Banning hate speech from public discourse in Canada and South Africa: A legal analysis of the roles of both countries' constitutional courts and human rights institutions

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1 Introduction

It is uncontested that the right to freedom of expression is a fundamental human right that is almost universally recognised as central to any thriving democracy. Yet, in no country is it an absolute right. It is often, therefore, a tricky task to ascertain whether certain forms of expression cross the boundaries of the right to freedom of expression, and whether they cross over into the realm of being unprotected expression, specifically, hate speech. While the right to freedom of expression has been vigorously debated in many countries, scrutinising these forms of allegedly unprotected expression remains a challenge that faces most democracies around the world. In recent years there has been an increasing need to develop guidelines and standards on how one should approach allegations of hate speech.

South Africa and Canada arguably have two of the world's most admired human rights instruments, namely: the Canadian Charter of Rights and Freedoms[1] and the Constitution of the Republic of South Africa, 1996.[2] The rights and freedoms of the Canadian Charter had a considerable impact on the drafting of the South African Constitution in its post-apartheid era in the early 1990s, to the extent that Canadian constitutional jurisprudence is often referred to by the South African judiciary and other forums.[3] This has been the case especially

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[1]It is the first part of the Constitution Act, 1982. Hereafter referred to as 'the Canadian Charter'.
[2]Hereafter referred to as 'the Constitution'.
[3]See s 39(1)(c) of the Constitution. See for instance, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *S v Dodo* 2001 3 SA 382 (CC) and *Khumalo v Holomisa* 2002 5 SA 401 (CC).

where expression is alleged to be hate speech.[4]

One of the reasons for this is that this is an area in South African law that sorely lacks comprehensive jurisprudence on the forms of expression that go beyond the boundaries of the right to freedom of expression. While there is a fair amount of literature on the right to freedom of expression itself, the values that underpin this human right and, to some extent, the law of defamation, there is a definite lacuna in writing on hate speech laws.[5] It is even more unfortunate that the judiciary, when called upon to adjudicate on the 2006 Danish cartoons satirising the Prophet Mohammed[6] and the more recent 'Kill the Boer' song[7] as forms of hate speech, failed dismally to seize opportunities to develop this area of South African law. Canadian jurisprudence on hate speech thus forms an important source of law for South Africa. These are the principal reasons why we place a magnifying glass *specifically* on Canada (as a country with developed jurisprudence) and South Africa (as a developing country whose hate speech laws are still developing), and their respective approaches to protecting against hate speech.

Furthermore, both Canada and South Africa have established national human rights institutions that are tasked with promoting and upholding human rights and addressing human rights violations.[8] The Canadian Human Rights Tribunal (CHRT) and the South African Human Rights Commission (SAHRC) are two such bodies. These institutions operate independently of their respective judiciaries, and function

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[4]See for instance, *Islamic Unity Convention v Minister of Telecommunications* 2008 3 SA 383 (CC); *SABC v National Director of Public Prosecutions* 2007 1 SA 523 (CC); *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC); *Human Rights Commission of South Africa v SABC* 2003 1 BCLR (BCCSA) 99; and *Freedom Front v South African Human Rights Commission* 2003 11 BCLR 1283 (SAJHRC).

[5]Section 16(2) of the Constitution and ss 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Hereafter referred to as 'PEPUDA'.

[6]See *Jamiat-Ul-Ulama v Johncom Media Investment Ltd* Case no 1127/06, 2006-02-08 unreported. For more on this case, see Kende *Constitutional rights in two worlds: South Africa and the United States* (2009) 204; Pillay 'Cartoon wars: Free speech or hate speech?' (2010) 3 *SALJ* 463; Carpenter 'Freedom of speech and cartoons depicting the Prophet Mohammed: *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd* (unreported judgement no 1127/06)' (2006) 69 *THRHR* 684; and Goolam 'The cartoons controversy: A note on freedom of expression, hate speech and blasphemy' (2006) *CILSA* 333.

[7]See *Afri-Forum v Malema* 2010 5 SA 235 (GNP); *African National Congress v Harmse: In re Harmse v Vawda (Afri-Forum and Another Intervening)* 2011 12 BCLR 1264 (GSJ); and *Afri-Forum v Malema* (Vereniging van Regslui vir Afrikaans as *Amicus Curiae*) 2011 12 BCLR 1289 (EqC).

[8]There is a global trend towards the establishment of national human rights institutions. As indicated by Klaaren, such institutions are said to have 'the effect of improving the legality and fairness of public administration as well as providing a mechanism for the domestic implementation of international human rights obligations'. Klaaren 'South African Human Rights Commission' in Woolman *et al Constitutional law of South Africa* vol 2 (2012) (2nd ed original service)12-05, 24C-i at 24C-3. See further Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) 13 *Harvard Human Rights Journal* 1 and Okafor and Agbakwa 'On legalism, popular agency and "Voices of suffering": The Nigerian Human Rights Commission in context' (2002) 24 *Human Rights Quarterly* 662.

in a unique manner in respect of hate speech cases.[9] This year – 2012 – marks the 18th anniversary of the Bill of Rights in South Africa and the question to be asked in the face of this milestone is whether and to what extent these human rights institutions are fulfilling their mandate; focussing specifically on the right to freedom of expression and the way in which each institution deals with hate speech matters.

In this paper we adopt a comparative approach in considering the Supreme Court of Canada, the Constitutional Court of South Africa, the CHRT and the SAHRC as four national institutions that play a role in protecting against hate speech in Canada and South Africa respectively. We look briefly at the legal background to the establishment and functioning of these human rights institutions, outline their legal powers and respective roles in the societies within which they function, highlight selected hate speech cases heard by each institution, and in doing so we analyse their effectiveness as human rights institutions tasked with protecting against hate speech.

2 Overview of constitutional principles

Before we delve into the core themes of this paper, it is necessary to briefly outline the constitutional approaches adopted by the Supreme Court of Canada and the Constitutional Court of South Africa in cases dealing with the right to freedom of expression and hate speech, as it is these trends that dictate the approaches adopted by the respective national institutions when faced with complaints alleging hate speech.

2.1 Canada

Canada's constitutional right to freedom of expression is set out in the Canadian Charter and reads as follows:

> (1) The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
> (2) Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

The legal foundation for how the CHRT has ruled on allegations of hate propaganda is based on four decisions by the Canadian Supreme Court in the early 1990s that tested sections 1 and 2 of the Canadian Charter.[10] The cases

[9]See Moon 'The attack on Human Rights Commissions and the corruption of public discourse' (2010) *Saskatchewan LR* 73 at 93-129.
[10]See for instance, *R v Andrews* 1990 3 SCR 870, *Canada v Taylor* 1990 3 SCR 892, *R v Zündel* 1992 2 SCR 731, and *R v Keegstra* 1990 3 SCR 697. In all of these cases the Supreme Court of

tested the constitutionality of the anti-hate propaganda laws passed by Parliament in the 1970s.[11] Each controversial hate speech case involved an organisation that attempted to disseminate its messages to the public, and the common issue for determination was whether the ban on public dissemination of hate propaganda by an individual or organisation aimed at a minority group was constitutional.[12]

In *R v Oakes*[13] the Court devised what came to be known as the *Oakes* test in 1986 in order to establish if laws that minimally impaired the Canadian Charter such as free speech could remain legal. In several hate speech cases in the early 1990s, the Court used the *Oakes* test to determine if federal laws that limit a freedom are nonetheless constitutional according to section 1 of the Canadian Charter as a 'reasonable' limit on speech and justified in a 'free and democratic society'.

The Supreme Court first used the *Oakes* test in a hate propaganda case in 1990. In *R v Keegstra*,[14] the Court in a four to three vote ruled that James Keegstra, violated section 319(2) of the Criminal Code, which prohibits the public promotion of hatred against an identifiable group, when he promoted hatred against the Jewish community with anti-Semitic statements spoken to his students. These contested comments included terms such as 'subversive', 'treacherous', and 'power hungry'. The Court ruled that while section 319(2) violated section 2(b) of the Canadian Charter it was nonetheless constitutional within section 1.[15] Using the *Oakes* test, Dickson CJ stated that section 319(2) of the Criminal Code – which makes it illegal to publicly promote hatred against an identifiable group – was proportionate to its goal and limited in application because it pertains specifically to public hate propaganda aimed at an individual or minority group.[16] The law's use of the term 'wilful' in the promotion of hatred minimises the impairment to free expression.[17] Essentially, hate propaganda must be communicated on purpose with a specific goal in mind.

Dickson CJ deferred to Parliament's legislative intent behind section 319(2) of the Criminal Code. He said that Parliament recognised the 'substantial harm' that can come from hate propaganda.[18] Parliament, according to Dickson CJ, acted to protect Canadian minority groups because of the widespread 'harm' hate

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Canada ruled that the federal hate propaganda laws are constitutional since the controversial speech in question exposed a minority group to the danger of contempt in society thereby limiting their participation in a democratic society.

[11] Section 319(2) of the Offenses Against the Person and Reputation, RSC 1985 ch C-46 (2011). The law states that it is a crime to wilfully make public hatred-based statements against an identifiable group and it is subject to prosecution.

[12] See also Maitra and McGowan 'Racist hate speech and the scope of a free speech principle' (2010) 23 *Canadian Journal of Law and Jurisprudence* 343-372. In Canada, hate speech is illegal because it is viewed as an attack on the freedoms and equality of minorities.

[13] *R v Oakes* 1986 1 SCR 103.

[14] *R v Keegstra* (n 10).

[15] *Id* 795.

[16] *Id* 771.

[17] *Id* 775.

[18] *Id* 758.

speech can cause.[19] This harm included preventing pain suffered by the target group and to reduce racial, ethnic, and religious tensions in the country.[20] In passing the law, Dickson CJ stated that Parliament did not violate section 1 of the Canadian Charter and that both guarantees speech and allows for it to be reasonably restricted. In the Court's opinion, promoting the hatred of identifiable groups is of 'limited importance when measured against free expression values'.[21] The term 'hatred' narrowed the category of speech at issue in this case.[22] This satisfied the *Oakes* test's proportionality requirement. Banning a category of speech that promoted 'hatred' was narrow enough for the Court.

On the same day the Court announced its decision in the *Keegstra* case, it also decided another hate propaganda case. In *R v Andrews*[23] the Court ruled four to three that a bi-monthly newsletter violated section 319(2) of the Criminal Code, the same statute at issue in the *Keegstra* case.[24] The Nationalist Party of Canada, a white nationalist political organisation, published and distributed the newsletter.[25] It contained derogatory references about Canadian Jews and blacks as blights on society. Adopting a similar approach to that in *Keegstra's* case,[26] the Court stated that section 319(2) of the Criminal Code violated freedom of speech as guaranteed by section 2 of the Canadian Charter but was still constitutional under section 1's reasonable limit prescribed by law. Dickson CJ specifically referred to the reasoning he provided in the *Keegstra* case:[27] in a democratic country restricting hate propaganda is constitutional in order to protect groups of people from hatred and possible violence.[28] Dickson CJ stated that targeting minorities for possible violence violates the principles of democracy.[29]

In a third hate propaganda case in 1990, *Canada v Taylor*,[30] the Supreme Court, in another four to three vote, upheld the conviction of John Ross Taylor by the CHRT for communicating hate messages by telephone.[31] Between 1977 and 1979 Taylor, the leader of the Western Guard Party, had placed thirteen different anti-Semitic messages on an answering machine that the public could call and listen to.[32] Taylor and his organisation distributed cards to individuals and crowds with a message to call a telephone number to hear the message. The number was also placed in a local Canadian city telephone book with the notation 'White Power Message'.

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[19] *Ibid*.
[20] *Ibid*.
[21] *Id* 763.
[22] *Ibid.*
[23] *R v Andrews* (n 10).
[24] *R v Keegstra* (n 10).
[25] *R v Andrews* (n 10) 874.
[26] *R v Keegstra* (n 10).
[27] *Ibid*.
[28] *Id* 764.
[29] *Ibid*.
[30] *Canada v Taylor* (n 10).
[31] *Id* 903.
[32] *Ibid*.

Writing for the majority, Dickson CJ stated that Parliament's purpose in enacting the Human Rights Act[33] was to criminalise exposing an individual or group to hatred or contempt by repeated telephonic communication.[34] Using the telephone to spread hate propaganda is contrary to the 'furtherance of equality'.[35] Dickson CJ noted that in seeking to prevent the harms caused by hate propaganda, the objective of section 13(1) is important enough to warrant 'some limitation upon freedom of expression'.[36] The Court stated that hate propaganda goes beyond advocating an unpopular position; it exposes an individual or group of people to hate and potential violence.[37] According to the Court, the Canadian Human Rights Act seeks to eliminate this danger.

In 1992, in a four to three vote, the Court upheld the right of individuals to publish false information that could be hate related. The Court delineated a fine line between publicly advocating hate and a constitutional right to publish false information about historical events.[38] In *R v Zundel*,[39] it overturned section 181 of the Criminal Code that criminalised publishing a paper-based 'statement, tale, or news' known to be false and that which could cause 'mischief to a public interest'.[40] The Court ruled that the law was vague and overbroad.[41] The defendant, Ernst Zündel, published a thirty two page booklet titled *Did six million really die?* in which he questioned the number of Jewish victims who died in the Holocaust.[42] The Ontario Court of Appeal had ruled that the booklet violated section 181 of the Criminal Code.[43]

The Court acknowledged that publishing false information is often a matter of debate especially when historical facts are at issue.[44] While the Court did not endorse Zündel's writings, it maintained his right to publish unpopular viewpoints.[45] The Court ruled that the Canadian Charter's guarantee of free expression serves to protect a minority's right to express its views no matter how unpopular.[46]

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[33]The Canadian Human Rights Act, RSC 1985 ch H-6 (2008). Hereafter referred to as the 'Canadian Human Rights Act'.
[34]*Canada v Taylor* (n 10) 918.
[35]*Id* 943.
[36]*Id* 919. Section 13(1) states that it is a discriminatory practice for a person to use telephone-based communication to expose a person or group of persons to 'hatred or contempt'.
[37]*Canada v Taylor* (n 10) 930.
[38]*R v Zündel* (n 10).
[39]*Ibid*.
[40]Section 181 of the Sexual Offences, Public Morals and Disorderly Conduct, RSC 1985 ch 46 (2011). The law stated:

> Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[41]See *R v Zündel* (n 10) 743.
[42]*Ibid*.
[43]*R v Zündel* 1990 53 CCC (3d) 161.
[44]*R v Zündel* (n 10) 750.
[45]*Ibid*.
[46]*Id* 753.

The Court's four seminal cases from the 1990s demonstrate that hate propaganda that is publicly distributed is not protected speech under the Canadian Charter. False propaganda may be protected speech if it is in the form of a person's opinion even if his/her facts are wrong. The difference in these two approaches lies in the overall goal of the speech. The Court ruled that the Canadian Charter's guarantee of free expression serves to protect one person's view even if it is unpopular with the public. Often times, it is the unpopular sentiment that is in need of protection under a guarantee of free speech. McLachlin CJ noted that while deliberate lies do not hold value, exaggeration might serve useful social purposes such as spurring societal debate on important issues.[47]

In short, in circumstances similar to *Keegstra*,[48] *Taylor*,[49] and *Andrews*,[50] if the intent of the speech is to expose a group of people to public hatred, then that speech could be illegal. On the other hand, if the goal is to promote a false idea that does not try to incite hatred toward a group, then that speech could be constitutionally protected as it was in the 1992 *Zündel* decision.[51]

2.2 South Africa

South Africa's constitutional right to freedom of expression is set out in section 16 of the Constitution and reads as follows:

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

Less than two decades into democracy, South Africa is regarded as a fledgling democracy learning to fly. The Constitution was born out of a history of systematic human right violations, which is why the new constitutional order places a high premium on the protection of dignity. The hate speech clause in section 16(2) reflects the country's commitment to transformation and to creating a constitutionally protected culture of democracy regardless of race, ethnicity, gender or religion.[52]

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[47] *Ibid*.
[48] *R v Keegstra* (n 10).
[49] *Canada v Taylor* (n 10).
[50] *R v Andrews* (n 10).
[51] *R v Zündel* (n 10).
[52] See also Kende (n 6) 193. Article 14 of the draft Bill of Rights, which was proposed by the African National Congress in 1990, makes it clear that the state was required to 'prevent any form of

In recent years, the Constitutional Court has crafted a fairly rich jurisprudence in respect of section 16. While these cases have not dealt with hate speech specifically, they are nonetheless of value here in that one is able to gauge the role of the right in South African society, and demarcate its scope insofar as it does not extend to hate speech. The Constitutional Court is vocal about its reliance on the justifications for freedom of expression, namely, that it is valuable for its implicit recognition, protection and promotion of the moral agency and self-fulfilment of individuals in South Africa's budding democracy.[53] The Constitutional Court has, however, painstakingly stressed that this right is not of paramount value.[54] The constitutional dispensation heralds the importance of human dignity, equality and freedom as cornerstone values of its democracy.[55] These values necessarily underpin the approach of the Constitutional Court when interpreting section 16 and when assessing the justifiability of limiting the right.[56]

Section 16 is one of the few constitutional rights that is qualified. Section 16(2) removes a realm of expression beyond constitutional protection. Implicit in this internal modifier is the recognition that certain forms of expression have the potential to encroach harshly on the human dignity of others and thereby cause harm.[57] Hate speech has an undeniable potential to increase social tensions, the risk of violence and discrimination. According to Milo *et al*, hateful speech 'undermines the values of pluralism and diversity by communicating a message that some community members are less worthy than others merely by virtue of their membership of a particular group'.[58] In the South African context, hate

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incitement of racial, religious or linguistic hostility', and therefore was to enact legislation 'to prohibit the circulation of possession of materials which incite racial, ethnic, religious, gender or linguistic hatred'. See African National Congress Constitutional Committee 'A Bill of Rights for a New South Africa: 1990' 1991 7 *SAJHR* 110. See also Johannessen 'A critical view of the constitutional hate speech provision' 1997 13 *SAJHR* 135. The formulation of the provision was also influenced by international instruments, namely: Art 19 of the International Covenant on Civil and Political Rights and art 13 of the American Convention on Human Rights. Both these instruments prohibit war propaganda and the advocacy of racial hatred. Section 16(2) also finds its source in comparative constitutional jurisprudence. See for instance, *Chaplinsky v New Hampshire* 1942 315 US 568 and *Brandenburg v Ohio* 1969 395 US 444.

[53] *SANDU v Minister of Defence* 1999 6 BCLR 615 (CC) para 7. See also *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) para 26 and *NM v Smith* 2007 7 BCLR 751 (CC) para 145-146 where the Court cited with approval Scanlon 'A theory of freedom of expression' 1972 1 *Philosophy and Public Affairs* 204 at 216. See also *SABC Limited v National Director of Public Prosecutions and Shaik* 2007 2 BCLR 167 (CC) para 23. For further discussion on the justifications for free speech, see Milo *et al* 'Freedom of expression' in Woolman *et al* (n 8) 12-05, 42-14 – 42-30. See also Motala 'Freedom of expression' *in Reflections on democracy and human rights: A decade of the South African Constitution (Act 108 of 1996)* (2006) 153.

[54] See *S v Mamabolo* 2001 3 SA 409 (CC) para 41.

[55] Sections 1(a) and 7(1) of the Constitution.

[56] See *Khumalo v Holomisa* (n 3) para 25, *NM v Smith* (n 53) para 145 and *S v Mamabolo* (n 54) para 41.

[57] *Islamic Unity Convention v Independent Broadcasting Authority* (n 4) 435.

[58] Milo *et al* (n 8) 42-76.

speech thus undermines the commitment to nation-building and reconciliation. To this extent, expression that falls within section 16(2) need not comply with the general limitations clause in section 36 of the Constitution.[59]

The *Islamic Unity Convention v Independent Broadcasting Authority* case,[60] the only Constitutional Court case on hate speech to date, emphasises the significance of the country's history in the interpretation of section 16. The issue in this case was whether speech could be restricted because it was likely to prejudice relations between certain sectors. The facts briefly were that an interview broadcast on an Islamic community radio station included comments to the effect that Israel was illegitimate, that it was 'only' one million Jews who died during World War II and that the Jews were not gassed during the war.[61] Before a formal enquiry could be held, the Islamic Unity Convention launched proceedings in the High Court challenging the validity of the decision to hold the enquiry as well as the constitutionality of the relevant provision of the Code on the basis that it violated section 16 of the Constitution.

Langa DCJ delivered the key judgment and reasoned that, speech should not be lightly restricted, and that even offensive speech should be tolerated in the spirit of strengthening the country's democracy. The past needs to alert us to the danger of disallowing speech unless there are compelling reasons for the restriction.[62] However, the right must be balanced against other constitutional values such as equality, dignity and national reconciliation.[63] In discussing how these values were reflected in the hate speech provision, Langa DCJ stated that racist speech impinged on human dignity and stereotyped people based on immutable characteristics.[64]

The concept of human dignity thus plays a significant role as both a constitutional right and value that informs the interpretation of section 16(2)(c). There is a wealth of constitutional jurisprudence and literature on dignity, and as such, the concept is only considered here in so far as it interacts specifically with sections 16 and 16(2)(c) of the Constitution. So deeply entrenched is the constitutional protection of human dignity that it may not be derogated from, not even in a state of emergency.[65] The pre-eminence of human dignity, as both a value and a right, has

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[59]See further Cheadle 'Limitation of rights' in Cheadle *et al South African constitutional law – Bill of Rights* (2012) Issue 11 (2nd ed) 30-1 – 30-18.

[60]*Islamic Unity Convention v Independent Broadcasting Authority* (n 4) para 23.

[61]The radio station was sanctioned under a nation regulation (clause 2(a) of the Code of Conduct of the Independent Broadcasting Authority) which provided:

> Broadcasting licensees shall…not broadcast any material which is indecent or obscene or offensive to public morals or offensive 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.

[62]*Islamic Unity Convention v Independent Broadcasting Authority* (n 4) para 27.

[63]*Id* para 30.

[64]*Id* para 33. Langa DCJ stated that hate speech does not deserve constitutional protection because it has the 'potential to impugn adversely on the dignity of others and cause harm' (para 32).

[65]Section 37(5) of the Constitution.

been confirmed by the Constitutional Court in a number of cases.[66] Courts are under a legal duty to be steered by the quest for dignity in its decision-making process.[67] Dignity is indispensable to the balancing of conflicting interests,[68] and is itself shaped and developed by the exercise of freedom of expression.[69]

Langa DCJ reflected on this intricate balance that the courts are required to strike between freedom of expression and dignity. On the one hand, the Court must take into account the severely restrictive past where restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the violations of other fundamental rights.[70] [71] On the other hand, the balancing exercise concerns the protection of pluralism and broad-mindedness which is central to an open and democratic society which can be 'undermined by speech which seriously threatens democratic pluralism itself'.[72]

An added challenge to the analysis of hate speech arises in the form of the PEPUDA. While the purpose of the Act is to give effect to the constitutional right to equality, it also bans hate speech and prohibits the dissemination and publication of discriminatory information. There are two key provisions in this regard; section 10 which deals with the ban on hate speech and section 12 which provides for the prohibition of the dissemination and publication of discriminatory information.

Section 10 provides as follows:

> (1) Subject to the proviso in section 12, no person may 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;
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> (2) 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

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[66] See, for instance, *Dawood v Minister of Home Affairs Dawood v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC); 2000 8 BCLR 837 (CC) para 35 and *S v Makwanyane* 1995 3 SA 391 (CC) para 328.

[67] Cowen 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 34 at 47.

[68] *Ibid*.

[69] Davis 'Freedom of expression' in Cheadle *et al* (eds) *South African constitutional law – Bill of Rights* (2012) Issue 9 (2nd ed) 11-5.

[70] *Islamic Unity Convention v Independent Broadcasting Authority* (n 4) para 27.

[71] The apartheid system thrived through a number of pieces of legislation, policies and practices that regulated freedom of expression. Eg, the Public Safety Act 3 of 1953, the Criminal Procedure Act 56 of 1955 and the Protection of Information Act 84 of 1982. (Since 1994, most of the apartheid laws that limited freedom of expression have been repealed.) See further Motala (n 53) 153-154, 155-156 and 161-162.

[72] *Islamic Unity Convention v Independent Broadcasting Authority* (n 4) para 29. See also, Milo *et al* (n 8) 42-76.

> Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

Section 12 provides as follows:

> 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 inquiry, 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.

This legislation treats hate speech as a civil wrong for which the complainant can seek compensation as a remedy.[73] However, the sections are so poorly drafted that some of its wording appears redundant. The effect is that section 10, in straying so far from the wording of section 16(2)(c) of the Constitution, is potentially unconstitutional.[74]

In summary, the Constitutional Court adopts a balancing approach to competing interests.[75] Each case is engaged on an *ad hoc* case-by-case analysis,[76] the outcome of which depends on the extent to which the court will place value on freedom of expression or other competing interests.[77] Section 16 must necessarily be interpreted in a manner that best fits within a particular constitutional democracy.[78] In South Africa, this means giving due consideration to the three conjoined, reciprocal and covalent constitutional values. Ultimately, individualised justice may necessarily take priority over the general interests of the community.[79]

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[73]Milo *et al* (n 8) 42-86 submits that this relief (in comparison to criminal prohibition, in principle, is a welcome one and refers to the case of *Canada v Taylor* (n 10).

[74]See Albertyn *et al Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 94 who proposes a test to determine whether an expression that seems to be caught in s 10's vast net of prohibition actually does fall foul of the Act. See further Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the controversy?' (2001) 2 *TSAR* 294 and Milo *et al* (n 53) 42-86 – 42-88, Davis (n 69) 11-19 – 11-20, South African Human Rights Commission 'Discussion document: Freedom of expression' (21 November 2002) 4-5 (hereafter referred to as 'Discussion document: Freedom of expression').

[75]See *S v Mamabolo* (n 54) para 40-41.

[76]*Case v the Minister of Safety and Security* (n 53) para 16.

[77]Pillay (n 6) 478 and 488. See also Cheadle 'Freedom of expression' in Cheadle *et al* (eds) *South African constitutional law – The Bill of Rights* (2012) Issue 1 (2nd ed) 11-1 at 11-14.

[78]This approach was affirmed by *S v Mambolo* (E TV, Business Bay and the Freedom of Expression Institute intervening) 2001 5 BCLR 449 (CC) at para 10. See Pillay (n 6) 478 and 488 and Davis (n 69) 11-1 at 11-4.

[79]Chaskalson 'The third Bram Fischer lecture – human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 193 at 204.

3 Human Rights Institutions

3.1 Legal backgrounds, legal powers and roles in society

In the section that follows we consider the establishment of the CHRT and the SAHRC and their respective function and roles in society in respect of hate speech matters.

3.1.1 The Canadian Human Rights Tribunal

The Canadian Human Rights Commission (CHRT) was created by an Act of Parliament to ensure democracy and prevent discrimination for traditionally discriminated groups including women, Canadian native populations, and racial, religious, and ethnic minorities. The CHRT's authority to adjudicate matters on hate speech is derived from the Canadian Human Rights Act. The law criminalises discrimination based on several factors including race, religion, and sex. The law states that discrimination includes hate speech against a victim or group of people if there is a danger of being exposed to hatred or contempt.[80] Specifically, the Canadian Human Rights Act forbids any person or group of individuals from communicating telephonically with the intent of exposing a person or groups of people to 'hatred or contempt'.[81] In 2001, Parliament amended the Canadian Human Rights Act to include Internet-based communication.[82] This amendment reflects the fact that the government keeps up with how technology can impact the delivery of hate speech. The CHRT is able to use this body of law in its decision-making.

The 1977 federal statute that created the Canadian Human Rights Act included both the Canadian Human Rights Commission CHRC and the CHRT institutions.[83] These two federal bodies primarily serve to ensure that Canadians are not victims of discrimination. The CHRC is the first step in any public complaint process regarding allegations of hate speech while the CHRT is the final adjudicator of any unresolved human rights controversies, including those relating to hate speech. The CHRC plays more of a public role and its mandate includes:[84]

- organising and conducting public information programs;
- conducting human rights studies;
- reviewing acts of Parliament to determine if they are consistent with the human rights laws; and
- discouraging discriminatory activity through campaigns.

Thus the CHRT's role is secondary to the CHRC. The CHRT is the legal entity

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[80]Section 2 of the Canadian Human Rights Act.
[81]*Id* s 13 (1).
[82]*Id* s 3(2).
[83]Sections 27(1)(g) and 48.1 of the Canadian Human Rights Act. These two sections of the Canadian Human Rights Act enumerate the power, duties, and functions of the CHRC and CHRT.
[84]*Id* s 27.

that has the mandate to decide if an individual has acted in a discriminatory manner against a victim, including public hate propaganda.[85] The CHRT has several options at its disposal to mediate an appropriate punishment including levying a fine and adopting a special programme to rectify the discriminatory complaint. As an independent federal agency, the CHRT is similar to a court of law, but is less formal in its process.[86] All of its decisions are posted online for the public and published in the Canada *Gazette*.[87] As an administrative tribunal, it has more flexibility than regular courts by allowing those who appear before it a chance to present their cases more fully without having to follow strict rules of evidence.[88] A decision by the CHRT can be appealed to the federal courts of Canada including the Supreme Court.[89] The CHRT's main goal is to ensure that the Canadian Human Rights Act is interpreted and applied fairly and impartially at all hearings.[90] Its first online hate speech decision was in 2002.

Since the CHRT is the federal agency that mediates hate speech accusations, the remainder of this paper will focus on this organisation.

3.1.2 The South African Human Rights Commission

Chapter 9 of the Constitution creates certain national independent human rights institutions with the recognition that the roles of promoting a human rights culture and strengthening constitutional democracy cannot simply be left to the three organs of state and its citizens.[91] The SAHRC, inaugurated on 2 October 1995, is one such independent human rights monitoring institution.[92] The Constitution establishes the autonomy and impartiality of the SAHRC.[93] It entrenched constitutional democracy and marked a decisive break with the country's apartheid past.

It is unfortunate that there is a curious lack of research on the SAHRC. Where academic writing on the SAHRC is available, it is predominantly on its constitutional mandate in respect of promoting socio-economic rights, refugee

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[85] *Id* s 53(2).

[86] Canadian Human Rights Tribunal available at http://www.chrt-tcdp.gc.ca/index_e.asp (accessed 2011-11-22).

[87] Section 48.9(3) of the Canadian Human Rights Act.

[88] See http://chrt-tcdp.gc.ca/NS/about-apropos/download/pn2-np-eng.asp (accessed 2012-03-12).

[89] See http://chrt-tcdp.gc.ca/NS/about-apropos/jurisdiction-competence-eng.asp (accessed 2011-11-22).

[90] *Ibid*.

[91] See s 181(1) of the Constitution. Langa J in *New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC), 1999 5 BCLR 489 (CC) stated that these institutions are a 'product of new constitutionalism and their advent has important implications for other organs of State who must understand and recognise their respective roles in the new constitutional arrangement' (para 78).

[92] See ss 115-118 of the interim Constitution which set up the first manifestation of the Commission.

[93] See ss 181(2)-(4) of the Constitution and s 4 of the Human Rights Commission Act 54 of 1994. The SAHRC needs to exercise its powers and functions without fear, favour, prejudice or interference from any person or organ of the state.

rights and the combating of racism in the country.[94] It is unfortunate that little research exists on the SAHRC's role in promoting the right to freedom of expression and protecting against hate speech.

The SAHRC is a creature of statute[95] and derives its powers, functions and duties principally from the Human Rights Commission Act 54 of 1994[96] and the Constitution.[97] It derives additional powers and duties from other national human rights and sectoral legislation.[98] The SAHRC has as its core business the strategic objectives of monitoring and investigating individual and systemic complaints of human rights violations; promoting equality and addressing unfair discrimination (particularly on the basis of race, gender and disability) and providing the appropriate redress.

In summary, the SAHRC has the following roles and functions to fulfil:

- the central role of watchdog over the promotion and protection of human rights;
- the role of creating a constitutional culture in the country;
- an educative role of raising awareness of and training on human rights (for example, developing materials and conducting seminars, workshops, training programmes and community outreach campaigns);
- monitoring the media to track human rights issues;
- monitoring the development of new legislation and the implementation of PEPUDA[99] and the PAIA;[100] and
- monitoring and reporting annually on the state's progress in realising socio-economic rights in the country.

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[94] The SAHRC's reports and publications are available online at http://www.sahrc.org.za/home/index.php?ipkContentID=17&ipkMenuID=20 (accessed 2011-11-08).

[95] For an overview of the extent to which ch 9 institutions are creatures of statute and not creatures of the Constitution see Klaaren (n 8) 24C-16 – 24C-17.

[96] Hereafter referred to as the Human Rights Commission Act.

[97] Section 184 of the Constitution, read with ss 181, 193 and 194 of the Constitution, sets out the functions of the SAHRC in some detail. The Human Rights Commission Act supplements the constitutional establishment provisions. For an analysis of the relationship of the constitutional empowerment provisions and the establishment legislation, see Klaaren (n 8) 24C-16. See *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* (2007-07-31) 168-160 (hereafter referred to *'Report on the review of chapter 9'*) for more on the SAHRC's mandate in terms of the Human Rights Commission Act.

[98] PEPUDA and the Promotion of Access to Information Act 2 of 2000 (hereafter referred to as 'PAIA'). See s 184(4) of the Constitution.

[99] See *Report on the review of chapter 9* (n 97) 170-171 for more on the SAHRC's mandate in terms of PEPUDA.

[100] See *Report on the review of chapter 9* (n 97) 169-170 for more on the SAHRC's mandate in terms of this Act.

Govender, in emphasising the role of national human rights institutions, asserts that it is imperative that they 'do more than simply function as a surrogate court of law'.[101]

A few points raise the issue of the effectiveness of the SAHRC in respect of dealing with hate speech issues. First, the applicable legislative provisions give the SAHRC an extensive and far-reaching mandate in respect of almost every aspect of social, political, civil and economic rights. This places an extremely heavy burden on the SAHRC to fulfil its constitutional mandate, and it is argued that it is an ambitious one. There are too many roles for the SAHRC to effectively execute, and it has not been an easy mandate to fulfil. This leads to the second point which is the issue of resources, under-funding and disparate funding among the chapter 9 institutions which impacts adversely on the accountability and independence of the SAHRC.[102] Despite the Constitutional Court's calling for the financial and administrative independence of these institutions,[103] this remains an ongoing challenge.[104]

The problem of funding and resources is linked to the third point – the tenuous relationship between the SAHRC and the government.[105] This has been particularly evident in the context of the SAHRC's monitoring role in respect of socio-economic rights and the challenges it has encountered as a result of inadequate resources and the lack of cooperation by the organs of state who fail to respond to requests for information.[106] This tenuous relationship has also been illustrated in a number of hate speech controversies. It is rather interesting that a number of these matters involve discordant statements made by political leaders.

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[101]Govender 'The South African Human Rights Commission' in Andrews and Ellmann (eds) *The post-apartheid constitutions: Perspectives on South Africa's basic law* (2001) 571 at 572.

[102]See *Report on the review of chapter 9* (n 97) 185.

[103]See *New National Party of South Africa v Government of the Republic of South Africa* (n 91).

[104]See further Lawrence *The role of the South African Human Rights Commission in strengthening democracy* Unpublished research report, Masters of Management (University of Witwatersrand) (2003) 94 and 106 on the issue of funding and resources.

[105]The SAHRC, as an independent institution, is not only dependant on the state for its financial resources and composition (see ss 193(4) and 194(1) of the Constitution), but also to ensure its independence and impartiality and remains fully accountable to the state. As an independent institution that is tasked with the role of monitoring and promoting human rights, the SAHRC is also tasked with monitoring the state and the measures that the state has undertaken in order to give effect to human rights. This means that the SAHRC has the power to hold the state accountable for its actions or inactions (as the case may be) and the state is required by law to be fully cooperative with the SAHRC. According to Lawrence, there is a lack of coordination within parliamentary structures about where and how the ch 9 human rights institutions fit in as well as a lack of understanding about the procedures and measures of accountability (Lawrence (n 104) 113). For a discussion on the doctrine of separation of powers and the issues of independence and accountability, see Klaaren (n 8) 24C-11–24C-15.

[106]See Thipanyane 'The monitoring of socio-economic rights by the South African Human Rights Commission in the second decade of the Bill of Rights – Methodological issues' (2007) 8/1 *ESR Review* 11. See also Lawrence (n 104) 111 and 134.

One such noteworthy case involved former African National Congress Youth League (ANCYL) president, Julius Malema, and the Congress of South African Trade Unions general secretary, Zwelinzima Vavi, who made controversial public statements that they were prepared to take up arms and kill in support of the African National Congress (ANC) president, Jacob Zuma.[107] The SAHRC's preliminary findings were that the statements made by both were unconstitutional and called on both to retract and apologise for their statements within 14 days on the grounds that they were in violation of section 10 of PEPUDA. Both refused; despite the SAHRC extending the deadline for the ultimatum. The SAHRC threatened Malema and Vavi with legal action in the Equality Court.[108] In refusing to comply with the SAHRC's notice, Vavi and Malema had gone too far in attacking the independence and integrity of the national institution and hindering its duties, and the SAHRC expressed its disapproval:

> This attitude is very worrying. The SAHRC is a constitutional body established to enhance and protect human rights … and if people find us not doing our work or abusing powers they should challenge us in court, not insult or attack us in corners … They are encouraging South Africans to disrespect the country's Constitution … We are not immune to mistakes. We are a public body operating on taxpayers' money. We need to be accountable for our work.[109]

Despite seeking parliamentary support, Parliament was not forthcoming, and the President remained silent on the matter. After much media publicity the SAHRC eventually retracted its demand for an apology claiming it was it in the interests of 'moving forward'.[110]

This case illustrates the lack of governmental support for the SAHRC in situations where its integrity is at risk and where it most needs the backing of government. It is argued that this lack of support fundamentally undermines the effectiveness and credibility of the SAHRC. The Constitution and the Human Rights Act place an obligation on organs of the state to assist and protect the SAHRC and to ensure its dignity, independence and impartiality.[111] Govender asserts that this duty must be taken more seriously if the Commission (as well as other chapter 9 institutions) are to discharge their mandates effectively.[112]

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[107] See http://mg.co.za/article/2008-07-02-sahrc-mulls-malemas-kill-for-zuma-remarks (accessed 2011-10-18), http://mg.co.za/article/2008-07-03-thank-god-for-tutu (accessed 2011-10-18) and http://mg.co.za/article/2008-06-28-vavi-prepared-to-die-for-revolution (accessed 2011-10-19).

[108] See http://www.businessday.co.za/Articles/Content.aspx?id=50111 (accessed 2011-10-18).

[109] *Ibid*.

[110] http://www.businessday.co.za/Articles/Content.aspx?id=50247 (accessed 2011-10-18).

[111] Klaaren states that '[a]lthough rendered in rather empathetic terms, this duty appears to be honoured in the breach' Klaaren (n 8) 24C-15. See also *Report on the review of chapter 9* (n 97) 179-181.

[112] Govender (n 101) 581 states:

> The challenge facing [the ch 9] institutions is to convince those exercising power that they are not simply to be tolerated but should be pro-actively assisted. There will be a necessary tension between them and organs of state, as there sometimes is between courts of law and the government. What is required is an understanding that the exercise of power in South Africa is subject to constraints and that these institutions

This incident also illustrates the next point. The SAHRC has in certain instances failed to assert itself as an institution to be reckoned with. In demanding an apology, granting an extension of the notice and thereafter retracting the demand when the apology was not forthcoming, the effect was equivalent to a mild scolding and not even a slap on the wrist. The public inevitably judges its human rights institutions in terms of their ability to tackle human rights violations and transgressions with determination, effectiveness and efficiency.[113] The incident, rather unfortunately, dented the image of the SAHRC and this was reflected in the public, media and political response.[114] The SAHRC ought to stand its ground firmly and utilise the full scope of its powers to ensure compliance with its orders, notices and findings specifically in the political arena. Following through with its threats of legal action will also go a long way to building its credibility and asserting its authority as a watchdog of human rights violations. The establishment of a vibrant human rights culture requires strong leadership from an independent and authoritative body.

It is therefore of no surprise that the SAHRC does not get due respect from the leading party's youth group, the ANCYL, or some political figures. In August 2011, in response to yet another contentious remark by a political leader,[115] the SAHRC cautioned against certain types of utterances:

> [A]ll South Africans, and in particular those in public office or in decision making positions, should refrain from making utterances or statements, and expressing opinions which have the potential to be unpalatable and/or offensive to others. Instead these officials should use such public platforms to communicate in a manner that respects and upholds the rights of others, promotes the values of the Constitution and contributes towards the building of a nation that is united in its diversity.[116]

Public statements made by political figures since then have illustrated that the SAHRC's recommendation has fallen on deaf ears and its failure to follow through

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together with the courts have been given a legitimate overseeing role by the drafters.

See, eg, *New National Party of South Africa v Government of the Republic of South Africa* (n 91).

[113] See Robbina *et al Organisational behaviour – global and southern African perspectives* (2009) 309.

[114] See further http://mg.co.za/article/2008-07-02-malema-wont-withdraw-kill-for-zuma-statement, http://mg.co.za/article/2008-07-03-thank-god-for-tutu and http://www.sowetanlive.co.za/sowetan/archive/2008/07/08/sahrc-favoured-malema---ifp (accessed 2011-10-18).

[115] In an interview on a national television programme, Tokyo Sexwale, Minister of Human Settlements, made the statement that '[t]he growing number of squatter camps in South Africa is caused by people who are kicked out by very, very evil farmers …' The SAHRC found that, based on ss 9 and 16 of the Constitution read with s 12 of PEPUDA and precedent, the Minister was merely expressing an opinion, without facts, on what he perceived to be the cause of the increase in squatter camps in the country. The Commission found that the remarks did not constitute hate speech, and there were insufficient grounds for Sexwale to apologise. See http://www.sahrc.org.za/home/index.php?ipkMenuID=&ipkArticleID=75 and http://www.news24.com/SouthAfrica/News/SAHRC-Sexwale-farmer-comment-not-hate-speech-20110825 (accessed 2011-10-21).

[116] See http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=252703&sn=Detail&pid=72308 (accessed 2011-10-21).

with consequences.[117] Another case which illustrates this point is that involving Bongani Masuku of the Congress of South African Trade Unions (COSATU) who made anti-Semitic remarks at a rally by the Palestinian Solidarity Committee at the University of the Witwatersrand in March 2009. He continued making similar comments thereafter in other forums including the Internet and email.[118] The South African Jewish Board of Deputies lodged a complaint with the SAHRC who made a finding that the remarks constituted hate speech in terms of section 16(2) of the Constitution and section 10 of PEPUDA.[119] The SAHRC ruled that it was clear Masuku was referring to Jews and Israelis in his statements, and gave notice to Masuku to tender an apology to the complainant within fourteen days but not later than 23 December 2010, failing which the matter would be referred to the Equality Court for final adjudication. Masuku has yet to apologise and the SAHRC has yet to follow through with its threat of referral to the Equality Court.

In short, these issues bring into question the efficacy of the monitoring and enforcement system in respect of hate speech matters especially in cases that are fraught with political dynamics. Section 18 of the Human Rights Commission Act makes any conduct that interferes, hinders or obstructs the performance of its functions, duties and powers a criminal offence.[120] Although a drastic approach, the SAHRC should, if need be, invoke this provision in the future, including against the state.[121]

In the face of the new age of information and technology the SAHRC also faces an additional challenge. The exercise of its powers is limited in respect of resolving complaints against hateful expression posted on social networking sites, for example, Facebook and Twitter. The SAHRC recently expressed concern about the unregulated nature of communications on these sites.[122] In a recent press statement, the SAHRC chair, Lawrence Mushwana, while acknowledging the important role of such media in promoting freedom of expression, said that hate

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[117] See, eg, http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=262486&sn=Detail&pid=71616 and http://www.afriforum.co.za/english/2011-10-20-anc-jeugliga-se-reaksie-op-makula-dui-op-rassistiese-vooroordeel-teen-wittes/ (accessed 2011-10-21).

[118] The remarks included the following:

> [A]s we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity[.]

[119] 'The comments and statements made are of an extreme nature that advocate and imply that the Jewish and Israeli community are to be despised, scorned, ridiculed and thus subjecting them to ill-treatment on the basis of their religious affiliation.' File ref no GP/2009/0362 at 9 of the finding.

[120] Section 18 of the Human Rights Commission Act. See further Lawrence (n 104) 155.

[121] Thipanyane proposes the use of this provision in respect of ensuring that the state takes its recommendations in respect of the monitoring of socio-economic rights seriously. Thipanyane (n 106) 14.

[122] See http://www.news24.com/SciTech/News/SAHRC-concerned-about-Facebook-Twitter-20110829 (accessed 2011-10-18).

speech (and other human rights violations) on these sites are as a result of a lack of regulatory mechanisms to subject user-registration to the relevant legislative provisions.[123] Users often use fictional profiles making it impossible to trace their locations and so to hold them accountable. The SAHRC also acknowledged that it has had to close complaint files after being unable to proceed further for a lack of practical solutions despite having sought the services of experts, and asserts that this is an international problem that requires a global solution, not a local one.[124]

In this new era where the exponential growth of social networking and media sites have connected hundreds of millions of people around the world,[125] placed enormous power in the hands of ordinary people to express themselves freely, and created a commanding platform for the dissemination of information, it is unfortunate that the SAHRC is not able to resolve complaints arising from these forums. This leaves a gaping hole in its mandate specifically in the context of protecting against the human rights violations that arise from online hate speech. In this respect, the CHRT is able to fulfil its mandate far more effectively than the SAHRC.

The role of the SAHRC in respect of hate speech matters is, however, far from being completely unconstructive. The SAHRC enjoys powers of mediation, adjudication, litigation and interpretation which it has to some extent exercised in the context of freedom of expression.[126] [127] In cases where the SAHRC has been involved in litigation and sat as the adjudicating body, its findings and decisions have been sound and firmly founded on constitutional jurisprudence. This is evident from the cases discussed in the following section. Its findings send out a clear message that hate speech would not be tolerated in a constitutional democracy. The advantage of this quasi-judicial mode of handling complaints is that the procedures are more cost effective for the complainant and less time consuming, rigid and confrontational. This makes the SAHRC more accessible than the courts. The problem is however that the SAHRC does not share the judicially binding powers of the courts to enforce its recommendations and findings; nonetheless, some organs of state have treated the decisions as binding.

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[123] *Ibid*.

[124] The SAHRC's press statement followed an announcement by the Hawks, a South African police unit that combats organised crime, that an investigation was underway after the *Sunday Times* newspaper published a Facebook image of a white male with a rifle posing over what appears to be a lifeless body of a black child 'like a hunter celebrating his kill'. The image appeared on the Facebook profile of a so-called 'Eugene Terrorblanche'; the profile name being a play on the name of Eugene Terre'Blanche, the Afrikaner Weerstandsbeweging (AWB) leader who was murdered in April 2010. *Ibid*.

[125] Facebook, eg, has over 1 billion registered users.

[126] See the Human Rights Commission Act. See also Klaaren (n 8) 24C-7–24C-9 and Minyuku 'Developing a complaint handling mechanism: The South African Human Rights Commission and the Commission on Gender Equality – Research Report no 11' (2000).

[127] See Hund 'Remarks on the South African Law Commission's state-based approach to popular justice' (2006) 22 *SAJHR* 328 where he, in part, considers the SAHRC's task of finding a solution to the problem of the role of popular justice in South Africa's new democracy.

The SAHRC has also held a number of open seminars on current hate speech controversies which served to provide a platform for debate and discussion, for example; the seminar titled 'Freedom of expression in the context of religious diversity – How to we strike the necessary balance?' which was held in March 2006 in the midst of the Danish cartoon controversy where the Prophet Mohammed was depicted with a bomb-shaped turban. Following the recent decision handed down by the Equality Court on the 'Kill the Boer' song,[128] the SAHRC indicated its intention to host a provincial dialogue series on arising hate speech matters. The SAHRC has played an active role in combating racism which has undoubtedly been a positive step towards protecting against hate speech in society.[129] There have been a couple of *ad hoc* discussion documents on freedom of expression and hate speech published by the SAHRC; however, these have been too few and far between.[130] It is proposed that the SAHRC should take a page out of the CHRT's book by making all of its decisions available online for easy public access. As it stands, this is not the case.

The SAHRC is currently in a process of repositioning itself with the goal of being more responsive and addressing its challenges in a meaningful way.[131] [132] This goal of rethinking ways of delivering on its mandate was an initiative that began at the end of 2010 and is reflected in the SAHRC's first plenary report in 2011. The current CEO, Kayum Ahmed, has acknowledged that this process entails asking difficult questions of itself, critical self-reflection, performance evaluation and utilising its limited resources to ensure increased organisational effectiveness. The results thus far have yielded an improvement in performance from 52% in 2009/2010 to 67% in 2010/2011. The CEO has expressed determination in achieving 100% of the SAHRC's strategic goals in the next three years.[133]

This reflects that the SAHRC is certainly aware of its shortcomings and acknowledges that there is room for vast improvement. It remains to be seen how

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[128] *Afri-Forum v Malema* (n 7). See also *Freedom Front v South African Human Rights Commission* (n 4) where the Commission made a finding in respect of the same song.

[129] The SAHRC has, eg, made significant strides in its research on racism which has a great impact on hate speech. Their work includes a Discussion Document on a national action plan and strategy to combat racism specifically, a report on racism in public secondary schools (February 1999), an investigation into racism at the South African Police Vryburg District (November 1999), a report on combating racism (July-August 2000), an investigation into racism in the media (November 1999-2000), a report on xenophobia and related intolerances (August-September 2001), a report on South Africa's compliance with provisions of the international convention against all forms of racial discrimination (June 2006) and the Human Rights Development Report in 2008.

[130] Eg, the Commission published a summary of cases/investigations from 1997, 1999 and 2000 dealing with freedom of expression as well as the 'Discussion document: Freedom of expression' (n 74).

[131] See http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=76 (accessed 2011-09-28).

[132] The *Report on the review of chapter 9* (n 97) 182-183 indicates further challenges faced by the SAHRC in terms of institutional governance issues.

[133] *Ibid*.

it tackles and overcomes some of the real hurdles in its path. Its progressive approach is nonetheless reassuring.

3.2 Selected hate speech cases arising from the human rights institutions

3.2.1 The Canadian Human Rights Tribunal

In recent years, hate speech cases heard by the CHRT arose out of incidents on the Internet. In the 21st century, the Internet is often the main forum for disseminating hate speech. Canadian law reflects this through provisions of the Canadian Human Rights Act that criminalise online hate speech. The first case the CHRT heard related to online hate speech was *Sabina Citron and Canadian Human Right Commission v Ernst Zündel*.[134] This decision laid the legal groundwork for how the CHRT specifically would adjudicate hate speech decisions, especially those related to the Internet.

The CHRT *Zündel* case,[135] decided in January 2002, was the first time section 13(1) of the Canadian Human Rights Act was applied to a website. The CHRC referred the case to the CHRT when the Toronto Mayor's Committee on Community and Race Relations filed a complaint alleging that Zündel had posted hate messages on a web site.[136] It took eight years for the CHRT to reach a final decision due to several motions by the defendant to have the matter dismissed. Each motion was denied but subsequently appealed in the federal courts. Zündel lost each appeal.

The CHRT ruled that, as the owner and publisher of the website, Zündel violated section 13(1) of the Canadian Human Rights Act and ordered him to cease publication.[137] The CHRT had to first ensure that all aspects of the law applied to the case. First, it had to determine if Zündel himself controlled the editorial content of the website. Secondly, the CHRT had to determine if the web site was a source for telephone-based communication. Finally, the web site's content had to contain material that would expose a person or group of people to hatred or contempt. In all three respects, the CHRT – similar to a court of law – took testimony from experts and ruled that the web site violated the law. The CHRT Chairman, Pensa, cited the Supreme Court's earlier decisions[138] including its earlier *Oakes* test when he said there are limits to freedom of expression when victims are placed in harm's way by hate speech.[139] He said this limit upon free expression includes hate

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[134] *Sabina Citron and Canadian Human Rights Commission v Ernst Zündel* 2002 CHRD no 1 (CHRT). This case involved the same Ernst Zündel as in *R v Zündel* (n 10).
[135] *Sabina Citron and Canadian Human Rights Commission v Ernst Zündel* (n 134)
[136] *Ctron and Toronto Mayor's Committee v Zündel* 2002 CHRD no 1 (CHRT).
[137] *Id* 2. The 'Zündelsite' questioned the historic details of the Holocaust.
[138] *R v Andrews* (n 10), *Canada v Taylor* (n 10) and *R v Keegstra* (n 10).
[139] *Citron and Toronto Mayor's Committee v Zündel* (n 136) 79. See also *Canada v Taylor* (n 10) and *R v Keegstra* (n 10).

propaganda posted on the Web.[140] Pensa stated that technology does not have an impact on the importance of a law such as section 13(1).[141]

Its subsequent decisions since 2002 followed the same legal philosophy. Any successful complaint of hate speech would need to prove that the speech in question exposed a minority group to the danger of hate by the wider Canadian community. If that can be proven then criminalising that speech does not conflict with the Canadian Charter and the Canadian Human Rights Act.[142] The Supreme Court of Canada and the CHRT agree that in a democracy everyone is entitled to respect and equality, especially any group that is at risk of being discriminated against.

3.2.2 The South African Human Rights Commission

The SAHRC has, since its inception, received a number of complaints from various sectors of society and has had to tackle issues arising from section 16(2)(c) of the Constitution. It is beyond the scope of this paper to discuss the details of each complaint.[143] However, there are four common threads that run throughout these complaints, namely, the controversial expressions were published either in the print media or broadcast on the radio; secondly, the expressions contained some form of criticism of persons on the basis of race or ethnicity;[144] thirdly, there is strong support for the Canadian Supreme Court's emphasis on dignity in cases involving hate speech[145] and, lastly, reliance on Canadian jurisprudence in the interpretation of the elements for the hate speech test.[146] The approach of the SAHRC has been dictated by the cornerstone values of the Constitution and the jurisprudence of the Constitutional Court. The complementary relationship and nature of the SAHRC and the Constitutional Court has in recent years revealed itself to a greater degree.[147]

There are two landmark decisions on hate speech involving the SAHRC which arose in the early 2000s. In *Human Rights Commission of South Africa v*

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[140] *Citron and Toronto Mayor's Committee v Zündel* (n 136) 82. The CHRT Chairman, Pensa, indicated that the rulings in the *Taylor* and *Keegstra* cases criminalising hate propaganda apply to web sites.

[141] *Citron and Toronto Mayor's Committee v Zündel* (n 136) 79.

[142] Section 13(1) of the Canadian Human Rights Act.

[143] There was a spate of hate speech cases heard by the SAHRC in the 1990s. See for instance, *Federal Council of the National Party v Maharaj Kasrils and Mokaba* (1997), *General Constand Viljoen v Makhaye* (1999) and *Portfolio Committee Testimony* (1999) in South African Human Rights Commission 'Discussion Document: Freedom of Expression' (n 74).

[144] See 'Discussion Document: Freedom of Expression' (n 74).

[145] *R v Keegstra* (n 10) cited as authority in *Human Rights Commission of South Africa v SABC* (n 4) 107. See also *Freedom Front v South African Human Rights Commission* (n 4) 1288-1289, 1293 and 1298.

[146] See *Freedom Front v SAHRC* (n 4) 1289-1295.

[147] For instance, like the Constitutional Court, the SAHRC has been alert to the dangers of disallowing speech. See *Freedom Front v SAHRC* (n 4) 1288.

SABC[148] it was the SAHRC who lodged a complaint with the Broadcast Complaints Commission of South Africa (BCCSA) against the South African Broadcasting Commission (SABC). The SABC had broadcast a Zulu song by Mbongeni Ngema, 'Amandiya', which contained statements about the Indian population. Broadly translated, the song expressed the view that Indians were a threat to black South Africans and appealed to courageous men to be alert to the threat that Indians posed to black South African culture and lifestyles, and appealed to all black people to rise up against Indian oppression.

The BCCSA found that the song amounted to an advocacy of hatred based on race in terms of section 16(2)(c) of the Constitution.[149] The BCCSA's found that the song polarised the Zulu and Indian populations (the latter being a minority group) by demeaning Indians, and this amounted to hatred.[150] The BCCSA also found that there was a real likelihood that the inflammatory song would instil fear in the Indian people, and this amounted to a violation of their constitutional right to dignity.[151] The song threatened the safety of the Indian people and placed their constitutional right to security at risk.[152] The intention of the songwriter and the broadcaster was irrelevant as the test for hate speech is an objective one.[153]

This case is significant for three reasons. Firstly, it is a good illustration of the active role that the SAHRC has the power to play in protecting against hate speech. This case was not a finding of the SAHRC; instead it was a matter that the SAHRC felt compelled to initiate of its own accord because of the nature of the complaint. Even though the SAHRC did have the power to make a finding on this matter itself, it is obliged to refer complaints to another forum which may be able to deal more effectively with a matter. Based on the nature of the expression and the broadcasting medium that was used to convey the message, the SAHRC therefore referred the matter to the BCCSA for determination.

Secondly, the BCCSA emphasised the importance of giving weight to the medium that was used and how effective that medium was in the context of the expression.[154] In this case, the medium was not 'an intricate poem in a serious literary work',[155] it was a song that was written in simple language with a catchy tune. The song was thus easily understood by listeners, in particular, the many Indian people who can speak or at least understand the Zulu language, and it was broadcast on a mass medium.[156] Song, as a medium, was an extremely powerful one because it reached and connected with people from all walks of life

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[148] *Human Rights Commission of South Africa v SABC* (n 4).
[149] *Id* 101-108.
[150] *Id* 106.
[151] *Id* 107.
[152] *Id* 107-108.
[153] *Id* 108.
[154] *Id* 104-105 and 108.
[155] *Id* 108.
[156] *Ibid.*

irrespective of their levels of literacy. The BCCSA also considered the significance of song as a form of art and raised the pertinent issue in this case of determining where the art ends and hate speech commences.

Lastly, the BCCSA considered the constitutional protection of minority groups. In this case the targeted group were Indians who were a minority group that forms approximately 2.6% of the South African population largely based in KwaZulu-Natal where the Zulu language is most predominant.[157] Referring to constitutional jurisprudence, specifically the *Islamic Unity* judgment[158] and *Christian Education South Africa v Minister of Education*,[159] the BCCSA emphasised that the protection of the rights of minorities and the recognition of diversity are an integral part of the new democratic order in its quest for reconciliation and national unity.[160] In essence, constitutional interests are not dependant on 'a counter-balancing of numbers, but a qualitative one based on respect for diversity'.[161]

The case *Freedom Front v SAHRC*[162] is the other significant case involving the SAHRC. The Freedom Front, a political party, lodged a complaint with the SAHRC arguing that the slogan 'Kill the farmer, kill the Boer' amounted to hate speech.[163] However, the SAHRC rejected this contention and found that while the slogan may be distasteful and hurtful and may offend the rights to dignity and equality, they did not explicitly fall into section 16(2)(c) of the Constitution.[164] This case was thereafter heard by an appeal panel of the SAHRC in terms of section 12(a) of its regulations.[165] The panel found that the slogan indeed constituted hate speech in terms of section 16(2)(c) of the Constitution.

This decision raised a number of key principles. First is the approval and reliance of the SAHRC on the decision of *R v Andrews*[166] as cited by the Supreme Court of Canada in *R v Keegstra*[167] in respect of the meaning of *hatred* and *harm* as elements of section 16(2)(c). The elements of section 16(2)(c), which reduces the protection of the right to freedom of expression to a level less enjoyed than by Canada, nonetheless creates a fairly stringent standard of proof. Despite this, Canadian jurisprudence has provided a wealth of direction for South Africa in the

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[157] *Id* 105.
[158] *Islamic Unity Convention v Independent Broadcasting Authority* (n 4).
[159] *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).
[160] *Human Rights Commission of South Africa v SABC* (n 4) 105.
[161] *Christian Education South Africa v Minister of Education* (n 159) para 112, quoted in *Human Rights Commission of South Africa v SABC* (n 4) 105-106.
[162] *Freedom Front v SAHRC* (n 4).
[163] The slogan was chanted at two public events; at an ANC Youth League meeting in Kimberley and at the funeral of ANC leader, Peter Mokaba, in Polokwane (footage of the funeral was broadcast on SABC television).
[164] 'Discussion Document: Freedom of Expression' (n 74).
[165] Notice 1465 of 1996.
[166] *R v Andrews* (n 10).
[167] *R v Keegstra* (n 10).

interpretation of section 16(2)(c). The element of *hatred* is an attempt by the drafters to circumscribe the limitation as a way of overcoming the inherent dangers of limiting the right to free speech as a democratic ideal. The manner in which this element must be interpreted has been considered by the Constitutional Court on a limited number of occasions.[168] The *Keegstra* case[169] is once again instructive here.[170]

Second, the SAHRC found that in interpreting the element of incitement to cause *harm*, the meaning could not be confined to mere physical harm but that it should also be interpreted to include psychological harm. The SAHRC arrived at this conclusion based on the decision of *R v Keegstra*[171] where the Supreme Court of Canada described the types of harm that be caused by hateful speech.[172]

The approach is in keeping with that of the South African approach where the importance of dignity, the promotion of tolerance and respect is stressed. We agree that it is only in extending the meaning of harm to include psychological and emotional harm that the true purpose and intention of section 16(2)(c) of the Constitution can be realised.[173] It is important to note that this understanding of *harm* ties in closely with the discussion above on the scope of dignity and its significance in the enquiry into section 16(2)(c).[174]

Third, the SAHRC cautioned that there must be a distinction drawn between expression that offends and expression that harms or is likely to cause harm,[175]

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[168] See for instance, *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 3) where the Court held that expression, in relation to the requirement of hatred, must be analysed by the perspective of the vulnerable group.

[169] *R v Keegstra* (n 10).

[170] In *R v Keegstra* (n 10) Dickson C J C held at 249-250:

> [T]he term [*hatred*] connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J A stated in *R v Andrews* … 'Hatred is not a word of casual connotation. To promote hatred is to instil detestation and malevolence in another.' Hatred in this sense is a most extreme emotion that belies reason; an emotion that if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.

[171] *R v Keegstra* (n 10). The Supreme Court of Canada described the types of harm that may result from hate speech. The Court stated at 227-8:

> [A] response of humiliation and degradation from the individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to a community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. The decision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target-group members to take drastic measure in reaction, perhaps avoiding activities which bring them into contact with outsiders or adopting attitudes and postures directed towards blending in with [the] majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

[172] See also *Freedom Front v SAHRC* (n 4) 1293 where *R v Keegstra* (n 10) was quoted.

[173] See Pillay (n 6) 485-486 and Currie and de Waal *The Bill of Rights handbook* (2005) 377 where it is stated that 'a conception of harm that is not confined to physical harm, but includes harm to dignity interests conforms to the purpose of the hate-speech exception'.

[174] *Ibid*.

[175] *Freedom Front v SAHRC* (n 4) 1295.

and stressed that there must be a causal connection between the advocacy of the hateful expression and the harm caused. The closer the causal link the more likely that the expression in question would fall under section 16(2)(c). The test is an objective one based on the reasonable person – 'whether a reasonable person assessing the advocacy of hatred on the stipulated grounds within the context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm'.[176] We submit that this causal connection adds to the stringent nature of the test for hate speech, which in our view, negates the concerns that section 16(2)(c) makes drastic inroads into the right to freedom of expression.

Lastly, the SAHRC laid a good foundation for the legal approach that must be adopted by courts and forums in cases alleging hate speech.[177] First is the acknowledgment that any test to assess hate speech must acknowledge the seriousness of classifying speech as such and the resultant impact on the right to freedom of expression.[178] Following the approach of the Supreme Court of Canada, the Constitutional Court advocates a purposive approach in constitutional interpretation, and this has been followed by the SAHRC.[179] In addition, the tone, context and content of the expression in question are also key factors to be considered on a case-by-case basis. Following on from the approach adopted in the *SABC* case, the SAHRC affirmed that another relevant factor is whether the expression is directed at a minority or vulnerable group in society – the more vulnerable a group is, the greater the likelihood that harm will be caused by the advocacy of hatred.

Of the most recent hate speech cases wherein the SAHRC was involved, the most interesting involves a politically-based cartoon by cartoonist, Zapiro[180] that depicts the ANC president, Jacob Zuma, with his pants undone, while the former ANCYL president, Julius Malema, and the then secretaries general in the tripartite alliance, Gwede Mantashe, Blade Nzimande and Zwelinzima Vavi, pin down a blindfolded female figure, Lady Justice, who is wearing a sash with the printed words 'Justice System'.[181] A speech bubble has Gwede Mantashe urging Jacob Zuma to 'Go for it, Boss!'. The cartoon was published in a national Sunday newspaper on 7 September 2010. This led to the National Secretary of the Young Communist League, Buti Manamela, lodging a complaint with the SAHRC to determine whether the cartoon violated any of Zuma's constitutional rights and whether it also amounted to hate speech.

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[176] *Id* 1298.
[177] *Id* 1289-1290, 1296 and 1298.
[178] *Id* 1289 read together with 1295.
[179] *Id* 1289-1290. See also *R v Big M Drug Mart Ltd* 1985 1 SCR 295.
[180] This was the cartoonist who drew the cartoon depicting the Prophet Mohammed with a bomb-shaped turban.
[181] *Manamela, Buti v Shapiro* case reference no GP/2008/1037/E Mokonyama.

The SAHRC found that while the cartoon was insensitive, distasteful and offensive to those depicted; the meaning was satirical and metaphorical. Based on the political context, the right to free expression in this case was found to outweigh the ANC president's right to dignity. The cartoon also did not constitute unfair discrimination based on gender and did not infringe the right to dignity of women and/or rape victims. In essence, the offending expression did not fall within the scope of section 16(2).

There are three points to note on this case. First, the SAHRC, in echoing the principles from the *Freedom Front* case,[182] stated that the focus of the inquiry should also be on whether the expression itself causes or is likely to cause harm, and not on the subjective intention of the person articulating it.[183] The SAHRC also articulated that rights should be 'balanced in accordance with their worth' in a democracy.[184]

The second point is in respect of the value and protection of political speech in context. The SAHRC affirmed that political expression deserves a heightened level of protection. In this case, the depiction was published in the public interest and had in fact stimulated valuable and insightful political debate.[185] The SAHRC referred to *Holomisa v Argus Newspapers*[186] where the Court articulated that the dictates of a democracy insofar as political figures are involved require that criticisms of politicians should be free, open, robust and unrestrained and this is because of the immense power and influence wielded by these figures.[187]

Lastly, the SAHRC applied its mind to PEPUDA and its application to hate speech. It was noted that the definition of hate speech in PEPUDA differs substantially from that in the Constitution.[188] The SAHRC found that PEPUDA did not apply to the cartoon in question for the simple reason that section 10 of PEPUDA narrowly defines hate speech as expression in the form of words only, and as such the cartoon drawing fell outside its ambit.[189] The words expressed in the cartoon also fell short in that they did not indicate a clear intention to be hurtful, incite harm and/or promote or propagate hatred.[190]

What is evident from these cases is that the SAHRC has, through its decisions, used the Constitutional Court's and the Supreme Court of Canada's jurisprudence as a foundation from which it is slowly building a set of guiding principles on hate speech. There is no room for an absolutist approach of allowing free and inhibited expression in a market place of ideas.

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[182] *Freedom Front v SAHRC* (n 4).
[183] *Manamela, Buti v Shapiro* (n 181).
[184] *Ibid*.
[185] *Ibid*.
[186] *Holomisa v Argus Newspapers* 1996 6 BCLR 836.
[187] *Manamela, Buti v Shapiro* (n 181).
[188] *Ibid.*
[189] *Ibid*.
[190] *Ibid.*

4 Comment

Generally, the *dicta* of the Constitutional Court of South Africa have mandated caution against uncritical borrowings from comparative jurisprudence (specifically that of the US),[191] however, the Court has evidently placed heavy reliance on Canadian hate speech jurisprudence.[192] While both countries share substantial legal and philosophical doctrines as to why hate speech is prohibited, it is apparent that there also are fundamental differences in the functioning and roles of their respective human rights institutions. Here we consider six doctrinal characteristics common to both countries and one difference in their legal regimes, and thereafter analyse the roles and functioning of the human rights institutions.

The first and foremost common legal doctrine is that both countries' legal systems support the notion of shared democratic values, including equality, dignity and freedom amongst all sectors of society. In Canada, the fundamental notion behind banning hate propaganda is the belief in preserving access to democracy for Canadians. South Africa's divided past prevented many segments of societies from being equal, active members in the country. The post-apartheid constitutional dispensation seeks to ensure this injustice does not recur. While Canada and South Africa have different historical backgrounds, they do share the belief in democratic access for all groups of people including traditionally vulnerable groups. As such, both jurisdictions recognise that hate speech undermines the values of pluralism and diversity.

Second, both countries have a shared meaning of human dignity in their constitutional jurisprudence. *Law v Canada* is one such case that aptly defines this common interpretation of dignity:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with…psychological integrity and empowerment…Human dignity is harmed when individuals and groups are marginalised, ignored or devalued, and is enhanced when laws recognise the full place of all individuals and groups.[193]

The Constitutional Court of South Africa, despite having found it a challenge to ascertain the meaning of this intricate concept of dignity,[194] has embraced the

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[191] *De Reuck v Director of Public Prosecutions* (WLD) 2003 12 BCLR 1333 (CC) para 48. See also Davis (n 69) 11-4(1).

[192] For a look at the constitutional underpinnings of freedom of expression in the US and Canada, see Huscroft 'The constitutional and cultural underpinnings of freedom of expression: Lessons from the United States and Canada' (2006) *The University of Queensland LJ* 181. See Barendt *Freedom of speech* (2005) who analyses free speech and free speech interests in a global comparative context. See also Milo *Defamation and freedom of speech* (2008) 43. See Kende (n 6) 183 who considers freedom of expression in a comparative context between South Africa and the US. See Lundmark *Power and rights in US constitutional law* (2008) (2nd ed) 128 who, in part, focuses on free speech and related legal issues in the US.

[193] *Law v Canada* 1999 170 DLR 4th 1 (SCC) para 53.

[194] See *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 3) para 29.

Canadian understanding of the concept, and this has been reflected in a number of its judgments.[195] In both countries, the concept of human dignity is intrinsically correlated to the inherent worth and humanity of an individual and the respect afforded to that individual. Human dignity encompasses both the personal sense of self-worth as well as the public's estimation of the worth of an individual.[196]

This leads to the third point. Both higher courts have stressed that, at both the individual and group level, dignity forms an integral element in the balancing process in cases of freedom of expression and hate speech. While freedom of expression is a 'guarantor of democracy' and for seeking truth in society,[197] free speech may be limited on behalf of the individual's or group's right to democracy, freedom and equality. While the high courts in both countries stress the values of human dignity and democracy for all citizens, they base these values in law. No one legal freedom surmounts others. The higher courts of both countries take into account the context and the value of the expression, which is pivotal to the balancing process.[198] Central to the approach of both higher courts is the recognition that, in determining the constitutionality of limiting expression, not all expression is of equal value.[199]

This balancing act leads to the fourth common legal value, an acceptance that rights can and should be limited. The purpose of Canadian and South African legal doctrines on hate speech is to prevent harm to individuals and groups. Hate speech plays no role in the discovery of truth and it hinders the democratic process. This danger can override freedom of speech under specific circumstances. Any public incitement or advocacy to violence is beyond the scope of both countries' freedoms. Incitement, the fifth shared value, is one that South African jurisprudence borrowed from Canada. Using words to encourage others to hate is outside the boundaries of the law. *Incitement to cause harm* forms an important part of the South African test for hate speech. Incitement has been interpreted to mean 'an act of instigation',[200] but what *is* meant by 'incitement to cause harm'? In this regard, the Supreme Court of Canada in *R v Andrews* has been instructive as to the meaning of this element:

> When an expression does instil detestation it does incalculable damage to the Canadian community and lays down the foundation for the mistreatment of members of the victimised group.[201]

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[195] The Court in *S v Dodo* (n 3) affirmed that individuals should not be treated simply as 'instruments of objects of the will of others' (para 38) and *Khumalo v Holomisa* (n 3).

[196] See also Haysom 'Dignity' in Cheadle *et al* (eds) *South African constitutional law: The Bill of Rights* (2012) Issue 11 (2nd ed) 5-1 at p 5-12 – 5-13.

[197] See *SABC v National Directior of Public Prosecutions* (n 4).

[198] Barendt (n 192) 57.

[199] *Ibid*.

[200] Currie and De Waal (n 173) 377.

[201] *R v Andrews* (n 10) 179. In terms of this approach, hate speech, expressed in the context of ethnic or racial conflict, could be considered to constitute incitement to harm, and as such, fall

Finally, both countries have a shared understanding of hatred and the harm it can do.[202] Dickson CJ noted in the 1990 *Keegstra* decision that promoting hatred against an identifiable group is a very limited right within the context of society's free expression values.[203] In the *Taylor* decision in the same year, Dickson CJ stated that hate propaganda is contrary to Canada's overall goal of furthering equality.[204] These approaches have been echoed by the Constitutional Court and the SAHRC in their quest for reconciliation, nation building and the promotion of respect and tolerance, and are reflected in the cases cited and discussed in this paper.

While the two countries share six values that underlie their respective hate speech laws, there is one important difference and that is the structure between the hate speech provisions. Section 16(2) of the South African Constitution specifically states that free speech does not include *propaganda for war, incitement of imminent violence, and advocacy of hatred based on race, gender, ethnicity or religion and that which constitutes incitement to cause harm.* In Canada, hate speech law was created at parliamentary level in the federal Criminal Code. Whereas the South African Constitution provides specific limits to free expression, section 1 of the Canadian Charter makes generic provision for the reasonable limitation of rights and leaves it to the Supreme Court of Canada to provide the specifics to the limitation. It must be noted that, in comparison to Canada, South Africa does not have legislation that criminalises hate speech. Section 16(2) of the Constitution does not in itself create a self-standing and enforceable prohibition of hate speech; instead, PEPUDA creates a civil cause of action for hate speech. Johannessen questions the necessity of section 16(2) as a provision that has constitutional protection and argues that section 16(2) removes a contentious area of law from a legal framework which guarantees fundamental rights as well as their limitation independently of those in power, and in doing so, puts 'eternal trust in future governments'.[205] We argue that while one, justifiably, should be wary of the dangers of limiting free speech, there are more merits to the presence of section 16(2). The ANC's draft Bill of Rights clearly indicates that the incitement of racial, religious or linguistic hostility should not be tolerated in a democratic society.[206]

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beyond the protected scope of expression in terms of s 16(1). See Davis (n 69) 11-17. See also *Islamic Unity Convention v Independent Broadcasting* Authority (n 4) and *Freedom Front v South African Human Rights Commission* (n 4).

[202] *R v Andrews* 43 CCC (3rd) 193 has been instructive on the meaning of hatred. Cory JA stated:

> Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another. Clearly an expression goes a long way before it qualifies (211).

[203] See *R v Keegstra* (n 10) 771.

[204] See *Canada v Taylor* (n 10) 918.

[205] Johannessen (n 52) 150.

[206] See (n 52). See further Milo *et al* (n 8) 42-73–42-79.

In turning to the CHRT and the SAHRC, both institutions have the legal mandate to investigate individual human rights and discrimination complaints and provide appropriate redress. Whereas both institutions share a common role as the adjudicating body for unresolved hate speech claims, it is important to note that the majority of discrimination cases related to hate speech in South Africa stem from on-going efforts to heal the divisions of apartheid. Canada does not have a similar tragic history that requires a similar redress of grievances and the nature of the cases are also less politically based.

Whilst the two bodies adjudicate on specific hate speech controversies, the main difference from the Canadian perspective is that the CHRT applies already established hate speech jurisprudence based on the 1990 Canadian Supreme Court rulings discussed earlier in the paper.[207] Those decisions provide a solid legal framework for the CHRT in its decision-making process. On the other hand, the SAHRC is often faced with task of developing the legal framework of South Africa's hate speech laws. While this ought not to be the case, there is an inherent lack of jurisprudence from the Constitutional Court and the Equality Court in this regard. At times, the SAHRC is also an initiating party to a hate speech case, for instance, the *SABC* case.[208] Its role is extended from monitoring anti-discrimination polices and investigating discrimination incidents to becoming directly involved in a hate speech controversy. This active role contrasts sharply with the CHRT's legal role in Canada in that it does not act as a litigant, only an adjudicator.

Existing in a legal realm where the SAHRC can be an active party to a hate speech court case yet simultaneously resolve other hate speech complaints as a neutral investigator could place the long-term legal role of the administrative body in doubt. The SAHRC's mandate is overly broad and spans over almost every sector of South African society. Whereas the CHRT serves simply to resolve unsuccessfully mediated disputes, the SAHRC also functions as the national educator and human rights watchdog over all human rights issues. Being spread rather thinly over its many functions and roles in South African society inevitably detracts from its core business and places strain on its already limited financial and human resources. It is argued that what is required is a rationalisation of functions and roles among the various chapter 9 institutions. This will ensure that greater protection is awarded to vulnerable and marginalised sectors.[209] It is submitted that perhaps what is needed is the establishment of an institution similar to that of the CHRT; a Tribunal that would focus solely on the adjudicative processes and, in so doing, alleviate a great deal of the pressure placed upon the SAHRC.

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[207] See *R v Keegstra* (n 10), *R v Andrews* (n 10) and *Canada v Taylor* (n 10).
[208] *Human Rights Commission of South Africa v SABC* (n 4).
[209] *Report on the review of chapter 9* (n 97) 184.

A further distinction between the two institutions is that, as governmental actors in their respective democracies, the CHRT functions in a stronger capacity. It enjoys the same powers as a court of law and has the power to enforce fines. The SAHRC, in comparison, is the weaker of the two institutions. If the SAHRC does not have the same authority as a court of law and is not respected as *the* enforcer and educator of hate speech discrimination, then over time its public legitimacy could erode. In the post-apartheid era, the public needs to look to a governmental body that is beyond day-to-day politics and one that can effectively monitor and settle unfair discrimination complaints including hate speech incidents that remind the public of its apartheid past.

If the South African government deemed it necessary to create the body in 1995, then it is also incumbent on the government to grant it the authority and necessary support to carry out its function of resolving hate speech discrimination cases. This includes the power of enforcement. The tenuous relationship that the SAHRC shares with the state definitely impacts negatively on its proper functioning. The very nature of the functioning of the SAHRC is sensitive. As a human rights institution, it is tasked with holding certain institutions accountable and yet also, when necessary, needs to cooperate with the same.[210] While the SAHRC needs the necessary support from government, it is also imperative that it act fearlessly and without favour or prejudice.

Perhaps, the government needs to properly decide the SAHRC's role *vis-à-vis* the judiciary and the legislature in the country.[211] As it stands, the SAHRC is positioned between the judiciary and the legislature. What this means in practical terms is that, on the one hand, the SAHRC has the power to demand answers from the legislature, the executive, private institutions and individuals about their adherence to human rights (or lack thereof) through its power of subpoena.[212] On the other hand, it lacks the necessary authority to make binding judgments as the judiciary does. The SARHC has instead to rely on cooperation or invoke its dispute resolution processes. Conversely, Canadian federal law recognises and fully supports the CHRT's active role in investigating and deciding hate speech complaints that are not resolved by the CHRC.

5 Conclusion

The work done by both the CHRT and the SAHRC is undoubtedly of vital importance and relevance for both countries. These human rights institutions make a significant contribution to the establishment, entrenchment, and deepening of democracy and the achievement of a vibrant human rights culture

[210] See also *Report on the review of chapter 9* (n 97) 167.
[211] As indicated in the *Report on the review of chapter 9* (n 97) 184, the legislation governing the SAHRC is outdated and is in need of amendment.
[212] *Report on the review of chapter 9* (n 97) 167.

in each country. What is required to achieve this end is strong leadership from a strong, impartial and independent institution; one which holds the respect of citizens and receives the necessary support from the state. Although the SAHRC has made significant progress since its establishment, it faces challenges of considerable magnitude which have the effect of weakening its effectiveness and efficiency as envisaged by its establishment. Inequalities also remain embedded in social and political attitudes and relations, and this continues to have a direct impact on the marginalisation of vulnerable groups which further impacts on the rights to freedom of expression and dignity and what would constitute protected speech. The SAHRC's role in this regard will further strengthen in the future as it strives to achieve its goal of being more responsive and addressing its challenges in a meaningful way. This will bring the institution in line with international standards of good practice. After all, the strengthening of a constitutional democracy and constitutional discourse is dependent on a stricter observance of human rights.