issue of whether the broadcast was appropriate in the context of news programming and comment thereon, the BCCSA found that freedom of expression encompasses the right to broadcast that which is offensive but within bounds.⁸⁸² The Commission cautioned that the South African experience requires “special care” to be taken with regard to racial sensitivities,⁸⁸³ but the emission in question had not transgressed the bound of acceptable broadcast and right to freedom of expression.

6.2.2.2.3 Remarks in Bad Taste

This category covers remarks broadcast that, though made in ill-conceived jest, in pure carelessness or just bad taste, created controversy enough to induce claims of hate speech but not enough to prove it.⁸⁸⁴ For instance, a comment made on air that the Shangaan tribe was created from apes was found to be profane and indecent, but not sufficient to regard it as hate speech or even in violation of the Code.⁸⁸⁵ Similarly, the BCCSA held that an on-air joke that ridiculed the standard of education received by matriculants from Afrikaans Christian schools as prolonged simple apartheid propaganda, was not found to be hate speech.⁸⁸⁶ The adjudicator did find that the joke was defamatory as its aim was foremost to belittle and tarnish the reputation of the matriculants targeted.⁸⁸⁷

More controversial claims consist of the use of racial slurs and derogatory terms during a broadcast. In this vein, the BCCSA had to consider whether the use of the racial terms “nigger” and “beach nigger” were akin to the derogatory slurs of “kaffir,” “hotnot” and “coolie,” which may be considered hate speech through the mere wielding of these terms.⁸⁸⁸

⁸⁸¹ *Kroese v SABC 2* Case 50-A-2010 at para 8.

⁸⁸² *Kroese v SABC 2* Case 50-A-2010 at para 9.

⁸⁸³ *Kroese v SABC 2* Case 50-A-2010 at para 10.

⁸⁸⁴ For the current purposes, this category is guided by the wording and findings of the BCCSA as “remarks in bad taste.” These cases generally deal with offensiveness and provocative speech that may or may not extend to the point of hate speech.

⁸⁸⁵ *Bowen v Radio 702* Case No-29-2000.

⁸⁸⁶ *BVCO & Geldenhuys v Jacaranda 94.2FM* Case No-02-2012.

⁸⁸⁷ *BVCO & Geldenhuys v Jacaranda 94.2FM* Case No-02-2012 at para 13.

⁸⁸⁸ *Muller v Heart 104.9FM* Case No-12-2011.

The Commission found that due to the mocking context that the terms “nigger” and “beach nigger” were used in, the mere uttering of these terms was insufficient to find proof of an advocacy of hatred and incitement of violence.⁸⁸⁹ Though utter in bad taste, the words were inadequate to be considered hate speech. Comparably, the use of the term “porra” was equally considered not to have the same emotive connotations and effects as the aforementioned taboo racial terms.⁸⁹⁰ The complainant in this case claimed the use of this racial term was derogatory to the Portuguese community, offensive and ostracising in nature, violating clause 16.3(c) of the (old) Code by advocating hatred based on ethnicity and inciting harm. The BCCSA upheld the broadcaster’s assertion that for a transgression of this clause to be proven, there had to be an element of public support, provocation or promotion of detestation and ill will towards the Portuguese people: not the mere usage of language considered by some to be “in bad taste.”⁸⁹¹ There was accordingly no evidence of enmity or ill will towards the Portuguese community in the jovial, light-hearted setting of “buffoonery” that characterised the broadcasts of the “Rude Awakening” radio programme, according to the BCCSA.⁸⁹²

The distinction between the rampant use of various racial epithets seemingly lies in context and connotations surrounding the words in contention. The above tag used to refer to the Portuguese lacked a derogatory and loathing element rooted in South African history that is characteristic of many other racial labels. This particular term can be contrasted with the use of “makula (coolies)” as seen in *Keboneilwe v SABC2*.⁸⁹³ In this case, the presenter also used a racial tag to refer to a particular ethnic group but the undertone and association inherent in that particular term is that differentiated it from the *Barreira* case. Due to the fact that the term “coolie” has been a consistent marker of hatred and disrespect towards the Indian community that is deeply rooted in the apartheid segregationist era, the Commission found such language as “macula” to be unacceptable in today’s constitutional dispensation. Its inherent degrading and hateful associations relegate it to the realms of hate speech with the mere use of the term.⁸⁹⁴ Coupled with its firm roots in apartheid discourse, the BCCSA held that the use of “makula” and “coolie” are *prima facie* manifestations of an advocacy of hatred.

⁸⁸⁹ *Muller v Heart 104.9FM* Case No-12-2011 at 3.

⁸⁹⁰ *Barreira v 94.7 Highveld Stereo* Case No-16-2010.

⁸⁹¹ *Barreira v 94.7 Highveld Stereo* Case No-16-2010 at 4-5.

⁸⁹² *Barreira v 94.7 Highveld Stereo* Case No-16-2010 at 6-7.

⁸⁹³ *Keboneilwe v SABC2* Case No 3 of 2011.

⁸⁹⁴ *Keboneilwe v SABC2* Case No 3 of 2011 at para 5-6.

From here, incitement to harm is fairly consequential as the Commission held that such expression debases the Indian community, thus proving an incitement to harm.⁸⁹⁵

6.2.2.2.4 Humour

In the same vein as remarks in bad taste, jest is an excusable form of expression as far as the BCCSA is concerned, even in the context of offensive, racially provocative jokes.⁸⁹⁶ The Commission has been painfully aware that it is impossible to ban racial jokes⁸⁹⁷ in a practical sense, seeing as they are widespread and because of the constitutional guarantee of freedom of expression. It seems the only solution to try self-censor content that may be unduly provocative, for fear of backlash from viewers, and to suppress content that is deemed hate speech, at the risk of legal sanction. It must also be borne in mind that audience members may be over-sensitive and that not all race-related jokes are to be taken seriously.⁸⁹⁸

6.2.2.2.5 Satire

Satire⁸⁹⁹ is a long-standing tool with which to examine and comment on social ills under the guise of exaggerated humour, ridicule and wit.⁹⁰⁰ It is generally deemed excusable under the broad heading of comedy as part and parcel of *bona fide* dramatic creativity and even related to opinion on public interest matters. Though conceptually protected under freedom of expression, the BCCSA has indicated that there are indeed limits that override artistic freedom, such as hate speech, as the harm inflicted in this circumstances is far too great to excuse.⁹⁰¹ In *Naidoo v 94.7 Highveld Stereo*,⁹⁰² the BCCSA had to rule on whether portions of a stand-up comedy routine aired on radio were a violation of the Code of Good Conduct for Broadcasters. The satirical sketch aired was performed by comedian Riad Moosa and it featured the term “coolie” several times and viewers complained that this was unacceptable

⁸⁹⁵ *Keboneilwe v SABC2* Case No 3 of 2011 at para 6.

⁸⁹⁶ This category will examine the limits of controversial jokes and humour in the hate speech complaints adjudicated upon by the BCCSA.

⁸⁹⁷ *Jewish Defence League v Radio 702* Case No-26-1998.

⁸⁹⁸ *Kleynhans v 94.7 Highveld Stereo* Case No-50-2002.

⁸⁹⁹ This grouping of cases is so comprised according to the wording and findings of the BCCSA. While “humour” and “remarks in bad taste” are interlinked into this category, the cases chosen are more closely linked to their satirical intention rather than their humouristic or provocative outcomes.

⁹⁰⁰ *Esau v Heart 104.9FM* Case No-01-2011.

⁹⁰¹ *Esau v Heart 104.9FM* Case No-01-2011 at para 11.

⁹⁰² *Naidoo v 94.7 Highveld Stereo* Case No-24-2010.

for broadcast as hate speech. In the aforementioned cases of humour and remarks made in bad taste, the Commission considered context and intention on the part of the author to be the chief indicators as to whether an advocacy of hatred and incitement to violence were present. In this case, the BCCSA noted the context to be jovial and the intention only to induce laughter on the part of the comedian⁹⁰³ but held that the use of the specific term “coolie” trumped any consideration of freedom of expression and was thus ruled hate speech. As seen in previous cases, this term evokes apartheid-era notions of oppression, inferiority and hatred, which all are harmful and degrading to the Indian community. This approach can be contrasted to the comparable cases of hate speech read on air was part of *bona fide* news programming that were not deemed to be transgressions of the Code by the BCCSA.⁹⁰⁴

6.2.2.2.6 Fictional Shows

The BCCSA has had to deal with certain cases of alleged hate speech during episodes of popular local dramas.⁹⁰⁵ One such complaint was made concerning an airing of the popular soap opera, *Isidingo*, in which one of the characters criticised “crazy (and) stupid white people.” The Commission noted that such popular shows are a useful platform to present social issues, such as race relations, and oblige the public to face them.⁹⁰⁶ It was conceded that the remarks may be offensive in isolation, but cannot be deemed hate speech as they do not advocate any hatred.⁹⁰⁷ Interestingly, the BCCSA noted that incitement to harm was present as such a remark could be considered hurtful, and thus inflicting harm.⁹⁰⁸ This is unique as the general approach is to usually negate an advocacy of hate and the enquiry usually ends at that point. It is indicative of a trend in the BCCSA judgments that an advocacy of hatred is usually considered proof of harm but this case views them as distinct. Yet, both elements are still required for hate speech to present.

A second case in point involved the repeated use of the term “porra” on the local drama, *Erfsondes*. In *Ferraz v TV2*,⁹⁰⁹ the complainants averred the term could be equated to the use

⁹⁰³ *Naidoo v 94.7 Highveld Stereo* Case No-24-2010 at para 8.

⁹⁰⁴ The case of *Darne v SAFM* Case No-06-2010 is an example discussed in 6.2.2.2.2.

⁹⁰⁵ “Fictional Shows” are grouped in this category was those which are scripted and performed by professional actors. This is to be differentiated from live opinion pieces or jokes and sketches on live television or radio.

⁹⁰⁶ *Farham v SABC3* Case No-05-1999.

⁹⁰⁷ *Farham v SABC3* Case No-05-1999 at para 5.

⁹⁰⁸ *Ibid.*

⁹⁰⁹ *Ferraz v TV2* Case No-39-A-2010.

of “kaffir” in effect and connotation. The Commission found that the primary meaning of the term was a slang reference to Portuguese people and lacked any negative associations. Furthermore, in context, the term had been used in a friendly setting and not with the intention of insulting or degrading, let alone advocating hate or inciting harm.⁹¹⁰

6.2.2.2.7 Songs and Music

Hate speech under the guise of music⁹¹¹ has not been taken lightly by the BCCSA, but the act of banning music has strong apartheid connotations and has been met with much controversy in the public eye. The complaints regarding the SABC’s broadcast of the struggle song, “*AmaNdiya*,” and the media and civil society interest this matter garnered brought the matter to the steps of the BCCSA.⁹¹² The furore ignited, however, when the song was banned by the BCCSA, was even stronger, with many critics viewing the move as reminiscent of apartheid-era censure and a failure to engage in a dialogue about race and hate that the song was supposed to motivate.⁹¹³ This hype undoubtedly made for an interesting addition to the law reports in, one would speculate, an attempt to alert the courts as to the progress made in hate speech cases in the tribunals as well as to practitioners to gauge the possible reception of similar cases in the courts and to advise their clients accordingly.

In the case of *Human Rights Commission of South Africa v SABC*,⁹¹⁴ the tribunal had to examine whether the broadcast of the song “*AmaNdiya*” contravened the Code and section 16(2)(c) of the Constitution.⁹¹⁵ In this matter, a public KwaZulu-Natal radio station broadcast

⁹¹⁰ *Ferraz v TV2* Case No-39-A-2010 at para 6.

⁹¹¹ This final category deals with lyrics and not live words, opinions or scripted dialogue. It has an added area of interest as music relies on catchy tunes, rhythm and rhyme.

⁹¹² There has been considerable interest in the running up to the BCCSA case on Ngema’s struggle song, such as C Hooper-Box “Ngema’s *AmaNdiya* faces ‘hate speech’ test” (June 8 2002) *iOL News* <http://www.iol.co.za/news/south-africa/ngema-s-amandiya-faces-hate-speech-test-1.87847?ot=inmsa.ArticlePrintPageLayout.ot> (Accessed 10 December 2012). In the wake of its banning by the BCCSA, many strongly worded scholarly opinions were published, such as G Baines “Racist Hate Speech in South Africa’s Fragile Democracy: the case of Ngema’s ‘*AmaNdiya*’” in M Drewett and M Cloonan (eds) *Popular Music Censorship in Africa* (2006) 63.

⁹¹² Neisser 1994 *Constitutional Law Journal* 110; B Harris “New Song, Same Old Tune?” (2002) *Centre for the Study of Violence and Reconciliation* <http://www.csvr.org.za/wits/articles/arthur3.htm>.

⁹¹³ See G Baines “Racist Hate Speech in South Africa’s Fragile Democracy: the case of Ngema’s ‘*AmaNdiya*’” in M Drewett and M Cloonan (eds) *Popular Music Censorship in Africa* (2006) 63.

⁹¹⁴ *Human Rights Commission of South Africa v SABC* 2003 (1) BCLR 92 (BCCSA).

⁹¹⁵ Though the Commission is only mandated to apply its mind to the Code, it presumably deemed an additional constitutional consideration prudent owing to the overall standard the Constitution sets and the immense media interest that has abounded over the issue.

the song in question during an evening current affairs programme that discussed the struggle chorus and broadcast it as well. The lyrics included excerpts such as;

“it was better with whites, we knew then it was a racial conflict... being turned into clowns by Indians, Zulus do not have money and are squatting in shacks as chattels of Indians... Indians are playing the fool with us... They don’t even like the children of black people...”⁹¹⁶

The first contention that the song violated that Code by “prejudicing relations between sections of the population” was rapidly addressed and found to be a non-issue due to the *Islamic Unity Convention* judgment deeming that particular clause of the Code constitutionally problematic and thereby invalid.⁹¹⁷ The Commission consequently turned its attention to the scope of section 16(2)(c) of the Constitution, the “hate speech clause,” and dissected it so as to determine a test in this regard. An objective two-fold test for hate speech was furthered, comprising of a primary enquiry into particular expression constitutes “an advocacy of hatred” followed by a secondary enquiry into whether there is harm caused as a result.⁹¹⁸

In answering the first leg of the test, the Commission held that despite the cathartic intentions of the writer to initiate a dialogue between these two races and to heal divisions of the past, objectively speaking, the song demeans the Indian race.⁹¹⁹ Its lyrics blame them for all Zulu hardship and convey a decisive element of hate.⁹²⁰ This was evidenced, according to the Commission, by the prominence of emotive themes of poverty, chattel, clowns, fools, deprivation and oppression in the song.⁹²¹ The BCCSA further identified the advocacy of hatred in question as being based on one of the listed grounds in section 16(2)(c), race, and as such, is *prima facie* fulfilment of the first leg of the test.⁹²²

The second leg of the test determines whether there is harm present.⁹²³ The Commission interpreted “harm” by stating that it did not have to equate it to the likelihood of a real attack,

⁹¹⁶ Lyrics as translated in the decision of *HRCSA v SABC* 2003 (1) BCLR 92 (BCCSA) para 2.

⁹¹⁷ *Islamic Unity Convention v IBA* para 43 held that the portion of the Code in question was unconstitutional for its broadness and replaced it with section 16(2) of the Constitution; *HRCSA v SABC* 2003 (1) BCLR 92 (BCCSA) para 11-12.

⁹¹⁸ *HRCSA v SABC* 2003 (1) BCLR 92 (BCCSA) para 34, 35 and 39.

⁹¹⁹ *HRCSA v SABC* 2003 (1) BCLR 92 (BCCSA) para 35.

⁹²⁰ *Ibid.*

⁹²¹ *Ibid.*

⁹²² *HRCSA v SABC* 2003 (1) BCLR 92 (BCCSA) para 36.

⁹²³ *HRCSA v SABC* 2003 (1) BCLR 92 (BCCSA) para 39.

only the “likelihood of fear.”⁹²⁴ As such, the BCCSA was able to demonstrate that “a likelihood of fear” through the demeaning content of the song, coupled with its infectious tune and straightforward language.⁹²⁵ The fact that many Indians speak and understand Zulu was also a decisive factor as much of the Indian community could easily comprehend the message of the song and thereby their constitutional right to security of person is negatively affected. The song was therefore held to be broadcast in contravention of the Code as hate speech, violating the dignity and security of Indian people.⁹²⁶

The reason for the uproar in banning this song is no doubt rooted in how the Commission reached its decision of “hate speech.” According to the BCCSA, the harm requirement in the test for hate speech is not harm at all, but only fear. This leap from proving “incitement to cause harm” to “a likelihood of fear” is tenuous, especially given that the Constitution requires that harm be an effect of hate speech and a certain constitutional understanding of “harm” has thus been widely accepted in dealing with hate speech complaints.⁹²⁷ The BCCSA seems to have come to the morally correct conclusion in condemning and recognising the song as hateful and degrading but has not succeeded in proffering much in the way of legal reasoning in terms of its decision on hate speech. What is more, the order will only have implications the future broadcast of the song. The judgment does not prohibit an individual singing the song or purchasing it, leading to the uneasy realisation that hate speech findings in the realm of media regulation address only the symptom of the problem.⁹²⁸ Ultimately, the content of the song broadcast was deemed to be “hate speech” but the radio station was not sanctioned by the BCCSA on the basis of their intention to “inform the debate and content of a *bona fide* current affairs programme.”⁹²⁹

Another instance of alleged hate speech was explored when the YFM breakfast team ran a feature containing the “Julius Malema Hit Parade.” The presenters had taken excerpts of Malema’s various chants and words and put them to a music beat, making a mock playlist of Malema’s latest public verbal *faux pas*. Many listeners complained that the content aired constituted hate speech. The BCCSA launched an inquiry into whether the broadcasters had

⁹²⁴ *Ibid.*

⁹²⁵ *Ibid.*

⁹²⁶ *Ibid.*

⁹²⁷ See 4.3.2.1 on the constitutional understanding of “harm.”

⁹²⁸ See the discussion at 8.3 on the result of the Broadcasting Code in “shooting the messenger” through its prohibition of hate speech on the airwaves.

⁹²⁹ *HRCSA v SABC 2003 (1) BCLR 92 (BCCSA)* para 42.

in fact breached Clause 16(c) of the previous Code by airing material that advocated hatred on racial grounds that incited harm.⁹³⁰ The most contentious was the audio clip containing a remix of the “Kill the Boer” chant. The complainant alleged that the act of “meticulously”⁹³¹ crafting these pieces was indicative of a premeditated campaign promoting hate speech.⁹³² Furthermore, it was claimed that any humour behind the pieces was marred by the fact that the station’s target audience, the youth of South Africa, was being influenced in an unconstitutional manner, especially considering the sensitivity of racially motivated murder in the South Africa.⁹³³ The BCCSA considered the importance of the free and open exchange of ideas the Constitution seeks to promote⁹³⁴ but noted the limitation placed on this right. The Commission ultimately deemed portions of the song featuring the call to kill ultimately “tips the scale” in favour of a finding of hate speech. A defence of artistic freedom was raised but the Commission held that the fact that art is protected does not mean that hateful art is immune.⁹³⁵ These almost conflicting ideas are difficult to rationalise at first because artistic freedom is specifically protected by the Constitution yet it is juxtaposed here with advocacy of hate, which is expressly outlawed. The BCCSA dissected the song in order to try and determine where art ends and hate speech begins. The Commission viewed any call to kill “a serious matter”⁹³⁶ that was exacerbated by the fact that it was put to an appealing tune and given considerable airtime. The BCCSA held that the content was “inflammatory and irresponsible” and constituted an advocacy of hatred. The incitement to harm was supported by the increasing number of racial farm murders the fact that such a song would infringe of a vulnerable portion of society.

6.2.2.3 Overview of BCCSA Cases

The Code itself is evolving towards the attainment of the constitutional standard on expression and can largely be commended for its stance on hate speech but the decisions informed by the Code are obscure and ambivalent. Further, the standing of these decisions appear to hold little weight within their own structures. From the findings surveyed, BCCSA decisions seldom refer to previous decisions. While these findings are only of persuasive

⁹³⁰ *Coetzee v YFM* Case 25-A-2010.

⁹³¹ *Coetzee v YFM* Case 25-A-2010 at 2.

⁹³² *Ibid.*

⁹³³ *Ibid.*

⁹³⁴ *Coetzee v YFM* Case 25-A-2010 at 4.

⁹³⁵ *Coetzee v YFM* Case 25-A-2010 at 6.

⁹³⁶ *Ibid.*

value to other tribunals or courts, reference to preceding decisions will advance certainty and consistency in decision-making.

A drawback to this format of complaint and adjudication that fact listeners allege “hate speech” as a popular and seemingly generic term. However, the cases often prove to be something else entirely. Many of findings also do not set out the applicable law or portion of the Code in contention and only flag a keyword “hate speech” at the beginning of the decision. This indicates that the term “hate speech” is being coined as broad, catch-all phrase for all offense and not for instances of legitimate advocacy of hatred and incitement of harm, as mandated by the Constitution. Most of the complaints that allege “hate speech” are in reality closer to defamation or mere remarks made in poor taste, in the context of a joke or satire.⁹³⁷ However, the Commission does make allowance for this and recognises common sense instances of jest,⁹³⁸ comedy⁹³⁹ and satire⁹⁴⁰ and this is indicative of a contextual and common sense approach taken by the BCCSA.

6.3 Print Media

The basis for speech regulation in print media stems from the Films and Publications Act.⁹⁴¹ This statute governs all published, reproduced and distributed written matter⁹⁴² and mandates

⁹³⁷ For example, in Case 29 of 2011, the BCCSA held that a racial joke used to highlight religious hypocrisy was not an instance of hate speech. The point of the joke was satirical, making use of an outrageous situation of a Muslim man being late for work because he was beaten with a Qu’ran to demonstrate that Islam, though a peaceful religion, knows extreme violence among certain followers. The BCCSA noted the place of the joke in critiquing all religions for not “practicing what they preach” and not as a means of advocating religious hate or inciting violence.

⁹³⁸ Case 50 of 2002 recognised that a joke told on the radio about Afrikaans traffic police was not to be taken seriously and to be “laughed off” despite its perpetuation of racial stereotypes.

⁹³⁹ Case 41 of 2011 held that the mockery of Jesus in a humorous setting was not blasphemy and advocacy of hatred on religious grounds, but mere comedy.

⁹⁴⁰ Case 01 of 2012 upheld the view that mere offensiveness is not a test for hate speech and that the song with remarks in poor taste about “white people” must be received in its satirical intention.

⁹⁴¹ The Films and Publications Act 65 of 1996.

⁹⁴² Under the section 1(xv) of the Act, “publication” covers:

- (a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
- (b) any writing or typescript which has in any manner been duplicated;
- (c) any drawing, picture, illustration or painting;
- (d) any print, photograph, engraving or lithograph;
- (e) any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or on which has been recorded for reproduction;
- (f) computer software which is not a film;
- (g) the cover or packaging of a film; and
- (h) any figure, carving, statue or model.

that it adheres to fundamental constitutional values and rights.⁹⁴³ As such, section 29⁹⁴⁴ prohibits any advocating war, violence and hatred, in line with section 16(2) of the Constitution. Section 4 sets out the defenses to an allegation of hate speech as *bona fide* scientific, documentary, dramatic, artistic, literary or religious publication; *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or *bona fide* discussion, argument or opinion on a matter of public interest. Although the Films and Publications Act governs material, such as films, that require pre-release classification, this 1996 statute sets the tone for the Print Media Code as regulated by the Press Council of South Africa.

6.3.1 Press Council

Print media content is entirely self-regulated by the Press Council of South Africa. This body was established by the industry to promote the right to freedom of expression, journalistic practice and ethics, press regulation, public awareness as well as collaboration.⁹⁴⁵ In the wake of apartheid, it was especially necessary to give press regulation a considerable revamp, given the role it played in censorship during the regime.⁹⁴⁶ In terms of industry regulation, the Press Council sets up the Office of the Press Ombudsman⁹⁴⁷ and the South African Press Appeals Panel. It also accepts a Press Code of Conduct with which to regulate with industry in terms of acceptable content in the constitutional state. The Press Council is therefore mandated to perform all of its functions in the furtherance of its constitution and the Press Code. In 2012, the Press Council was reformed and launched its Constitution and amended Code in an effort to encourage independent and voluntary self-regulation in the print media sphere.

⁹⁴³ Section 2 of the Films and Publications Act.

⁹⁴⁴ Section 29 states that:

- (1) Any person who knowingly distributes a publication which, judged within context –
 - (a) amounts to propaganda for war;
 - (b) incites to imminent violence; or
 - (c) advocates hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm,shall be guilty of an offence.

⁹⁴⁵ Section 1 of the Constitution of the Press Council of South Africa.

⁹⁴⁶ G Berger “The Struggle for Press Self-Regulation in Contemporary South Africa: Charting a Course between an Industry Charade and a Government Doormat” (2010) 36.3 *Communicatio* 289 at 290-296 plots the evolution of press regulation.

⁹⁴⁷ Section 1.3 of the Constitution of the Press Council of South Africa.

The Press Ombudsman, the industry “professional watchdog,”⁹⁴⁸ is required to be a citizen and permanent resident of South Africa with extensive press editorial experience at a senior level, as well as possessing the ability to be a fair and independent adjudicator, committed to fairness, freedom of speech and the free flow of information.⁹⁴⁹ The position entails that the Ombudsman independently deal with and attempt to settle, or otherwise adjudicate, complaints relating to the South African Press Code.

6.3.1.1 South African Press Code

6.3.1.1.1 Mandate and Provisions

The Press Code is essentially a Code of Conduct that binds the members of the Press Council⁹⁵⁰ and any other publications who subscribe to it. The Press Council is the “custodian”⁹⁵¹ of the Code that binds members an industry standard of content, informed by the constitutional stance on freedom of expression.⁹⁵² As a means of committing to criteria of excellence and maintaining public credibility and trust by avoiding unnecessary harm,⁹⁵³ the Press Code prohibits the publication of hate speech. Clause 5 prohibits “discrimination and hate speech” by providing that the press;

5.1 except where it is strictly relevant to the matter reported and is in the public interest to do so... shall avoid discrimination or denigratory references to peoples’ race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth or other status, nor shall (the press) refer to people’s status in a prejudicial or pejorative context;

5.2 ... has the right and indeed the duty to report and comment on all matters of legitimate public interest. This right and duty must, however, be balanced against the obligation not to publish material which amounts to:

5.2.1 propaganda for war;

5.2.2 incitement of imminent violence;

5.2.3 advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

⁹⁴⁸ Wasserman and De Beer 2005*Critical Arts: North-South Cultural and Media Studies* 42.

⁹⁴⁹ Section 9.1 of the Constitution of the Press Council of South Africa.

⁹⁵⁰ Section 4 of the Constitution of the Press Council of South Africa.

⁹⁵¹ Press Council Website <http://www.presscouncil.org.za/> (Accessed 12 December 2012).

⁹⁵² The Preamble of the Press Code explicitly states the provisions of section 16 of the South African Constitution.

⁹⁵³ Preamble of the Press Code.

Clause 5.1 imposes a negative obligation on publishers to refrain from printing certain discriminatory or prejudicial content, but qualifies this provision with a defence of strict relevance to the matter reported on. Clause 5.2, on the other hand, confirms the right and duty of the press to inform the public but provides that this right may not be absolute in cases of hate speech.

6.3.1.1.2 Discussion

The Press Code takes the important step of regulating expression and mentions hate speech by name as a particular ill that warrants addressing. It incorporates the constitutional prohibition of hate speech under section 16(2)⁹⁵⁴ in its preamble as well as in clause 5.2. The formulation of the Press Code mirrors the Constitution by stating its right to publish but qualifies this right in terms of what is excluded from protection: hate speech. Unlike the Broadcasting Codes, the Press Code does not cite a list of defences of “*bona fide* artistic creativity” and the like, but simply invokes its right to publish in the context of legitimate public interest. As with the constitutional stance, a balancing exercise must ensue to ensure that a context-sensitive approach to regulating speech is followed. This Code is the most constitutionally faithful rendition of the right and limitations of freedom of expression and implies that there is no outright ban on hate speech without first considering the worth of particular expression as material in promoting free speech and a free media.

6.3.1.2 The Code in Action: Decisions of the Press Ombudsman

The Press Council lists its adjudicative structures as comprising of the Press Ombudsman and the South African Press Appeal (SAPAP) in clause 6.1.3 of its Constitution. Complaints that warrant further investigation and adjudication are heard by the Press Ombudsman and parties have seven days as of receipt of the decision to apply for leave to appeal to the chairperson of

⁹⁵⁴ See 4.3.2.1 on the constitutional position on hate speech in section 16(2)(c).

the SAPAP. In 2012, only two decisions of this body involved allegations of racial hate speech in printed media.⁹⁵⁵

In *George Annandale v City Press*,⁹⁵⁶ the complaint centred on a column published in the City Press by a freelance writer entitled, “Blacks in bondage.” The piece was written while the author was in Ventersdorp covering the murder trial of former AWB leader, Eugene Terre’Blanche, and featured the author’s opinion on the deeply racist and untransformed town. The complaint by a reader was that the columnist, firstly, falsely implied that the ex-mayor of Ventersdorp had been murdered by the white right-wing extremists and, secondly, wrote his piece in order to propagate racial hatred. A portion that was highlighted in the decision was, “If a mayor can be killed for challenging white power and perpetrators can get away with it, what chance do ordinary mortals have?” The Press Ombudsman examined the first allegation and noted the author’s strong bias towards the victim and his detestation of the AWB. It was held that the columnist had the right to voice his dislike of the AWB as, after all, he penned opinion pieces. What was problematic was his one-sided portrayal of the mayor’s murder and his disregard of important facts. The author had not mentioned the murder trial that unearthed the strong possibility that the murder had been the result of a diamond deal gone wrong; a fact that the journalist should have included in his column. The Press Ombudsman held that a defence of “comment” was not applicable in this case as the author has not taken account of all the available facts. The finding was therefore that the columnist had breached the Press Code for his publication of false and biased information. On the second count of alleged hate speech, the Press Ombudsman traced the hate speech provisions in the Constitution in that freedom of expression does not extend to hate speech, and the relevant clauses of the Press Code that state that “the Press should avoid discriminatory and denigratory references to people’s race.” It was held that the author’s despising of the AWB did not equate to him advocating hatred and inciting harm. The second complaint was therefore dismissed and the City Press was ordered to publish a summary of the findings of this decision.

⁹⁵⁵ The Press Council publishes the findings of the Press Ombudsman on its website and a key word search for “hate speech” yielded eight results, of which three were relevant. Of the three, two decisions involved racial hate speech. (Accessed 12 December 2012).

⁹⁵⁶ *George Annandale v City Press* Ruling by the Deputy Press Ombudsman, 12 July 2010.

The second decision of alleged racial hate speech available, *Ziyad Motala v Sunday Times*,⁹⁵⁷ is an appeal to the SAPAP on a column entitled, “When our leader sneezes, the media must catch a wake-up.” The piece was considered controversial because of its stereotypical depiction of Indians as nepotistic, corrupt, unethical and dishonest and a complaint was therefore laid with the Press Ombudsman. It was initially found that the column was satirical and had not intended to be racist and there the complaint was dismissed. On appeal to the SAPAP, the Sunday Times defended its columnist who overtly declared his tone and intention in all his pieces as “somewhat serious, somewhat fun” and reasoned that the vast majority of the readership did not take any offense to what had been published. The SAPAP noted that the piece was indeed offensive but the subject matter was of legitimate public interest, for which opinions are encouraged. A defence of “comment” was therefore granted as the column explored the issue of society’s tendency to negatively stereotype Indians, which was presented honestly and without malice. The SAPAP therefore dismissed the complaint of hate speech as offense, owing to the fact that a society as diverse as South Africa perceives offense in innumerable ways. In a dissenting minority ruling, it was found that the column was indeed permeated with malice and therefore a defence of comment would be inappropriate in this matter.

6.3.1.3 Overview of the Press Ombudsman Cases

These two decisions show that the Press Ombudsman and the SAPAP regard hate speech as an advocacy of hatred and incitement to cause harm, as provided for in the Constitution.⁹⁵⁸ The Press Code speaks of avoiding discriminatory references to race and referring to race in a derogatory manner under the heading of “discrimination and hate speech.” There is some confusion as to whether these considerations of discriminatory language are what the Press Council deems to be hate speech or whether the constitutional definition has been imported into the Press Code. In *George Annandale*, the Press Ombudsman cited what it perceived to be the constitutional and Code provisions against hate speech as the right to freedom of expression not extending to an advocacy of hatred and incitement to cause harm in the former and an avoidance of discriminatory and denigratory references to race in the latter.

⁹⁵⁷ *Ziyad Motala v Sunday Times* Ruling by the Press Appeal Panel of the Press Council, 12 January 2011.

⁹⁵⁸ See 4.3.2.1 on the constitutional stance on hate speech.

The defence of comment in the Press Code has also been suggested and employed in these complaints. In *Ziyad Motala*, the SAPAP found that this defence was appropriate in public interest issues and that the dissemination of honest and fair opinion was paramount. This defence was only possible because the message was not hate speech in the article published and only offensive opinion.

6.4 Media Regulation of Hate Speech

Media regulation is an important feature of a healthy democratic state as it is a public endorsement of the right to freedom of expression and its inherent limitations. Both broadcast and print media apply Codes of Conduct that hold their content to a high standard of integrity and constitutional values and the public can get feedback from their complaints through the applicable industry regulators. As such, hate speech is judged against yet another legal framework that justifiably curbs certain unconstitutional expression according to a context-sensitive approach and sets a strong message that violently oppressive language will not be tolerated in a society established on human rights, tolerance and transformation. While the Codes appear to be constitutionally consonant in outlawing hate speech, there is the issue of the defences both broadcast Codes contain that could result in a finding of hate speech on the facts, but permits no sanctions on the broadcaster who disseminated the racially violent language.⁹⁵⁹ Such a result defies section 16(2) of the Constitution that states specifically that hate speech is excluded from defence. The Press Code states that the industry has an obligation not to print, and therefore disseminate, hate speech, which is in parity with the constitutional stance.⁹⁶⁰

In terms of the broadcast media sphere, decisions consulted do not do the applicable Codes justice. The CCC has jurisdiction to adjudicate hate speech cases but hardly does in reality and the BCCSA frequently conflates notions of offensive speech with hate speech and has yet to formulate a clear and consistent test in this regard. Press decisions thus far, on the other hand, are in consonance with the Code but they have had very few opportunities to grapple with hate speech matters. It is likely that the Press exercises more care and consideration in expressing their opinions and in conveying facts due to the proverb, *verba volant, scripta*

⁹⁵⁹ Note the result in *Human Rights Commission of South Africa v SABC* of a finding of hate speech in Ngema's "AmaNdiya" but a failure to uphold the complaint and sanction the broadcaster.

⁹⁶⁰ See 4.3.2.1 on the constitutional stance on hate speech.

manent, literally translated to “spoken words fly, written words remain.” The Press deal in the written word, which attracts more reflection and care, as opposed to the spoken word, that is often improvised and regularly careless. Of course, there are obvious exceptions in the broadcast industry with scripted narration, song and fictional shows that all exist in the written word before they are translated into speech. However, the chances of an author choosing to pen words of hate speech and an editor approving his writing over a radio or television speaker uttering unscripted hate speech in the heat of the moment is significantly less. The broadcast media carries with it inherent risks of impromptu and unexpected speech on live broadcasts that makes it far harder for broadcasters to control what they disseminate. The cases examined show that most complaints of hate speech in the broadcast industry selected are from unscripted outburst on talk shows or reported on by the news.⁹⁶¹ Their printed counterparts exist in satirical columns that create controversy but have yet to be deemed to be hate speech.

What is more is that the effect of deeming expression a contravention of a Broadcasting or Print Code as hate speech addresses the symptom and not the cause of hate speech.⁹⁶² The findings are binding on the broadcasters but not individuals who wish to sing or purchase music such as “*Amandiya*”⁹⁶³ or “Shoot the Boer,”⁹⁶⁴ or comedians such as Riad Moosa⁹⁶⁵ who use terms such as “coolie” in their acts. While the regulation of expression is undoubtedly necessary in the media sphere, one must acknowledge that there is more work to be done in changing mind-sets and reconciling parties than is afforded through the work of the BCCSA, ICASA or Press Ombudsman.⁹⁶⁶

Another relevant factor to consider in assessing the work of these fora in adjudicating hate speech matters is their status. The BCCSA, CCC and Press Ombudsman are not courts but they share certain judicial attributes in that they hear complaints, apply legal standards to a set

⁹⁶¹ Complaints such as; *PA de Waal v Talk Radio 702* Case No-32-2010; *Hook v Chai FM* Case No-39-2011; *South African Jewish Board of Deputies v Cape Talk* Case No-35-1999; *T Labuschagne v YFM Tribunal* Case No-21-2003BVCO & *Geldenhuis v Jacaranda 94.2FM* Case No-02-2012; *Bowen v Radio 702* Case No-29-2000; *Muller v Heart 104.9FM* Case No-12-2011; *Barreira v 94.7 Highveld Stereo* Case No-16-2010; *Keboneilwe v SABC2* Case No 3 of 2011; *Jewish Defence League v Radio 702* Case No-26-1998; *Kleynhans v 94.7 Highveld Stereo* Case No-50-2002.

⁹⁶² See 8.3 on hate speech findings in the broadcasting sphere equated to “shooting the messenger” and ultimately proving of little value in preventing hate speech.

⁹⁶³ See 6.2.2.2.7 for a discussion on this case before the BCCSA.

⁹⁶⁴ See 6.2.2.2.7 for a discussion on this case before the BCCSA.

⁹⁶⁵ See 6.2.2.2.5 for a discussion on this case before the BCCSA.

⁹⁶⁶ How reconciliation or transformation on a personal level is to be facilitated falls outside the scope of this thesis.

of facts and hand down decisions that are binding on members of their respective bodies. In this way, the BCCSA, CCC and Press Ombudsman can be compared to non-judicial administrative tribunals. While defining the concept of “tribunal” in South Africa is said to be daunting, given their varied structure in this country,⁹⁶⁷ what is generally agreed upon is that tribunals are created to enforce rights and ensure public policy is implemented, through internal appeal or review within certain spheres.⁹⁶⁸ Tribunals thus offer another form of judicial review⁹⁶⁹ and are generally favoured by parties for their alternative to the formality of courts, their costly and slow functioning and often lack of specialist knowledge.⁹⁷⁰ It is difficult to determine what legal character the CCC, BCCSA and Press Ombudsman have in terms of whether they are indeed administrative tribunals or something else. Burns offers four tests to assist in this regard: firstly, a test of procedure and composition; secondly, a material test; thirdly, a formal test; and finally, an enforceability test.⁹⁷¹

In terms of the first test, the above three bodies encompass similar procedures to courts.⁹⁷² Most of their members are either mandated to have legal experience or it is the practice to seek out individuals so qualified,⁹⁷³ with the exception of the Press Ombudsman. However, according to Burns, this test is not absolute and only an indication of whether a body is in fact a tribunal. Therefore, one can conclude that all three bodies present no impediment to clearing this first hurdle. In terms of the second test, these bodies deal with material of a legal dispute in nature, in that it is a question of rights, privileges, duties and freedoms.⁹⁷⁴ The

⁹⁶⁷ G Armstrong “Administrative Justice and Tribunals in South Africa: A Commonwealth Comparison” (2011) University of Stellenbosch Master of Laws Thesis 56; 129.

⁹⁶⁸ Y Burns *Administrative Law Under the 1996 Constitution* 2ed (2003) 277.

⁹⁶⁹ G Armstrong “Administrative Justice and Tribunals in South Africa: A Commonwealth Comparison” (2011) University of Stellenbosch Master of Laws Thesis.

⁹⁷⁰ Armstrong 2011 University of Stellenbosch Master of Laws Thesis 65

⁹⁷¹ Burns *Administrative Law* 277.

⁹⁷² Section 17C of the ICASA Amendment Act details the procedure of the CCC and shows it to adhere to certain court and trial procedures, such as providing notice of the hearing, affording reasonable time to respond to allegations, hearing *viva voce* from the parties, pre-hearing conferences, enforcing non-compliance measures and keeping a record of proceedings. Appendix 1 of the BCCSA Constitution sets out adjudication procedure for complaints and similarly provides notice to parties, and presents the option of appearing before the Commission. The Press Ombudsman

⁹⁷³ Section 17A of the ICASA Amendment Act mandates that the Chairperson of the CC be either a judge, advocate, attorney or magistrate and that its members be fit and proper people, with qualifications in one of a variety of pertinent fields, one of which could be law. Clause 5 of the BCCSA Constitution only mandates that the Chairperson and Commissioners have expertise in the media. The current Chairman, however, is a lawyer, therefore one can infer that the preferred practice of the BCCSA is to have legal expertise on the part of their members. Clause 9 of the Press Council Constitution also does not require its Press Ombudsman to have legal qualifications but only press editorial experience and impartiality. In practice, no one in the office of the Press Ombudsman is legally trained.

⁹⁷⁴ The CCC, BCCSA and Press Ombudsman deal with infringements of their respective Codes of Conduct, which place duties to broadcasters and editors adhere to industry standards.

decisions by these bodies reached are indeed done so by means of the application of specific legal frameworks in relation to rights and duties in the media sphere. The third indicator is judged according to whether these three bodies share similar attributes to a court, in that they are independent, public and accessible. The BCCSA and Press Ombudsman pride themselves on the fact that they are independent by virtue of their self-regulatory nature and ICASA, though state mandated, is also institutionally independent. All hearings in these fora are public and are accessible, in that they are cheap and effective. The final test, and most persuasive according to Burns, is whether the findings of these bodies have legal force and are thus binding. Judging by the powers conferred on these regulatory bodies, there can be said to be real consequences for broadcasters or editors who do not comply with decisions of the BCCSA, CCC or Press Ombudsman, thereby fulfilling the fourth and decisive requirement that binding decisions on the parties involved are produced, securing their status as tribunals.

Determining their status as tribunals, or at least analogous structures, is useful in assessing the role of the BCCSA, CCC and Press Ombudsman in hate speech complaints and the suitability of current measures. The findings of these bodies therefore have weight among the parties and the media industry and as such, they are important tools in combatting hate speech and regulating language. Their value is particularly relevant when comparing these bodies to the SAHRC, whose value is more symbolic than practical, seeing as it does not deliver legally enforceable decisions.⁹⁷⁵ What emerges is that accumulation of hate speech decisions, though binding on broadcasters, are of only persuasive value other adjudicative fora or potential litigant and practitioners in the civil arena.

6.5 Concluding Remarks

There are effective measures in place to regulate speech in the media and suitable tribunals to determine complicity with the industry-wide standards on permissible expression, taking cognisance of the context within which the media operate. On the whole, the print media has fewer complaints of hate speech, compared to the broadcast sector, due to the inherent nature of both mediums of communication. The Codes in place in the media sphere are generally constitutionally compliant in their condemnation of hate speech but the broadcasting Codes in particular veer slightly from the constitutional standpoint in including opinion on public

⁹⁷⁵ See 4.3.4.3.2 on the status of the SAHRC.

interest matters as a defence for hate speech. The content of the Codes is testament to the difficult nature of language and how hard it is to constrain, given its malleability and how hard it is to produce suitable provisions to guide the media every day and the tribunals in their assessment. The media sector highlights the task of reporting on and conveying emotions and how hard it is to regulate hate speech. A further insight into how language is regulated can be examined in relation to the common law and the remedies it offers for degrading and hateful language.

CHAPTER 7

THE PROHIBITION OF HATE SPEECH IN THE COMMON LAW

7.1 Introduction

In addition to the constitutional, legislative and broadcasting regulation on expression, there are residual and enduring measures that acknowledge the necessary restrictions on complete free speech. Though not hate speech-specific measures, the common law provides the precedent for curbing certain expression and confirms the long-standing notion that certain language cannot be tolerated when it impairs the dignity of others. This is the central theme to the justification of outlawing hate speech.⁹⁷⁶

The apartheid-era framing of discourse that one would currently term “hate speech” existed in a very different form from what it is known as today. Violent and oppressive language was the medium of expression used to describe, address and insult those subjugated by the regime through dehumanisation and indignity.⁹⁷⁷ Most notably, there was no comparably entrenched right to freedom of expression, dignity or equality as is provided for presently in the Constitution. Accordingly, there was no prohibition on hate speech as a form of violent and oppressive language but there was recognition of the fact that certain language could be limited and sanctioned.

The common law and legislation curbed language that was insulting or defamatory,⁹⁷⁸ or that threatened social stability, respectively. A particular brand of expression was condemned as a justifiable limitation to freedom of expression under the Riotous Assemblies Act⁹⁷⁹ that “promoted feelings of hostility between race groups.”⁹⁸⁰ On the face of it, it would appear that such a provision would prohibit that which one would term hate speech today but instead was largely promulgated to preclude political gatherings and silence opposition to the

⁹⁷⁶ See 4.33 for discussion on hate speech impairing the constitutional right to dignity.

⁹⁷⁷ See Chapter 2 where the link between violent language to uphold and bolster hate speech is established.

⁹⁷⁸ See Chapter 7 generally for the common law position on language.

⁹⁷⁹ Riotous Assemblies Act 17 of 1956.

⁹⁸⁰ I Currie and J de Waal *The Bill of Rights Handbook* 5ed (2008) 377, ft 99.

apartheid state. A grain of truth that can be extracted from this type of legislation is that language wields tremendous power and can be used to stir people to action. However, what distinguishes pre-constitutional speech provisions from their contemporary counterparts is that no mechanism existed previously with which to measure justifiable limitations on expression as can be found in the Constitution today.⁹⁸¹

What would be viewed as hate speech today in a constitutional sense was adjudicated upon using the common law, which has consistently prohibited violent and hateful language. The common law thus offers a variety of civil and criminal recourse to a litigant for the infringement of their reputation and dignity. Both rights concern a person's esteem, with the right to one's reputation, judged according to what others are led to think of the person, and one's dignity, estimated according to what a person thinks of themselves⁹⁸² in the aftermath of violent and hateful language. Though perceptions have altered over the years according to what society deems degrading or humiliating, a common thread of impermissible language can be traced through the law's consistent protection against violent and hateful expression. This also begs the inevitable question as to whether the various avenues available to a litigant in this regard create duplication in the law, given the current legislative measures on hate speech. The common law conceives of hate speech in terms of degradation and insult, which provides further dimensions in the fluidity of language. Like all hate speech regulation, the common law provisions walk the uneasy line of trying to pin down offense, insult and considerations of esteem. Therefore, a consideration of this common law foundation is a thought-provoking basis from which to consider legislative regulation of language and whether they complement or duplicate each other.

7.2 Protection under the Civil Law

7.2.1 Infringements of Reputation

The common law provides that everyone is entitled to the right to his or her good name and to recourse against any unjust attack to their reputation.⁹⁸³ The law of defamation is therefore

⁹⁸¹ See the discussion on internal limiters to the right to freedom of expression as well as a general rights limitation clause in sections 16(2) and 36, respectively at 4.3.2.1.

⁹⁸² M Loubser, R Midgley (eds), A Mukheibir, L Niesing and D Perumal *The Law of Delict in South Africa* (2010) 328.

⁹⁸³ Loubser and Midgley (eds) *Law of Delict* 329.

available to those aggrieved under the *actio iniuriarum*.⁹⁸⁴ This civil remedy for expression wrongfully and intentionally published that diminishes one's repute in the eyes of others⁹⁸⁵ can therefore be used in the context of racially degrading expression to obtain relief in the form of damages. What is protected is exposure to "offensive and degrading treatment or exposure to ill-will, ridicule, disesteem or contempt"⁹⁸⁶ but the qualification as to what one considers defamatory is, of course, relative to the factors society deems debasing at the time.⁹⁸⁷ Prior to the constitutional era, it was understandable that the criterion as to what could defame a person was very often racially determined,⁹⁸⁸ given the institutionalised racism of the time. Hateful and abusive language was a characteristic of the linguistic apartheid landscape and therefore racial slurs that would be deemed hate speech to a contemporary ear were accepted when addressing or referring to those falling outside of the infamous "European" race group.⁹⁸⁹ However, the case law shows that these labels were deemed defamatory when used to accuse a person of being "non-white,"⁹⁹⁰ and not merely because the terms themselves were repulsive to human dignity, as evidenced from the discussion below.

In the absence of any constitutional framework protecting free speech, the common law of defamation was a popular choice for litigants wishing to vindicate their reputation in the pre-apartheid era. To demonstrate, a claim of defamation was instituted in 1909 for calling a nurse a "white kaffir" in the case of *Spencer v Mcdiarmid*.⁹⁹¹ In this matter, the court held that the expression was more than mere abuse and indicated that she was "dirty, untidy and slovenly"⁹⁹² and as such was held to be defamatory in nature. Further, *De Villiers v Vels*⁹⁹³ held in 1921 that the statement that a white man "lived like a kaffir" was similarly defamatory in the use of the racial label as a "low and degraded standard of comparison."⁹⁹⁴ This tradition continued during the apartheid era, with similar cases of defamation being instituted,

⁹⁸⁴ *Minister of Police v Mbilini* 1983 (3) SA 705 (A) 715G.

⁹⁸⁵ Loubser and Midgley (eds) *Law of Delict* 328-329.

⁹⁸⁶ *Minister of Police v Mbilini* 1983 (3) SA 705 (A) 715G-716A; *Sokhulu v New Africa Publications Ltd t/a "The Sowetan Sunday World"* [2002] 1 All SA 255 (W) 259C-259D.

⁹⁸⁷ *Pitout v Rosenstein* 1930 OPD 112.

⁹⁸⁸ See the case law below outlining racial slurs as defamation.

⁹⁸⁹ Terms such as "kaffir" and "coolie" was common place to describe or address members of the black and Indian races, respectively. (P Herbst *The Color of Words: An Encyclopaedic Dictionary of Ethnic Bias in the United States* (1997) 58; 133).

⁹⁹⁰ As evident from the case law discussed below.

⁹⁹¹ *Spencer v Mcdiarmid* (1909) 23 EDC 143.

⁹⁹² *Spencer v Mcdiarmid* 145.

⁹⁹³ *De Villiers v Vels* 1921 OPD 55.

⁹⁹⁴ *De Villiers v Vels* 57.

such as *Maskowitz v Pienaar*,⁹⁹⁵ stating unequivocally that “to say of a white person that he is coloured is defamatory of him.”⁹⁹⁶ Similarly, in *Taljaard v S & A Rosendorff & Venter*,⁹⁹⁷ the plaintiff, a white woman, sued for defamation after being described as non-white in a summons prepared by a law firm on the grounds that such untruths had humiliated her and further had impaired her dignity and honour, claiming damages for *iniuria*⁹⁹⁸ in the alternative. Though the absence of the element of publication precluded a ruling for defamation and rather an award of damages for *iniuria*, what this case illustrates is that the grounds alone that caused the plaintiff’s diminished reputation were that others thought her of as “non-white.” It would appear from this case that the facts, aside from publication of the remark, would have been sufficient for a claim of defamation.

What is telling of the abovementioned cases is that they all rely being equated to a “black” person as the basis for degrading their reputation. It is true that the purpose of the law of defamation is to offer a remedy to those who believe their esteem to be diminished in the eyes of others and, accordingly, these cases are still relevant in that they acknowledge this legal principle. However, their use is limited in the criteria and reasoning applied, citing a racial comparison as a source of the degradation, which is an affront to the contemporary entrenchment of the right to equality and values of tolerance. However, these old defamation cases provide a useful benchmark with which to understand why certain expression is offensive and an example of hate speech today.

*Mangope v Asmal*⁹⁹⁹ confirms that a defamatory statement aimed at the dignity and reputation of a person cannot evade sanction under the umbrella of freedom of speech in the current dispensation.¹⁰⁰⁰ This case was decided in the context of a black politician who was criticised and called a “baboon.” The court held that this “unwarranted slating” which unnecessarily diminishes one’s esteem in the view of others would evade sanction under the law of defamation. Hartzenberg J noted the particular implication in the use of term “baboon” that one is of “low... and sub-human intelligence, not even worthy of being described as human” and as such, the term in context is an affront to a person’s right to their reputation. The

⁹⁹⁵ *Maskowitz v Pienaar* 1957 (4) SA 195 (A).

⁹⁹⁶ *Maskowitz v Pienaar* 197A. Interestingly enough the speaker in this case evaded liability on the grounds that poor lighting and misinformation had caused the mistaken identity.

⁹⁹⁷ *Taljaard v S & A Rosendorff & Venter* 1970 (4) SA 48 (O).

⁹⁹⁸ See 7.2.2 on the discussion on civil *iniuria*.

⁹⁹⁹ *Mangope v Asmal* 1997 (4) SA 277 (T).

¹⁰⁰⁰ *Mangope v Asmal* 289B-D.

Equality Court has reiterated its position on the use of the term “baboon” as an instance of racist hate speech,¹⁰⁰¹ indicating the overlap between the claims in defamation law and in the realm of hate speech legislative prohibitions.¹⁰⁰²

*Khumalo v Holomisa*¹⁰⁰³ traces where the common law of defamation starts and where the constitutional right to freedom of speech ends.¹⁰⁰⁴ This case dealt with the right to free expression vested in the press when a newspaper, *The Sunday World*, stated that a well-known South African politician was under investigation by the authorities for this involvement in gang of bank robbers. The court in this case noted the inevitable tension between defamation and freedom of expression and posed two questions in this regard: firstly, does the defamation unjustifiably limit the constitutional right to freedom of expression, and if so, should the common law be developed further? A second enquiry considers the role of the element of truth: whether the fact that it serves as a defence in the common law for defamation is in line with the constitutional exceptions to freedom of expression listed in section 16(2)?¹⁰⁰⁵ O’Regan J held that there can never be a constitutional interest in conserving reputation founded on a false basis,¹⁰⁰⁶ and therefore it is ultimately considerations of human dignity that will tip the balance in this case. The court relied on *National Media Ltd v Bogoshi*¹⁰⁰⁷ in this regard and confirmed that the right to dignity cannot automatically trump the right to freedom of expression and ultimately held that a defence of “reasonable publication” may be advanced in consonance with the constitutional right to freedom of expression. In *Khumalo v Holomisa*, the applicants had failed to make a case that the law of defamation goes further than the Constitution envisages for free speech and therefore *Bogoshi* remains valid law. The court held that the burden of first establishing truth is onerous and practically problematic but the defence of reasonable publication manages to strike the balance between the rights to dignity and freedom of expression as it avoids the binary classification of truth and falsehood.¹⁰⁰⁸

¹⁰⁰¹ See 5.2.2 for a further discussion of *Herselman v Geleba* (231/2009) [2011] ZAEQC 1 (1 September 2011).

¹⁰⁰² In the sphere of Labour Law, the use of the term “baboon” is similarly condemned and is grounds for dismissal on the basis of misconduct. Racially oppressive language such as this is outlawed in the Employment Equity Act 55 of 1998 as unfair racial discrimination and the common law permits dismissals for racial name calling on the grounds of misconduct, as seen in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* [2002] 6 BLLR 493 (LAC), where an employee was dismissed for calling a fellow worker a “kaffir.”

¹⁰⁰³ *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

¹⁰⁰⁴ See the discussion on the right to freedom of expression and the limitations thereof in 4.3.2.1.

¹⁰⁰⁵ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 33-34.

¹⁰⁰⁶ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 35.

¹⁰⁰⁷ *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

¹⁰⁰⁸ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 43.

Therefore, where racial hate speech is concerned, *Khumalo v Holomisa* effectively shows that the law of defamation is another constitutionally permissible limitation on the right to freedom of speech. Therefore, one could surmise that hateful language that also fulfils the requirement of defamation could be pursued in court using civil law. *Strydom v Chiloane*¹⁰⁰⁹ is authority for the fact that a claim for racially oppressive language can be conceivably instituted a variety of fora, provided that the facts fulfil the requirements of the particular law that governs them.¹⁰¹⁰ Though not always the obvious choice for a hate speech case, circumstances may permit the use of the civil law if the expression is also defamatory. After all, the Equality Act has a very generous definition of racial hate speech that could easily additionally encompass notions of defamation.¹⁰¹¹ Practitioners may even opt for such a private law form of relief before tackling the uncertain realm of litigating hate speech under the Equality Act.¹⁰¹² In terms of clearing case loads, the more settled delictual route would certainly be more favourable as it increases the chances of a substantial damages award, even settlement before any litigation even gets underway.

7.2.2 Infringements of Dignity

Hate speech can clearly be subsumed into the delictual understanding of insulting language. Insult is the defilement of one's feelings, self-esteem, pride, or moral or societal value¹⁰¹³ and hate speech is the epitome of such debasement. As shown, violent and oppressive language silences its target, rendering them insignificant and even subhuman.¹⁰¹⁴ To prove *iniuria* civilly, one must demonstrate a factual violation of the victim's feelings that is both wrongful and intentional¹⁰¹⁵ and this has been achieved in instances of what would now be recognised as hate speech.¹⁰¹⁶ Loubser *et al* exemplify an infringement of one's *dignitas* with degradation, belittling and affront and counsel that any infringement of the constitutional right

¹⁰⁰⁹ *Strydom v Chiloane* (A420/06 [2007] ZAGPHC 234 (18 October 2007).

¹⁰¹⁰ *Strydom v Chiloane*, at para 12-17, held that a claim based on an employee calling a worker a "baboon" could be filed in a civil *iniuria* suit, as hate speech in the Equality Court or as a violation of the Employment Equity Act's prohibition of racial discrimination in the Labour Court.

¹⁰¹¹ See 5.2.2 on the provisions of the Equality Act in this regard.

¹⁰¹² *Ibid.*

¹⁰¹³ Loubser *et al Delict* 313.

¹⁰¹⁴ Bearing in mind the definition of hate speech in the Equality Act as hurtful, harmful or hateful language, this makes the link between hate speech and insult in the civil law easier to establish. See 5.2.2 in this regard.

¹⁰¹⁵ *Ibid.*

¹⁰¹⁶ For example, *iniuria* could be proven for derogatory use of the word "kaffir" in *Ciliza v Minister of Police* 1976 (4) SA 243 (N) 249; *Mbatha v Van Staden* 1982 (2) SA 260 (N) 262.

to dignity is a predominantly subjective affair,¹⁰¹⁷ while Van der Walt and Midgley stress an inward and outward aspect to an infringement of dignity.¹⁰¹⁸ Van der Walt and Midgley highlight the importance of both a consideration of the victim's subjective feelings as well as an evaluation as to their objective esteem in what they perceive others to believe their standing in society is.¹⁰¹⁹ Bearing the South African experience in mind, it is easy to marry the concept of racially oppressive and violent language with subjective vilification of the individual and their impression of their own standing in society.

Iniuria claims viewed within the prism of hate speech have included racially charged insults, such as in the case of *Ciliza v Minister of Police*.¹⁰²⁰ Here, the court considered the merits of an *iniuria* claim against a white policeman for calling a black man a "kaffir."¹⁰²¹ The court held that there were multiple meanings associated with the term "kaffir" but in the context, it was understood to convey a person who is "uncivilised, uncouth and coarse,"¹⁰²² and as such, was an assault to his dignity. Six years later in 1982, *Mbatha v Van Staden*¹⁰²³ took this even further and held that the term "kaffir" is widely considered to be deeply offensive and therefore an intention to offend is implied.¹⁰²⁴ From there, it has opened up contemporary understandings of racially derogatory terms being injurious by their mere utterance alone. For instance, in *Ryan v Petrus*,¹⁰²⁵ the respondent called his father's mistress, the appellant, a "hoer" (whore) and a "kaffir" and the appellant instituted a claim on the grounds that the expression was an affront to her dignity. The court confirmed that mere use of the word "kaffir" is "an aggression upon the appellant's dignity" outright as it embodies sentiments of offense wielded to denote a person who is "uncivilised, uncouth and coarse"¹⁰²⁶ and damages were accordingly ordered.

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ JC Van der Walt and R Midgley *Principles of Delict* 3ed (2005) para 80.

¹⁰¹⁹ *Ibid* ; Loubser *et al Delict* 328-9.

¹⁰²⁰ *Ciliza v Minister of Police* 1976 (4) SA 243 (N).

¹⁰²¹ Interestingly, the appellant originally claimed under the law of defamation but changed his pleadings to *iniuria* in the alternative, indicating that defamation is often harder to prove as it hinges on publication of some sort, whereas *iniuria* does not.

¹⁰²² *Ciliza v Minister of Police* 247A.

¹⁰²³ *Mbatha v Van Staden* 1982 (2) SA 260 (N).

¹⁰²⁴ *Mbatha v Van Staden* 262H-263A.

¹⁰²⁵ *Ryan v Petrus* 2010 (1) SA 169 (ECG).

¹⁰²⁶ *Ryan v Petrus* 2010 (1) SA 169 (ECG) 175C.

The link between civil *iniuria* and hate speech was cemented in the case of *Tarloff v Olivier*.¹⁰²⁷ The matter concerned anti-Semitic remarks made to a Jewish boy, such as “you fucking Jew Boy,” “bloody Jew” and also referred to him as “the Antichrist.” Although the case was heard before the Equality Act came into force, the court recognised the impending statute and used the fact that hate speech was soon to be outlawed specifically as grounds relevant to determining a higher quantum of damages to be awarded in this case. *Tarloff* therefore confirms that delictual remedies for speech, such as *iniuria*, are still relevant and applicable and must be developed in line with the constitutional disapproval of hate speech.¹⁰²⁸

7.2.3 Discussion

The sphere of civil law is certainly applicable to matters where degrading, violent and humiliating racial slurs prompt litigants to seek legal redress for the violation of their rights. The civil law recourse to the law of defamation and *iniuria* offers certain and consistent law, upheld by an array of solid jurisprudence. In the contemporary *milieu* of tolerance, transformation and respect for fundamental rights, the discourse of racial hate and superiority is offered no refuge in the law, be it under constitutional or civil law. It is true that hate speech and defamation are not identical, but on rare occasion there can be common ground. With the generous definition of hate speech in the Equality Act, there is bound to be some correlation. After all, in the absence of any constitutional challenge to the Equality Act, hate speech can be considered to be mere offensive language that is racially charged in terms of the statute.¹⁰²⁹ This type of expression is closer to the realm of insult, or even defamation, if circumstances permit. The distinction between hate speech and civil remedies for insult and defamation is being slowly eroded by the entrenchment of the Equality Act’s understanding of hate speech.

7.3 Protection under the Criminal Law

¹⁰²⁷ *Tarloff v Olivier* 2004 (5) BCLR 521 (C).

¹⁰²⁸ Currie and De Waal *The Bill of Rights Handbook* 379 ft 104.

¹⁰²⁹ See 5.2.3 for a discussion on the effect and constitutionality of the Equality Act provisions on hate speech.

Similar protections for repute and dignity exist in the parallel system of criminal law to protect those who are the victims of hateful and violent speech. The domain of criminal law espouses comparable notions of the right to an untarnished reputation and dignity with the added considerations of a higher burden of proof and harsher public sanctions that criminal remedies carry. Burchell and Milton¹⁰³⁰ observe that it is respect and admiration that humans seek in others, therefore it is only logical that the law protects a person's reputation and self-esteem from "hatred," scorn or disdain.¹⁰³¹

7.3.1 Infringement of Reputation

The law of criminal defamation exists to safeguard against unlawful and intentional publication of that which results in harming another's reputation¹⁰³² and has a history of protecting society against sedition and blasphemy.¹⁰³³ Contemporary uses can, however, be found in degrading and hateful expression that is deemed serious enough to warrant criminal sanction.¹⁰³⁴ Burchell and Milton point out that criminal defamation is often viewed as an out-dated and draconian measure that has no place in the constitutional state and values freedom of expression.¹⁰³⁵ However, as we know, this particular fundamental right is not absolute.¹⁰³⁶

There are compelling arguments for the continued use of criminal defamation, despite the relatively few cases that are prosecuted.¹⁰³⁷ The law acknowledges the need for sanctions proportionate to the crime committed and therefore serious defamation should carry heavier sanction with the option of instituting criminal proceedings.¹⁰³⁸ *S v Hoho*¹⁰³⁹ confirms the constitutional merit in a charge of criminal defamation as it protects the right to human dignity in the personal and public appraisal of self-worth that criminal defamation

¹⁰³⁰ JM Burchell and J Milton *Principles of Criminal Law* 3ed (2005).

¹⁰³¹ Burchell and Milton *Criminal Law* 741.

¹⁰³² *Ibid.*

¹⁰³³ Burchell and Milton *Criminal Law* 742.

¹⁰³⁴ Burchell and Milton *Criminal Law* 742-744.

¹⁰³⁵ *Ibid.*

¹⁰³⁶ See 4.3.2.1 on the justifiable limitations to the right of freedom of expression.

¹⁰³⁷ Burchell and Milton *Criminal Law* 743-744; *S v Hoho* 2009 (1) SACR 276 (SCA) at para 14-22 has confirmed that the crime of defamation has not been abrogated by disuse and that prosecutions need not be limited to serious cases of defamation as the penalty incurred will duly reflect the severity of the crime.

¹⁰³⁸ Burchell and Milton *Criminal Law* 744; *R v Harrison and Dryburgh* 1922 AD 320 at 327.

¹⁰³⁹ *S v Hoho* 2009 (1) SACR 276 (SCA).

encompasses.¹⁰⁴⁰ It appears, however, that this legal remedy has yet to be expanded on beyond the political dissent and media realms and employed for hate speech cases but its application is indeed theoretically possible. After all, criminal defamation is geared towards expression that degrades the esteem in the eyes of others by exposing a person to “hatred, ridicule or contempt.”¹⁰⁴¹ Accordingly, criminal defamation is consonant with the dehumanising effect that hate speech is renowned for. Moreover, by virtue of the various civil cases of defamation, it is not outside of the realm of possibility that a criminal case could also be brought for similar factual matters. The only difficulty lies in the relative obscurity of the crime, which, no doubt, prompts the use of more established criminal remedies, such as *crimen iniuria*, which is backed by longstanding case law and therefore easier to prove.

7.3.2 Infringement of Dignity

Expression that constitutes hate speech under the Equality Act may also constitute *crimen iniuria* in the civil law.¹⁰⁴² The common law remedy of criminal *iniuria* is available to victims of an unlawful, intentional and serious impairing of their dignity.¹⁰⁴³ However, given the nature of the apartheid regime, the prosecution of *crimen iniuria* was often carried out in a decidedly ill-conceived manner. For instance, in *S v Tanteli*,¹⁰⁴⁴ the complainant sought redress for the use of words he deemed degrading and insulting. How the matter arose was that the appellant, an English-speaking shop owner, could not understand the complainant’s query made in Afrikaans and responded with “whatever you are speaking, speak to the kaffir” (indicating the black man employed in the shop who was proficient in the language). The Magistrate initially held that the remark was insulting and degrading to an Afrikaans-speaking person through the implication that the language was “so low that, if it is spoken, it must be spoken to a “kaffir.””¹⁰⁴⁵ On appeal, the court held that the racial epithet used was offensive to the shop employee but also to the Afrikaans language for the reasons found by the lower court.¹⁰⁴⁶ On the latter count only, the court re-examined the claim of *crimen iniuria* and

¹⁰⁴⁰ *S v Hoho* 2009 (1) SACR 276 (SCA) para 30; *Khumalo v Holomisa* para 25.

¹⁰⁴¹ *R v Shaw & Fennell* (1884) 3 EDC 323 at 324 in Burchell and Milton *Criminal Law* 744.

¹⁰⁴² Section 10(2) of the Equality Act provides for possible criminal prosecution of hate speech and therefore cements the notion that *crimen iniuria* and civil hate speech provisions are aspirationally complementary. See 5.2.2 on the discussion of section 10(2).

¹⁰⁴³ Burchell and Milton *Criminal Law* 746.

¹⁰⁴⁴ *S v Tanteli* 1975 (2) SA 772 (T).

¹⁰⁴⁵ *S v Tanteli* 1975 (2) SA 772 (T) 775A.

¹⁰⁴⁶ *S v Tanteli* 1975 (2) SA 772 (T) 774H.

ultimately held that sanction only extends to an attack on a personal level, not a linguistic one.¹⁰⁴⁷ A reading of this case is a shock to contemporary senses as it constitutes a completely misguided prosecution on behalf of the complainant when the black shop employee was in fact the victim of the *crimen iniuria*.¹⁰⁴⁸ The case does, however, serve to effectively illustrate changed attitudes on oppressive speech during the regime as compared to today. Case law such as *Tanteli* provides a measure with which to track the significant progress of hate speech perception and adjudication in South Africa. With a justiciable Bill of Rights, the public now has the means with which to defend their fundamental rights and a standard on which to judge any limitation thereof.

In fact, the remedy of *crimen iniuria* is so well established that it has prompted the question of the very necessity¹⁰⁴⁹ of the hate speech prohibition in section 10 of the Equality Act and proposed subsequent hate speech legislation.¹⁰⁵⁰ According to Haigh, limitations to freedom of expression are more than adequately covered by the common law crime of *crimen iniuria*, the sacrosanct status of dignity in the Constitution and by section 16(2) itself.¹⁰⁵¹ According to Haigh, there appears to be a duplication of effort in this aspect of the law, which is evident as *crimen iniuria* and hate speech regulation are both concerned with the intentional and serious impairing of another person's dignity.¹⁰⁵² Admittedly, hate speech cannot be equated outright with *crimen iniuria* in all situations but there is considerable common ground shared between the two.¹⁰⁵³ A brief foray into the sphere of *crimen iniuria* jurisprudence yields judgments being handed down for the use of words that are "offensive,"¹⁰⁵⁴ "degrading and humiliating"¹⁰⁵⁵ and "an unlawful aggression upon dignity,"¹⁰⁵⁶ which are consideration relevant to examining what constitutes the harm in hate speech. *S v Steenberg*¹⁰⁵⁷ confirmed

¹⁰⁴⁷ *S v Tanteli* 1975 (2) SA 772 (T) 775C.

¹⁰⁴⁸ See 5.2.4.2.2 for examples such as *Magubane v Smith*, *Mdladla v Smith*, *Khoza v Saeed* for the fact that the term "kaffir" is considered to be a *prima facie* instance of hate speech. The BCCSA has acknowledged that the use of "kaffir" constitutes *prima facie* hate speech in *Ferraz v TV2* Case No-39-A-2010. See 6.2.2.2.6 for further discussion on this decision.

¹⁰⁴⁹ Haigh *Washington University Global Studies Law Review* 195.

¹⁰⁵⁰ See 5.2.3 for an evaluation of the Equality Act.

¹⁰⁵¹ Haigh *Washington University Global Studies Law Review* 195.

¹⁰⁵² *Afriforum v Malema* 20968/2010 para 109; *HRCSA v SABC* 2003 (1) BCLR 92 (BCCSA) para 39; *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1299.

¹⁰⁵³ P De Vos "Should we criminalise racism in South Africa?" (16 July 2012) *Constitutionally Speaking Blog* <http://constitutionallyspeaking.co.za/category/defamation/> (Accessed 6 December 2012) notes, "there is no doubt that if somebody uses highly derogatory racial... terms to insult somebody else, s/he will leave him/herself open to prosecution for *crimen iniuria*."

¹⁰⁵⁴ *S v Steenberg* 1999(1) SACR 594 (N).

¹⁰⁵⁵ *Ryan v Petrus* 2010 (1) SACR 274 (ECG) 280I.

¹⁰⁵⁶ *Ibid.*

¹⁰⁵⁷ *S v Steenberg* 1999 (1) SACR 594 (N).

the conviction of a white man for calling a black man a “kaffir” as a serious a violation of his *dignitas* enough to warrant the crime of *iniuria*. *S v Mostert*¹⁰⁵⁸ saw the confirmation of the verdict of *crimen iniuria* for a policeman calling his subordinate a “swart vark” (black pig) and a “piccanin.” The court held that while these terms do not have the same impact as certain others, they are nonetheless offensive and a remnant of our past. In particular, the court found the label of “piccanin” to be especially undignified as it is not only connotes a racial dimension, but also infantilises an adult man, which is reminiscent of apartheid tendencies.

7.3.3 Discussion

While each *crimen iniuria* case is justified in its finding, one cannot but notice the overlap in terminology used to rationalise hate speech, *crimen iniuria* and defamation. This could be due to the fact that the right to dignity is so fluid a concept that it can be moulded to almost every situation, but the fact remains that *crimen iniuria* provides a long-standing and effective solution to hateful and violent speech. While it is noted that the elements of *iniuria* itself share both criminal and civil application, it is trite law that now every offence serious enough to found a civil suit will be serious enough to warrant criminal prosecution.¹⁰⁵⁹

7.4 The Interplay Between Statutory and Common Law Hate Speech Remedies

It has been established that hate speech offends on a variety of levels.¹⁰⁶⁰ Hate speech offends the right to equality, as addressed in the Equality Act, but also one’s dignity, as the common law acknowledges.¹⁰⁶¹ However, there remains to be a clear line drawn as to where the statutory and common law remedies coincide and ultimately differ and how they are meant to be complementary.

The common law already entrenches adequate and long-standing solutions for the misuse of language.¹⁰⁶² According to Haigh, limitations to freedom of expression are more than

¹⁰⁵⁸ *S v Mostert* 2006 (1) SACR 560 (N).

¹⁰⁵⁹ *Ryan v Petrus* 2010 (1) SACR 274 (ECG) 281F-G.

¹⁰⁶⁰ See 1.1 on the nature and effects of hate speech and to 4.3.2.1 for why it is protected against.

¹⁰⁶¹ See 4.3.3 for a discussion on equality and dignity as relevant considerations in the constitutional treatment of hate speech prohibitions.

¹⁰⁶² See 7.2 for applicable civil remedies and 7.3 for applicable criminal remedies under the common law.

adequately covered by the common law crime of *crimen iniuria*, the non-derogable status of dignity in the Constitution and by section 16(2) itself.¹⁰⁶³ This duplication, or even triplication of law,¹⁰⁶⁴ is wholly unsatisfactory and even unnecessary. *Crimen iniuria* is concerned with criminalising the unlawful, intentional and serious impairing of another person's dignity¹⁰⁶⁵ and, according to *Afriforum*,¹⁰⁶⁶ *SABC*¹⁰⁶⁷ and *Freedom Front*,¹⁰⁶⁸ the enquiry into hate speech turns precisely on this aspect. A brief foray into the sphere of *crimen iniuria* jurisprudence yields results of judgments being handed down for the use of words that are "offensive,"¹⁰⁶⁹ "degrading and humiliating"¹⁰⁷⁰ and "an unlawful aggression upon dignity"¹⁰⁷¹ which are very familiar when examining what constitutes hate speech. This could be due to the fact that the right to dignity is so fluid that it can be moulded to almost every situation, but the fact remains that *crimen iniuria* is capable of providing recourse to victims of hate speech. While it is noted that the elements of *iniuria* itself share both criminal and civil application, it is trite law that now every offence serious enough to found a civil suit will be serious enough to warrant criminal prosecution.¹⁰⁷² Section 10(2) of the Equality Act in fact permits hate speech cases to be referred to the relevant Director of Public Prosecutions for criminal proceedings to be instituted. Thus, the issue of duplication is certainly relevant. There can be a simple explanation in that the Equality Act intends the civil remedy it provides to be complementary with the criminal sanctions in the common law, however, with the possible impending criminalisation¹⁰⁷³ of hate speech in the proposed legislation and policy,¹⁰⁷⁴ there needs to be further clarity on this issue.

A further concern that arises in considering criminal and civil remedies as complementary to hate speech provisions is the issue of intention in the statutory and common law provisions. As explored, the common law requires that dignity be impaired intentionally, whereas it is

¹⁰⁶³ Haigh *Washington University Global Studies Law Review* 195.

¹⁰⁶⁴ Triplication of law is a relevant consideration one takes into account that the criminal law realm is not even certain on the lines between *crimen iniuria* in the criminal and civil sphere, as noted by Burchell and Milton *Criminal Law* 747.

¹⁰⁶⁵ Burchell *et al Criminal Law* 746.

¹⁰⁶⁶ *Afriforum v Malema* 20968/2010 para 109.

¹⁰⁶⁷ *HRCSA v SABC* 2003 (1) BCLR 92 (BCCSA) para 39.

¹⁰⁶⁸ *Freedom Front v SAHRC* 2003 (11) BCLR 1283 (SAHRC) 1299.

¹⁰⁶⁹ *S v Steenberg* 1999(1) SACR 594 (N).

¹⁰⁷⁰ *Ryan v Petrus* 2010 (1) SACR 274 (ECG) 280I.

¹⁰⁷¹ *Ibid.*

¹⁰⁷² *Ryan v Petrus* 2010 (1) SACR 274 (ECG) 281F-G.

¹⁰⁷³ See M Vosloo "When Political Expression Turns into Hate Speech: Is limitation Through Legislative Criminalisation The Answer?" (2011) University of South Africa Master of Laws Thesis generally on the view that the criminalisation of hate speech is the best course of action in addressing hate speech in South Africa.

¹⁰⁷⁴ See 5.3-5.4 hate speech legislation and suggested hate crimes policy.

framed in the Equality Act as that which “could be reasonably be construed to demonstrate a clear intention” to be hurtful, harmful or hateful. This distinction is relevant if one is to regard *crimen iniuria* and civil remedies under the Equality Act as being complementary.¹⁰⁷⁵ The “loose form of *mens rea*”¹⁰⁷⁶ in the Equality Act, compared with the stringent intention element in the common law creates an unequal burden of proof which, again, requires that further clarity is needed on the relationship between civil and common law provisions on the regulation of speech.

However, the existence of hate speech-specific provisions in statute undeniably entrench the notion that hate speech is unacceptable. In a country such as South Africa, it is understandable and important that such an overt act as promulgating legislation to deal with hate speech exclusively is carried out. With the conflicted use and perception of language that abounds, it is certainly necessary and even advisable to formalise a stance on hate speech and not merely rely on common law remedies for the general misuse of language encompassed under civil and criminal remedies for *iniuria* and defamation. As demonstrated, hate speech can conceivably be addressed by common law solutions on language, but *iniuria* and defamation cannot, and should not, fit into hate speech provisions, if one is to be true to the nature of hate speech and not in the definition espoused in the Equality Act.¹⁰⁷⁷ Therefore, a clear line needs to be drawn in terms of where hate speech stands in the law before society can be expected have certainty on the use and perception of language in the new dispensation, not to mention certainty on the nuances of hate speech litigation.

7.5 Concluding Remarks

It is clear that there is significant overlap in the common law protection against hateful, scornful and degrading language and the concept of hate speech as understood today.¹⁰⁷⁸ It is unsurprising that there is considerable common ground in protecting against certain, impermissible expression as the right to dignity is protected consistently in the Constitution as well in the entrenched right to reputation and self-esteem. But, the question remains as to

¹⁰⁷⁵ See 5.2.2-5.2.3.3 on the provisions of the Equality Act for criminal proceedings to be instituted for hate speech under section 10(2) of the Act.

¹⁰⁷⁶ Teichner 2003 *SAJHR* 380.

¹⁰⁷⁷ See 5.2.2 for the Equality Act definition of hate speech.

¹⁰⁷⁸ See the Equality Act definition of hate speech in 5.2.2 as well as the possibility of hate speech violating the right to dignity under the provisions of the Constitution as discussed in 4.3.3.

whether the result is unnecessary duplication or the creation of complementary remedies in the civil and criminal spheres. Subsidiary hate speech legislation is supposed to clarify the bounds between this specific remedy and the broader recourse that delict and the criminal law offer. As such, it is predictable that litigants and practitioners opt for the safer and more established remedies that the common law can deliver rather than the uncertain and constitutionally ambiguous provisions of the Equality Act.¹⁰⁷⁹ The very fact that the common law is more accessible is problematic if the design of the Equality Act is to provide accessible hate speech specific measures and redress through the Equality Courts. After all, civil or criminal *iniuria* permits claims for language that only need insult or offend, whereas hate speech generally requires more than mere hurt feelings, if a more faithful understanding of hate speech is to be consulted, as I suggest.¹⁰⁸⁰ The Constitution envisions hate speech claims to be in the ambit of expression that advocates hatred and incites harm: this is a far more stringent requirement than that of mere *iniuria*. The danger, therefore, is that hate speech prohibitions become watered down in this respect through the formulation in section 10 to potentially constitute nothing more than the codification of *iniuria* or defamation in the Equality Act through its consideration of “hurtful” or “harmful” language as hate speech.¹⁰⁸¹ Perhaps the difficulty in harmonising the concept of a statutory and common law protection of hate speech is in the fact that *dignitas* and *fama* are separate common law entities, whereas the Constitutional Court does not draw a distinction in relation to the constitutional protection of dignity.¹⁰⁸² Be that as it may, for the present purposes, the common law can be said to offer additional complementary legal protection for victims of hate speech.

¹⁰⁷⁹ This statement is based on informal conversations with practitioners and law lecturers as to the possible duplication in the law governing racially hateful language in South Africa (circa August 2012).

¹⁰⁸⁰ See 1.1 for a definition of hate speech, as well as 2.3 for an argument on how hate speech is a manifestation of violent language.

¹⁰⁸¹ See 5.2.3.1-5.2.3.3 for an assessment of section 10.

¹⁰⁸² M Loubser, R Midgley (eds), A Mukheibir, L Niesing and D Perumal *The Law of Delict in South Africa* (2010) 329.

CHAPTER 8

MEASURING UP THEORY WITH PRACTICE: THE SUITABILITY OF HATE SPEECH PROVISIONS IN RELATION TO THE NATURE AND REALITIES OF LANGUAGE

8.1 Introduction

It is not the question of whether, but how best to introduce and apply hate speech provisions that plagues most modern democratic states. The Cohen Report from Canada best articulates this difficulty:

“...(it is) the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society, from time to time, draws lines at the point where the intolerable and impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of the injury to the community itself and to individual, members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.”¹⁰⁸³

It is the power of language to maim and dehumanise that mandates the regulation of expression but the inherent fluidity and uncertainty of language makes this a daunting and difficult task. Violent language is a basic ingredient in the process of dehumanising and it has been used extensively to expedite the massacre of millions of people in contemporary memory alone. The rudimentary function of language is, of course, to communicate and as such, it is the primary medium to articulate notions of racial inferiority, disseminate hateful propaganda through media, order annihilation and justify genocide in the name of “ethnic cleansing” or a “final solution.” Hate speech allows for the entrenchment of racist designs which aggravate existing and suppressed racism.¹⁰⁸⁴ There is thus clearly a need to regulate speech so as to outlaw hate speech in a manner that allows for the realisation of the right to

¹⁰⁸³ Opening paragraph of Report of the Special Committee on Hate Propaganda in Canada (also referred to as the Cohen Committee). Excerpt taken from D Dyzenhaus, S Reibetanz Moreau and A Ripstein *Law and Morality: Readings in Legal Philosophy* (2007) 860.

¹⁰⁸⁴ Motale and Ramaphosa cited in Devenish *Constitution* 100.

free expression, but also achieves the right to equality and dignity. Hate speech prohibitions expose the truly complex task of regulating expression through the medium of language and creating measures that are suitable to the South African experience. The preceding chapters, setting out relevant hate speech prohibitions, detail the state of the current and proposed approach to hate speech, but in this chapter the attention is turned to the suitability of these measures in relation to the realities of language.

8.2 What Hate Speech Provisions Reveal

8.2.1 Incongruous Interpretations of the Concept “Hate Speech”

What the various legal frameworks examined in the preceding chapters reveal is that there is no coherent understanding of hate speech in contemporary South Africa. This is no doubt due to the fact that language is a blunt instrument that is being used to express emotive concerns and sensitive racial dynamics.¹⁰⁸⁵ This is indicative of the fallibility of language being used as a means of regulate language, but the truth is that there is no alternative method if we seek to espouse a standard of constitutional and unconstitutional expression in the new era. However, it is with this inherent difficulty of language in mind that one must draft and apply hate speech provisions.

The Constitution mirrors international norms in that it excludes language that not only advocates hate but also results in some form of harm from the ambit of free expression.¹⁰⁸⁶ The definitional elements of hate and harm as a by-product of the offending speech are thus meant to filter down into subsequent legislation and policies regulating speech and prohibiting hate speech. This has been achieved to varying degrees. In this Equality Act and the proposed legislation, the language used to conceptualise hate speech is far-reaching, with hate speech defined to include “hurtful” speech, resulting in the failure to distinguish hate speech from mere offensive remarks.¹⁰⁸⁷ On the other side of the spectrum there is media regulation. In the media sphere, the concept of hate speech is linked to the constitutional

¹⁰⁸⁵ See 2.5 on regulating language.

¹⁰⁸⁶ See 4.4 for an evaluation of constitutional hate speech provisions with international norms.

¹⁰⁸⁷ See the provisions of the Equality Act discussed at 5.2.2 and a detail of hate speech legislation at 5.2 generally. An evaluation of both can be found at 5.6. The evidence of this erroneous definition and the conceptual difficulties it creates can be found in the hate speech cases of the Equality Courts as laid out in 5.2.4.2 generally. However, I return to this point of a misguided and misaligned definition of hate speech below.

standard on the subject.¹⁰⁸⁸ The ICASA, BCCSA and Press Codes all define hate speech as the “advocacy of hatred based on race, ethnicity, gender or religion that constitutes an incitement to cause harm.”¹⁰⁸⁹ The ICASA and Press Codes mention hate speech by name, while it is subsumed under the heading of “violence” in the BCCSA Code. All three depictions of the concept are true to the nature of hate speech as violent language¹⁰⁹⁰ and it is certainly notable that mere codes of conduct are more faithful to the constitutional standard than the legislature has been in its formulation of hate speech that is vague and overly broad.¹⁰⁹¹ The formal understanding of hate speech in the sphere of media regulation is generally constitutionally compatible but the practical results of the application of the broadcasting codes demonstrate that the concept of hate speech is still very much a moving target.¹⁰⁹²

The common law, on the other hand, does not prohibit hate speech explicitly.¹⁰⁹³ Its provisions are only relevant in the larger project of regulating expression in that it permits some leeway for that expression that goes the extra mile of damaging reputation and dignity and offers those afflicted the opportunity to seek legal recourse, providing they fulfil the requisite elements of each civil wrong or elements of the common law crime.¹⁰⁹⁴ As such, the common law provides a form of middle ground between hate speech prohibition and infringements of personality rights¹⁰⁹⁵ or violations of self-worth.¹⁰⁹⁶ Accordingly, the common law does not profess to prohibit hate speech specifically but if one were to mould it to such an endeavour, one could conclude that it is broad enough to sanction against advocacy of hate and incitement of harm as per the constitutional definition,¹⁰⁹⁷ as well as according to the wide definition in the Equality Act.¹⁰⁹⁸ However, the common law would not be the most direct or appropriate means in which to address a pure hate speech complaint. *Crimen*

¹⁰⁸⁸ See the ICASA, BCCSA and Press Code definitions of hate speech at 6.2.1.1.1, 6.2.2.1.1 and 6.3.1.1.1, respectively.

¹⁰⁸⁹ See the ICASA, BCCSA and Press Code definitions of hate speech at 6.2.1.1.1, 6.2.2.1.1 and 6.3.1.1.1, respectively.

¹⁰⁹⁰ See the definition of hate speech in 1.1 and the argument to view hate speech as violent language in 2.3.

¹⁰⁹¹ See the evolution of the Equality Act’s hate speech provision at 5.2.3 generally.

¹⁰⁹² See the cases of the BCCSA and their consideration of hurtful and harmful remarks as hate speech at 6.2.2.2 generally.

¹⁰⁹³ See the common law provisions on language at 7.2 and 7.3.

¹⁰⁹⁴ *Ibid.*

¹⁰⁹⁵ See the civil law remedies at 7.2.

¹⁰⁹⁶ See the criminal law remedies at 7.3.

¹⁰⁹⁷ See 4.3.2.1.

¹⁰⁹⁸ See 5.2.2.

iniuria, in particular, has the potential to be used in place of civil remedies for hate speech¹⁰⁹⁹ for the reason that “some insults to the dignity of a person are so gross as to evoke public outrage and to call for public denunciation through the criminal law.”¹¹⁰⁰ One could easily tie the rationale for the crime of *iniuria* to that which is the basis for prohibiting hate speech in that both result in grave damage to one’s dignity and demand redress through public channels.

However, the most problematic, or at least controversial, interpretation of hate speech lies in the first and only legislative ban on hate speech.¹¹⁰¹ At first glance, section 10 of the Equality Act contains the basis of hate, intention and harm that are relevant considerations,¹¹⁰² but the section construes these aspects in such a fashion as to create confusion and to provide that harm need not ensue from the expression it prohibits. The constitutional formulation of the hate speech ban foresees that some form of harm as a consequence, be it physical or psychological, that will ordinarily flow from the advocacy of hate in its provision for “incitement of harm” to not only the individual, but also to the fabric of society in general.¹¹⁰³ It is for this reason that the hateful expression is banned.¹¹⁰⁴ The practical implications of this conflicting conceptual issue is that the case law of the Equality Courts will not be a faithful interpretation of hate speech as established by the Constitution. What is more, this incongruent definition of hate speech has filtered down to other fora, such as the broadcasting tribunals. The constitutional treatment of harm is firmly established and widely construed, yet this vital element of any hate speech complaint has been even further diluted and conflated with notions of fear¹¹⁰⁵ and hurt.¹¹⁰⁶ Section 16(2)(c) of the Constitution clearly establishes that the harm that abounds from hate speech is the reason for its condemnation in the law, yet if the concept of harm is misunderstood or even absent from any hate speech enquiry, then a suitable or consistent treatment of hate speech is not possible.

¹⁰⁹⁹ See on the potential overlap between hate speech and *crimen iniuria* as discussed at 7.3.2-7.3.3.

¹¹⁰⁰ Burchell and Milton *Criminal Law* 747.

¹¹⁰¹ See 5.2.2.

¹¹⁰² Relevancy is judged in terms of international law mandates and constitutional guarantees, as discussed in 3.3.5 and 4.3.2.1, respectively.

¹¹⁰³ See 4.3.2.1 for an outline on the manifestations of “harm” contemplated in the constitutional understanding of the term, in particular the discussion of *R v Keegstra*. This Canadian case establishes that the harm in hate speech not only contemplates physical harm, but also psychological harm to the individual as well as harm to society at large where such physical or mental anguish occurs.

¹¹⁰⁴ See 1.1 on the nature of hate and why it is important that hate speech is outlawed.

¹¹⁰⁵ See *Human Rights Commission of South Africa v SABC* 2003 (1) BCLR 92 (BCCSA) and the discussion on it at 6.2.2.2.7.

¹¹⁰⁶ See *Mdabe v Reid* (09/2004) [2004] ZAEQC 2 (1 June 2004) for hate speech as “hurtful;” see *Smith v Mgoqi* (60/2007) [2007] ZAEQC 2 (23 November 2007) for offensive language being classified as hate speech; see *Magubane v Smith* (01/2006) [2006] ZAEQC 5 (3 March 2006) and *Mdladla v Smith* (40/05) [2006] ZAEQC 3 (3 March 2006). See the discussion of these cases at 5.2.4.2.2.

Another issue that emerges is that the hate speech prohibitions do not mirror the grounds that are reflected in the Constitution, namely an advocacy of hatred based on race, religion, ethnicity or gender. Section 10 effectively offers an open list that once again dilutes the seriousness of systemic hate speech on four main grounds with mere insult or discrimination based on a variety of lesser bases. Section 10 thus takes the concept of malleable language too far in that it provides for any permutation of insult to be banned as hate speech.¹¹⁰⁷ Hate speech as violent language is more than mere insult: it is language that violently divides a population and inflicts such an assault on their sense of self-worth and worth to the community that they belong to that it renders them targets for not only derision but damage and even extermination.¹¹⁰⁸ It is vital that hate speech be understood to be separate and different from insult but the cases based on the Equality Act and the Media Codes reveal that as South Africans, we are still struggling with this distinction.¹¹⁰⁹

8.2.2 The Challenge of Hate Speech Regulation

It is not only the malleability of language that makes outlawing hateful language a complicated task, but the history of language use in this country that creates considerable tension. We are able to ply language to conform to reconciliatory policies or to spreading hate but the new democratic dispensation dictates that we favour the former and reject the latter, while respecting freedom of expression, within constitutional boundaries.¹¹¹⁰ Literary theorists and social scientists would have it that this ability to shape language in any way we choose must be viewed as part of the beauty of expression and that language should be unbridled in its employment to craft ideas and shape expression.¹¹¹¹ As lawyers, we prefer structure and norms to dictate the bounds of expression that are guided by transformative

¹¹⁰⁷ See the evaluation of section 10 at 5.2.3 generally.

¹¹⁰⁸ See the discussion of violent language at 2.2.1 and hate speech as violent language at 2.3.

¹⁰⁸² See 5.2.4 on the cases based on the Equality Act generally and the media regulation of hate speech as seen the decisions outlined in 6.2.1.2, 6.2.2.2 and 6.3.1.2.

¹¹¹⁰ See 2.4 on the South African challenge with language.

¹¹¹¹ Baines in Drewett and Cloonan (eds) *Popular Music Censorship in Africa* 61. Writes that hate speech should not be outlawed so that robust dialogue can be fostered on important social issues, whereas the current stance is that a wide berth must be given to such discourse. Limiting certain categories of speech, the historian writes, is reminiscent of apartheid-era censorship.

constitutional values and fundamental rights, as is one of the hallmarks of the rule of law.¹¹¹² Lawyers prefer to pre-empt the harm caused by hate speech by regulating expression with reference to explicit and definite criteria so as to ensure certainty. I do not suggest that we should live according to a list of banned words or expression in order to achieve transformation, nor do I propose that permitting any and all speech is the key to reconciliation and meaningful social change. Suitable measures to regulate speech are necessary, not because people cannot adhere to their own code of morality but because of the fluid nature of language. What I offer is that hate speech should be viewed in a manner so as to combine the best of both worlds: maintain speech regulations but use our knowledge of the nature of language in assessing their suitability and efficacy. There will undoubtedly be difficulties perpetuated by the South African context and the conflict is situating language and assessing what expression is permissible and appropriate to the new mandate of transformative constitutionalism.

8.3 The Paradox Playing Out

What the various legal frameworks concerned with prohibiting hate speech all consistently show is that hate speech is a force that cannot be tolerated in the new South Africa. It is a relic of the past that flouts considerations of equality and dignity that symbolise the commitment to transformation. However, it is not as simple as replacing hateful expression with healing words to eradicate hate speech and usher in a new era.

The Constitution makes a good and vital step in declaring the stance on the limitations of expression but South African law is still grappling with its understanding of hate speech. Section 16(2)(c) of the Constitution is the definitive stance on what is constitutionally offensive to express in South Africa.¹¹¹³ Rather than apartheid-era blanket censorship, the Constitution now seeks to limit only that expression that will not enhance transformation, and that will in fact rehash apartheid-era behaviour and once again disseminate violent oppression and racial hatred.¹¹¹⁴ The current exclusions in section 16(2)(c) enhance democracy and the attainment fundamental rights of human dignity and equality. The constitutional provisions

¹¹¹² *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 108 entrenches the notion that legal certainty is a crucial tenet of the rule of law, which guides the South African democratic state, along with constitutional supremacy, per section 1 of the Constitution of the Republic of South Africa.

¹¹¹³ See 4.3.2.1.

¹¹¹⁴ *Islamic Unity Convention v Independent Broadcasting Authority* para 33.

are “specific and defined”¹¹¹⁵ exclusions, with the added the possibility of extending constitutional condemnation to analogous areas of expression, provided they pass the stringent section 36 limitations analysis.¹¹¹⁶ It is this measure of definition and focus that needs to permeate through all subsequent and relevant hate speech legislation so as to ensure that all measures are constitutional. What has been established in the investigation thus far is that this is not entirely the case.

The Constitution first lists protected categories of expression, followed by those that are not, namely hate speech.¹¹¹⁷ I view the constitutional formulation to yield categories of speech that are *prima facie* protected insofar as they do not equate to hate speech, which will receive no pardon in the new constitutional era. This is not to be confused with the notion of creating a list of prohibited words: rather, language that advocates hate and incites harm on listed grounds will not be tolerated in the constitutional state. In carrying out the hate speech test in terms of section 16(2)(c), any artistic, academic, press or scientific freedom will thus be upheld as the harm requirement will not be fulfilled if the intention of the speaker is to engage *bona fide* in the above endeavours. The fact that expression must pass both legs of the test is the safeguard to protecting free speech. I acknowledge that my reading of section 16 could be inverted so as to result in hate speech being *prima facie* banned, insofar as it does not equate to academic, artistic, press or scientific expression. However, owing to the fact that the inclusions to the right to free expression precede the exclusions, I posit that the most logical and constitutional manner in which to interpret section 16 is in a way that furthers freedom of expression. Therefore, language is *prima facie* deemed protected but only insofar as it does not fall foul of the provisions of subsection 2. In this reading of the provision, freedom of expression is promoted but hate speech is condemned for constitutional disparity.

The problem of how hate speech is dealt with in the Equality Act is not as easily reconciled. By incorporating section 12 by reference, a possible list of defences is created that leads to varied interpretations.¹¹¹⁸ It is unclear whether section 12 refers to unfair discrimination only and gives some context to applying section 10 for hate speech cases, or whether section 12 has been negligently drafted and is conflating considerations of discrimination with hate

¹¹¹⁵ *Ibid.*

¹¹¹⁶ *Islamic Unity Convention v Independent Broadcasting Authority* para 31.

¹¹¹⁷ See 4.3.2.1.

¹¹¹⁸ See 5.2.2 on the provision of section 10 and to 5.2.3 for an evaluation thereof.

speech.¹¹¹⁹ In any event, the list of protected speech in the Equality Act extends beyond the categories listed in the Constitution, which creates a conceptual issue in as far as freedom of expression is concerned. Despite the issues section 12 presents for section 10, reading the provision in line with the Constitution would amount to promoting the right to free expression first and only then limiting speech, should hate speech be present.

The biggest problem with section 10, however, comes with its broad and vague considerations of hate speech. Section 10 of the Equality Act blurs the line between offense and hate speech by prohibiting hateful, harmful or hurtful speech and this new and overly broad definition impinges on the right to free expression. Further, the Equality Act stipulates the fault requirement as follows: a reasonable person could (or might) conceivably view the promotion of hurt as representing an intention to create harm.¹¹²⁰ This complex and unworkable construction of section 10 confuses the issue of what hate speech really is and does not allow for a clear method in which to regulate speech. This is also a prime example of the fallibility of using language to regulate language.¹¹²¹ Through dense and verbose construction, the act of engaging in hate speech and the understanding of this concept is diluted and rendered incoherent. This dilution is too broad and too vague to pass constitutional muster.¹¹²² This uneasy list of possible defences, coupled with the overly broad definition on hate speech in section 10 strays from the constitutional lead and creates more questions than it offers a consistent stance on hate speech. There is already a tension in the use and experience of language in South Africa as a vehicle for harm as well as healing¹¹²³ that is meant to be alleviated through sound and consistent legal provisions dictating the bounds of expression in the new dispensation. Section 10 lowers the threshold significantly and is decidedly vague, the consequence of which will be vengeful or misguided litigation.¹¹²⁴ The Equality Act's unquestionably noble attempts to adhere to international law and provide a tangible pledge to

¹¹¹⁹ See 5.2.3 generally for an evaluation for the Equality Act measures.

¹¹²⁰ See an earlier discussion on this point in 5.2.2 and 5.2.3.

¹¹²¹ See 2.5 on regulating language through language.

¹¹²² Haigh *Washington University Global Studies Law Review* 202. Also see this view expressed at 5.2.3.1.

¹¹²³ See 2.4.3 on the conflicted use of language in South Africa.

¹¹²⁴ S Teichner "The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2002: the Good, the Bad and the Ugly" (2003) 1 *SAJHR* 349 at 354 cautions that vengeful and frivolous litigation may ensue. I posit that the vague provisions of the Equality Act also encourage misguided litigation. It is for this reason that litigation such as the "coconut" affair, *Mdabe v Reid* and *Smith v Mgoqi* occurs. While "coconut" clearly lacks the requisite hatred and harm of hate speech, the Equality Act creates the possibility for litigants to bring such misguided claims to the courts and tribunals. *Mdabe v Reid* and *Smith v Mgoqi* are examples of "hurtful" and "offending" speech, respectively, that have actually been ruled as hate speech by the Equality Court under section 10. The former condemned speech with a racial innuendo as hate speech and the latter an insult as prohibited speech under section 10.

safeguard against hate speech and discrimination are commendable but practically speaking, section 10 of the Equality Act is an unnecessary¹¹²⁵ supplement to section 16(2)(c) if it does not serve to further enhance constitutional standards and norms, fails to accurately convey the nature of hate speech¹¹²⁶ and thereby achieves little in concretising what the new standards for expression in society are.¹¹²⁷ This trend is replicating in the proposed hate speech legislation and policy.¹¹²⁸

The approach in the media is consistent in its definition of hate speech but diverges in as far as possible defences to hate speech go. The broadcast codes invert the approach taken by the Constitution in this case: they first list prohibited expression followed by “exclusions” to these categories. The approach of the Constitution, in my reading of it, lists protected speech first and implies that expression will only be limited if it amounts to hate speech.¹¹²⁹ The Broadcast Codes imply that hate speech is banned but certain expression will always be pardoned, which could be mistakenly construed as giving the media sector increased freedom of expression. This disparity could be remedied by taking the cue from *Pillay* in reading the Codes down in a constitutional manner so as to attain a constitutionally compatible result.¹¹³⁰ What is more, the list of protected speech in the Broadcast Codes goes further than that listed in section 16(1) of the Constitution by protecting opinion, argument and discussion on religion, belief, conscience or public interest topics. This too creates the impression that media freedom outranks considerations of academia, science or individuals exchanging information and ideas, which cannot be constitutionally viable. It is vital that the Broadcast Codes reflect that they mean because at the moment there is certainly room for a broader interpretation of the right to press freedom than that is outlined in section 16 of the Constitution.

Venter¹¹³¹ views the broadcasting industry’s conflicting view on the defences to hate speech to be due to the fact that race and racism will always be an issue of public interest and as such, related content will be always be broadcast, even if it contains instances of hate speech.

¹¹²⁵ Haigh *Washington University Global Studies Law Review* 205.

¹¹²⁶ See the definition of hate speech in 1.1.

¹¹²⁷ Haigh *Washington University Global Studies Law Review* 209.

¹¹²⁸ See 5.3 and 5.4 for discussion on the Hate Speech Bill and the proposed hate crimes policy, respectively.

¹¹²⁹ See the point made earlier in this section.

¹¹³⁰ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40 holds that a court or tribunal must read such a provision down in conformity with the Constitution.

¹¹³¹ Venter 2007 *Ecquid Novi: African Journalism Studies* 40 notes that the BCCSA frequently refers to the *Jersild* case in its decisions.

Venter believes the South African media have taken their cue from the widely cited foreign case of *Jersild v Denmark*,¹¹³² where a Danish journalist produced a controversial television exposé on a right-wing extremist movement that had gained considerable notoriety in the late 1980s. In the course of the programme, those interviewed engaged in hate speech concerned with the view that black people were not human but primate, and that immigrants were unwelcome in Denmark. Jersild was accordingly convicted in the Danish courts of aiding and abetting racist and xenophobic propaganda through his role in producing the television programme but was vindicated at the European Court of Human Rights for expressing his right to freedom of expression as a journalist.¹¹³³ In the ECHR, it was held that the journalist's right to freedom of expression outweighed any hate speech prosecution as it was his intention to highlight racism in Denmark, which a viewer would be able to easily recognise, given the context of the programme.¹¹³⁴ The ECHR pointed out that such reporting is a way in which the press fulfils its mandate of "public watchdog" and thus punishing a journalist for performing his job would not be in the public interest.¹¹³⁵ Accordingly, Jersild's right to impart ideas under freedom of expression was infringed and the court granted the journalist damages to this effect.

I am of the view that the disparity in approach in the broadcast media sector it is due to the fact that the format of language at play in the media sector context is different, compared to any other sector.¹¹³⁶ The Codes reign in broadcasters as transmitters or communicators of others' impermissible expression. Considerations of intention to advocate hate and incite harm therefore must fall away when a neutral third party is broadcasting another's message of hate speech as part of a *bona fide* newsworthy item.¹¹³⁷ There is the further element of live broadcast to consider, where a broadcaster may be liable for the spontaneous outbursts of a

¹¹³² *Jersild v Denmark* (15890.89) 23 September 1994 (ECHR).

¹¹³³ The European Court of Human Rights is charged with interpreting and enforcing the European Convention on Human Rights. Its judgments are binding on all signatories to the Convention and the court hears cases brought by such states as well as individual applications. The ECHR approach generally considers the wider, social ramifications of hate speech as well as promoting multiculturalism and tolerance to be far more decisive than upholding an individual's right to free speech. Article 10(1) of the Convention provides the right to freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 10(2) declares that this right carries with it duties and responsibilities and thus may be subject to formalities, conditions, restrictions or penalties prescribed by law and are necessary in a democratic state, in the interest of... the protection of the rights of others. It is in this framework that hate speech is prohibited by the ECHR.

¹¹³⁴ *Jersild v Denmark* (15890.89) para 34.

¹¹³⁵ *Jersild v Denmark* (15890.89) para 35.

¹¹³⁶ See the categories of expression dealt with by the BCCSA from 6.2.2.2.1-6.2.2.2.7, for example, with each requiring different considerations as to whether they were to be considered hate speech.

¹¹³⁷ See the BCCSA cases concerning hate speech in news programming at 6.2.2.2.2.

guest or presenter¹¹³⁸ in manner that evokes the sentiment of “shooting the messenger.”¹¹³⁹ However, where hate speech occurs in the act of a journalist voicing their own opinion and using hate speech to do so, then language is used in a very different way in the media and a finding of hate speech is warranted.¹¹⁴⁰ This is in sharp contrast to the careful approach of members of the print media in the nature of publishing newspapers and magazines, as opposed to live television or radio.¹¹⁴¹ Bearing this in mind, it is understandable why the Broadcasting Codes are written in such a manner so as to afford the media as much freedom as possible. Perhaps the “one size fits all” approach that we seek in hate speech regulation does not suit the broadcast media context and prevents a consistent application of the Codes. A further hindrance to securing a consistent approach to hate speech in this sector is that the complaints by the audience not only demonstrate a fundamental misunderstanding of the concept of hate speech and but certain adjudicators also conflate hate speech with the notion of offense or remarks in bad taste. What is more, sanctioning a broadcaster or an editor only addresses the symptom of the larger problem of hate speech.¹¹⁴²

8.4 Some Practical and Theoretical Hurdles to Achieving Suitable Hate Speech Measures

8.4.1 The Unanswerable Question of What Hate Speech Is

The question of what hate speech is and how to best regulate expression poses age-old questions but the South Africa experience adds a new dimension to this dilemma.¹¹⁴³ The conflicting use and role of language in South Africa is preventing a consistent understanding of hate speech, as we battle with leaving past violent expression behind.

¹¹³⁸ In *South African Jewish Board of Deputies v Cape Talk* Case No-35-1999, the BCCSA found the broadcaster to have contravened the Code where a right-wing extremist was interviewed on air and voiced anti-Semitic remarks and hate speech. The Commission found the broadcaster liable as the show’s presenter did not balance the remarks of the guest. See 6.2.2.2.1 for a discussion of this case.

¹¹³⁹ In *Darne v SAFM* Case No-06-2010, the BCCSA held that the broadcaster did not transgress the hate speech ban by airing a portion of the “Shoot the Boer” chant as it was within its mandate to inform the public. The BCCSA reasoned that this precluded any finding of “incitement” of harm on the part of the broadcaster. In *Kroese v SABC 2* Case 50-A-2010, the BCCSA similarly found that the broadcaster had not transgressed the Code by having its presenter read out a controversial email on air. It must be noted, however, that the material read out was more offensive than it was an instance of hate speech. See 6.2.2.2.2.

¹¹⁴⁰ See the opinion cases heard by the BCCSA at 6.2.2.2.1.

¹¹⁴¹ See 6.4 on the differences in disseminating broadcast and print content.

¹¹⁴² See an earlier discussion on this point at 6.4

¹¹⁴³ See 2.4 on the new tension that emerges in the use of language in South Africa.

Obtaining a comprehensive definition of hate speech is an insurmountable task given the layers of emotion, history and dehumanisation that it evokes but as lawyers, we strive for consistency in approach to ensure equality before law and non-arbitrariness. As Waldron notes, a society torn between values will interpret and apply vague provisions in different ways.¹¹⁴⁴ With South Africa conflicted as to how to use and perceive language, it is vital that the legal framework be as clear as possible on how language is to be regulated. The legislation, media codes and common law all have differing takes on how this is to be achieved but given that language is as malleable as it and expression is riddled with nuance and considerations of context, we will never be completely satisfied or wholly unswerving in our treatment of it. We will never find that elusive “tick list” for prohibited speech but, still, we can strive for a measure of consistency at the very least so as to achieve fairness and legal certainty.

8.4.2 The Quandary of How and Where to Litigate Hate Speech Complaints

Govender aptly observes, “rights now mean what the courts say they mean.”¹¹⁴⁵ Inherent in this statement is the value we all attach to the word of the courts, as opposed to tribunals or other comparable bodies.¹¹⁴⁶ The fact that the familiar route of consulting the SCA or Constitutional Court decisions cannot be taken with regard to hate speech makes this branch of law particularly difficult to get a handle on and to discern familiar trends. The reality is that most of the decisions, at least those that are accessible, are being arrived at by fora whose findings have little legal force, and sometimes not even binding on the parties involved. This is compounded by the fact that an array of hate speech-related law exists, making it hard to discern which is applicable, let alone providing clarity on the issue of which forum to select to approach for a ruling.¹¹⁴⁷

The Equality Act is mostly applicable in instances where complaints of hate speech arise as it is deemed to be the subsidiary legislation on the issue of hate speech. Its provisions, however, are, as pointed out in Chapter 5, fraught with difficulty. The process of the Equality

¹¹⁴⁴ J Waldron “Vagueness in Law and Language: Some Philosophical Issues” (1994) 82 *California Law Review* 509 at 527.

¹¹⁴⁵ Govender 2007 *SAPR/PL* 208.

¹¹⁴⁶ See 5.2.4.3.2 on the SAHRC as a body that is not a court nor tribunal and 6.4 on the status on the media regulatory bodies as tribunals.

¹¹⁴⁷ See 5.2.4.1 on the problem of jurisdiction with the Equality Act.

Court, however, is simple and cost-effective but it is not used very often.¹¹⁴⁸ The common law, on the other hand, provides certainty, with clear requirements and long-standing remedies for the abuse of language that have been developed, making an approach to the civil courts attractive to practitioners who are familiar with the civil courts and their processes.¹¹⁴⁹ In fact, allegations of hurtful (as opposed to hateful) language that the Equality Act deems to be hate speech are more suited to *iniuria* or defamation.¹¹⁵⁰

*Strydom v Chiloane*¹¹⁵¹ is authority for the fact that a claim for racially oppressive language can be conceivably instituted a variety of fora, provided that the facts fulfil the requirements on the law that governs them.¹¹⁵² In this case, a mine captain referred to miners in Fanakalo as “baboons” and a complaint was subsequently lodged in the Equality Court. On appeal, the appellant challenged the jurisdiction, averring that it was rather the Labour Court that was the appropriate forum to hear the matter because it concerned alleged racial discrimination in the workplace, which falls under the territory of the Employment Equity Act. The respondent reasoned that as an instance of hate speech, the Equality Court and its relevant legislation should hear the matter. The court held that in this scenario, there are conceivably four options available to such a complainant; a claim for *iniuria* in the civil court against the mine captain; a claim in the Labour Court against his employer and the mine captain; a hate speech complaint in the Equality Court against the author of the remarks; or a claim in both the Labour and Equality Courts against the employer and mine captain, respectively.¹¹⁵³ The court stated that the relevant consideration was the exact nature of the conduct in question and its severity.¹¹⁵⁴ It held that racially discriminatory conduct is “more serious” than hate speech, though the two concepts are connected, and thus preference should be given to the Employment Equity Act that governs racial discrimination in the workplace.¹¹⁵⁵ Ultimately, the court sent the matter back to the Magistrate for referral to the Labour Court but did not make any costs order, owing to the confusion on this aspect of the law.

¹¹⁴⁸ See an evaluation of the Equality Courts at 5.2.2 and 5.2.4.4.

¹¹⁴⁹ See 7.4.

¹¹⁵⁰ See an excursus on common law remedies in Chapter 7.

¹¹⁵¹ *Strydom v Chiloane* 2008 (2) SA 247 (TPD).

¹¹⁵² *Strydom v Chiloane* 2008 (2) SA 247 (TPD). para 12-17.

¹¹⁵³ *Ibid.*

¹¹⁵⁴ *Strydom v Chiloane* 2008 (2) SA 247 (TPD) para 16.

¹¹⁵⁵ *Strydom v Chiloane* 2008 (2) SA 247 (TPD) para 16-17.

Strydom v Chiloane demonstrates the uncertainty that abounds for litigants in electing the appropriate forum for hate speech complaints, and for those fora to apply themselves as to the suitability of their jurisdiction in the matter. The fact that the case in *Strydom* was ultimately referred to the Labour Court does not diminish the adjudication of hate speech in South African law; in fact, the Labour Courts have consistently held that hate speech is in fact a legitimate ground for dismissal as a form of misconduct in labour law.¹¹⁵⁶ Therefore, the seriousness of hate speech has also been subsumed into this branch of law and is being applied consistently. The issue that *Strydom v Chiloane* raises is that racially discriminatory speech is worse than hate speech, as thus it is this degree of gravity is what must determine the appropriate forum for the matter. Admittedly, whether the word “baboon” is an instance of hate speech rather than racially discriminatory language is another matter entirely, but it fits neatly into the nature of conduct that the Employment Equity Act seeks to address and protect against, making the Labour Court the more appropriate forum for adjudication in this matter. As stated in the judgment, the Equality Act’s jurisdiction is not entirely ousted as there is the option of proceeding against the employer and the mine captain separately.

The question of the most appropriate forum is highly relevant, given the various options available. Section 20 of the Equality Act dictates that the presiding officer must make a determination on this issue, having considered the personal circumstances of the parties, physical accessibility, the needs and wishes of the parties, the nature of the intended proceedings, the development of judicial precedent and jurisprudence in the particular area of law, and the views of the appropriate functionary at the alternative forum. Another consideration for litigants is undoubtedly the issue of tribunals over courts of law. The SAHRC is an appropriate forum for hate speech complaints but its decisions lack the enforceability of court decisions and its findings are not accessible, making it hard to gauge how one’s complaint would be received at this forum. What the SAHRC does however foster is the notion of dispute alternative resolution before adjudication, which provides much food

¹¹⁵⁶ Dismissals for engaging in hate speech have been confirmed by the Labour Appeals Court as fair and in consonance with the Employment Equity Act as well as the Constitution. In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* [2002] 6 BLLR 493 (LAC) 504-505A-B, the court held that racism in the workplace was unacceptable in the constitutional era committed to equality and human dignity. See further ME Manamela “Dismissal Based on an Unfounded Allegation of Racism against a Colleague: *SACWU v NCP*” (2008) 20 SA Merc LJ 298 that “abuse language,” such as racial comments and hate speech, can be said to be legitimate grounds for dismissals under the heading of serious misconduct in the workplace

for thought on whether hate speech complaints are more suited to mediation than the adversarial approach of the courts.¹¹⁵⁷

An idea that emerged in one of the SAHRC Provincial Dialogues on Hate Speech in 2011 was whether there is a more effective manner of dealing with hate speech other than via the courts or analogous structures.¹¹⁵⁸ There is certainly something to be said for advocating an approach that is not adversarial and that is more reconciliatory and flexible in matters of racially charged language. There may even be more social value and cohesion in a process like that of the SAHRC that acknowledges hate speech and rather seeks to foster understanding, flexibility and a transformation in language. In taking a hate speech matter to court, a confrontational, lengthy and costly exercise ensues in which one party wins and one loses. Both sides seek legal recognition and vindication for offense or hurtful remarks that may be resolved privately or with the use of mediation to greater satisfaction of both parties. In fact, the rationale for the *Afriforum* mediation agreement is stated as “promoting reconciliation”¹¹⁵⁹ which is always preferable for the parties involved, but the mediation in this case has unfortunately resulted in a missed opportunity for the legal community is obtaining clarity on section 10 of the Equality Act. However, electing for mediation is undeniably favourable in furthering a transformative society, trying to make sense of how to use language and deal with the issue of racism that lingers from apartheid and colonial times.¹¹⁶⁰ And for those remarks that are not successfully recognised as hate speech under a framework as broad and vague as section 10, the mere existence of this provision enabled them to bring the matters before a court or tribunal in the first place, clearly demonstrating that the Equality Act’s provisions do not adequately convey what hate speech prohibitions encompass to the people they are meant to serve.

¹¹⁵⁷ In February 2013, the SAHRC successfully mediated complaints it received about a comment on the Facebook page of Zama Khumalo, inviting his friends to a “BIG Black Braai” to commemorate the drowning of 15 white school children in 1985. In particular, the SAHRC stressed that the proceedings were not adversarial and rather with a view to constructive process, fostering growth and understanding in a non-adversarial manner. (I Mangena “SAHRC facilitates, welcomes public apology by Facebook “Racist” Khumalo” *SAHRC Website* www.sahrc.org.za/home/idx.php?ipkMenuID=8&ipkArticleID=178 (Accessed 18 February 2013)).

¹¹⁵⁸ R Krüger speaking at the South African Human Rights Commission Provincial Dialogue: “Transition Blind spot: navigating the balance between freedom of expression and hate speech in shaping a common or shared identity, heritage and moral consensus in South Africa” East London, 17 November 2011.

¹¹⁵⁹ *Julius Sello Malema v Afriforum* A.815/2011 Filing Sheet: Mediation Agreement para 3(c).

¹¹⁶⁰ See 2.4 on the South African challenge where language is concerned..

8.4.3 The Enforceability of Any Hate Speech Finding

Issues regarding the enforceability of hate speech findings also arise. The dynamics of an individual following through with a ban on uttering certain speech are complex as it essentially involves a personal choice not to use language in a certain way by an autonomous individual. Thus, it is extremely hard to enforce such a finding as one can simply avoid using hate speech in public or, seeing as language is a malleable medium, can disguise the sentiments of his/her hate in new and evolved hate speech terms. This issue of enforceability is particularly relevant when considering the chant of “Shoot the Boer.” In all three instances¹¹⁶¹ where a complaint of hate speech was raised, a court, tribunal or analogous structure has declared it as such, implying that the phrase is not permissible in the new era, let alone to be repeated by the same individual. However, the chant inevitably reappears. The SAHRC condemned it as hate speech in 2003 but that ruling has done nothing to quash its recurrence. This not only exposes the truth that the SAHRC cannot deliver legally binding decisions but also brings into question the general enforcement potential of any hate speech ruling. Even where parties consider themselves bound by such rulings, the jurisprudence and findings surveyed in this thesis demonstrate that most hate speech findings that are accessible are only of persuasive value to other fora.¹¹⁶² This is an unsatisfactory reality for a nation intent on transforming the way in which language is used and therefore the future and efficacy of hate speech litigation is unclear.

8.5 Discussion

South Africa’s on-going battle with the use and abuse of language over the years prompts the pertinent question of whether the plethora of legal frameworks that could conceivably be applied to the domain of hate speech is at all suitable, or even, effective in carving out a new and transformed society. The question of suitability is tethered to considerations of the difficult nature of language and the formidable task in regulating it. The challenge is in driving the agenda of promoting fundamental rights and achieving meaningful free expression

¹¹⁶¹ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC); *Afriforum v Malema* [2010] JOL 25566 (GNP); *ANC v Harmse: In re: Harmse v Vawda* [2011] 4 All SA 80 (GSJ).

¹¹⁶² Most of the hate speech decisions consulted in this thesis are from non-precedent setting fora, including the Magistrates’ Courts, the SAHRC and media regulatory tribunals. This is due to that fact that not only is there very little that has been decided, there is even less that is accessible on hate speech, as demonstrated in footnote 687 of 5.2.4.2.1 of this thesis.

for all, on one hand, and limiting language where it serves to unhinge and derail the transformation process on the other. This task is made more complex where measures are being applied in a multitude of fora of courts and quasi-judicial tribunals, whose findings are largely inaccessible, leading to an inconsistent overall approach. What is more, the applicable law is also scattered around the realms of the Constitution, legislation, common law and industry-related codes of conduct on expression. The South African experience is truly unique and complex, having been tainted by apartheid and its abuse and propagation of violent language; now a suitable solution and new understanding of violent language must be established and permeate through all fora and frameworks. Rather, it is an array of interpretations of the constitutional standard that have emerged and that play out with differing and conflicting results.

The nature of language explains the varied approach observed thus far. The concept of hate speech is not sufficiently understood to have consistent articulation in all legal frameworks relevant to the issue. Be that as it may, it does not explain the divergent and overly broad framing of hate speech in the Equality Act. It is crucial that the Equality Act espouse the constitutional stance on hate speech at the very least so as it be consistent, appropriate and valid in the South Africa legal system. What is more, the Equality Courts are governed by the statute and thus it is imperative that the hate speech provision does not send the misaligned message that hurtful words can be considered hate speech. This flaw is more than the result of the fluidity of language, as logic dictates that hate speech must be speech that is hateful and nothing less.

For all the criticism of the judgments and decisions based on the frameworks in place governing the prohibition of hate speech, it must be acknowledged that individual fora have very little scope to deviate from the statutes and codes. Most courts and tribunals are doing what they can, but there is also a worrying misunderstanding as to what hate speech truly is. There is a dire need in the South African context to take account of the ability of language to divide and dehumanise and provide as clear parameters as language will allow to inform the courts what speech is unacceptable. With the lack of clear representation of the constitutional, and by implication the international norms, on hate speech, there is tremendous latitude for hate speech to be perpetuated on one hand, and offensive speech to be exaggerated and mistaken for hate speech on the other, resulting in unwarranted censorship.

CHAPTER 9

CONCLUSION

The apartheid regime entrenched a tradition of violent and hateful language that has undoubtedly shaped how we view and use language today. The current reconciliatory and transformative agenda seeks to reclaim language as a means to achieve these ends but we are being held back by the ongoing problem of hate speech in this country. The problem of hate speech is further complicated by the fact that regulating language is a complex task and securing a consistent approach in framework and its application is even harder.

Hate speech prohibitions in South Africa are symbolically useful but practically problematic. They fail to take account of the complexities of language and do not espouse a clear and certain approach to language the language we now deem to be impermissible. While the difficult nature of language makes the regulation of expression a complex task at the best of times, we must strive for whatever consistency we can achieve in our approach. The obstacles in this regard are the misaligned approach of the Equality Act, which has major implications for the adjudication and perception of hate speech in South Africa; and the inconsistent application of hate speech provisions, which has led to no clear jurisprudential approach to hate speech, nor consistency in the treatment of complaints. The plethora of frameworks available makes it hard to discern how to litigate a hate speech complaint and also raises the question of whether this is in fact the best resolution to the clash between words that harm and those that heal. Ultimately, in the South African experience of language, we are plagued by our past, conflicted with our present but are hopeful for a future where hate speech is a thing of the past.

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