

**TWENTY YEARS OF SOUTH AFRICAN CONSTITUTIONALISM
NEW WORK LAW SCHOOL
13-16 NOVEMBER 2014**

**A CRITICAL ANALYSIS OF THE ROLE OF THE SOUTH AFRICAN HUMAN RIGHTS
COMMISSION IN PROTECTING AGAINST HATE SPEECH IN PUBLIC DISCOURSE¹**

KARMINI PILLAY* AND JOSHUA AZRIEL**

1 INTRODUCTION

Sticks and stones may break my bones but words will never hurt me.

Unfortunately, words *do* hurt. So too do other forms of expression that are used to convey messages both in the private and public spheres of society. It is uncontested that the right to freedom of expression is a fundamental human right that is almost universally recognized 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. Although finding the limits between permissible and impermissible speech is a challenge, there is general agreement that hate speech, however defined, does not deserve legal protection. The Constitutional Court of South Africa has affirmed this approach against the backdrop of the previous legal order which allowed the widespread and systematic denial of dignity of individuals, and has asserted that hate speech has the ‘potential to impinge adversely on the dignity of others and cause harm’² While the right to freedom of expression has been vigorously debated in many countries, scrutinizing 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

¹ This paper constitutes, in part, research published as K Pillay & J Azriel ‘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’ (2012) 27 *SAPL* 257 and, in part, work following on from this research.

* Karmini Pillay, BSocSci LLB (UNP) LLM (UKZN), Lecturer in Law, University of the Witwatersrand, Karmini.Pillay@wits.ac.za.

** Joshua Azriel, PhD, Associate Professor, Kennesaw State University, jazriel@kennesaw.edu.

² *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BCLR 433 at para 32.

allegations of hate speech.

South Africa sorely lacking in 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 void in the area of hate speech. It is even more unfortunate that the judiciary, when called upon to adjudicate on the 2006 Danish cartoons satirizing the Prophet Mohammed³ and the more recent 'Kill the Boer' song⁴ as forms of hate speech, failed dismally to seize opportunities to develop this area of South African law.⁵

Following the global trend towards the establishment of national rights-protecting institutions, South Africa inaugurated the South African Human Rights Commission⁶ on 2 October 1995. The SAHRC, like its counterparts, is 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'.⁷ The SAHRC has a far-reaching mandate in terms of creating, promoting and protecting a vibrant constitutional culture in the country. It also functions independently of the judiciary and in a unique manner in respect of hate speech matters. Few hate speech cases actually reach the courts, and there is a greater burden on the SAHRC to intervene on free speech violations and develop this area of law, where possible. The SAHRC is unlike any other institution in that it is able to deal with such cases as an active litigating party, a mediator or as a neutral

³ 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.

⁴ 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). See also Pillay 'From "Kill the Boer" to "Kiss the Boer" – has the last song been sung? *Afri-Forum v Julius Sello Malema* 2011 12 BCLR 1289 (EQC)' (2013) 28 *SAPL* 221-244.

⁵ *Ibid.*

⁶ Hereinafter referred to as 'the SAHRC' and 'the Commission'.

⁷ 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.

adjudicator. The public inevitably judges its human rights institutions in terms of their ability to tackle human rights violations and transgressions with determination, effectiveness and efficacy. This year marks the twentieth 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 this institution is fulfilling its mandate; focusing specifically on the right to freedom of expression and the way in which the institution tackles disputes on hate speech.

In this paper, we first outline South Africa's constitutional principles on hate speech. Second, we look at the role and function of the SAHRC in South African society, and we then highlight selected hate speech cases wherein the SAHRC has been involved. In doing so, we consider the effectiveness of the SAHRC in cases where free speech violations and hate speech have been alleged; the challenges faced by the SAHRC; and whether the SAHRC is keeping up with the changing nature of communication platforms. Lastly, we adopt a comparative approach of the SAHRC and its Canadian counterpart, the Canadian Human Rights Tribunal.⁸

2 OVERVIEW OF CONSTITUTIONAL PRINCIPLES

Before we delve into the core themes of this paper, it is necessary to briefly outline the approach adopted by the Constitutional Court of South Africa⁹ 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 SAHRC when faced with complaints alleging hate speech.

South Africa's constitutional right to freedom of expression is set out in section 16 of the Constitution of the Republic of South Africa, 1996¹⁰ 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.

⁸ Hereinafter referred to as 'the CHRT'.

⁹ Hereinafter referred to as 'the Constitutional Court'.

¹⁰ Hereinafter referred to as 'the Constitution'.

Two decades into democracy, South Africa's democracy is regarded as a fledgling in flight. 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.¹¹

In recent years, the Constitutional Court has crafted a fairly rich jurisprudence in respect of section 16. While these cases have not specifically dealt with hate speech, they are nonetheless of value here in that one is able to gauge the value of the right in South African society, and demarcate its scope insofar as it does not extend to hate speech. The Constitutional Court has been 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-fulfillment of individuals in South Africa's budding democracy.¹² The Constitutional Court has, however, painstakingly stressed that this right is not of paramount value.¹³ The constitutional dispensation heralds the importance of human dignity, equality and freedom as cornerstone values of its democracy.¹⁴ These values necessarily underpin the approach of the Constitutional Court when interpreting section 16 and when assessing the justifiability of limiting the right.¹⁵

Section 16 is one of the few constitutional rights that are qualified. Section 16(2) removes a realm of expression beyond constitutional protection. Implicit in this

¹¹ See also Kende (n 3) 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 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.

¹² *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* 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.

¹³ See *S v Mamabolo* 2001 3 SA 409 (CC) para 41.

¹⁴ Sections 1(a) and 7(1) of the Constitution.

¹⁵ See *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 25, *NM v Smith* (n 12) para 145 and *S v Mamabolo* (n 13) para 41.

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.¹⁶ Hate speech has an undeniable potential to increase social tensions, the risk of violence and discrimination. *Milo et al* states that 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’.¹⁷ In the South African context, hate 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.¹⁸

The *Islamic Unity Convention v Independent Broadcasting Authority* case,¹⁹ a rare judgment by the Constitutional Court on hate speech, emphasizes the significance of the country’s history in the interpretation of section 16. The issue in this case is whether the 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.²⁰ 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.²¹ However, the right must be balanced against other constitutional values such as equality, dignity and national reconciliation.²² In discussing how these values were

¹⁶ *Islamic Unity Convention v Independent Broadcasting Authority* (n 2) 435.

¹⁷ *Milo et al* (n 12) 42-76.

¹⁸ 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.

¹⁹ *Islamic Unity Convention v Independent Broadcasting Authority* (n 2) para 23.

²⁰ The radio station was sanctioned under a nation regulation 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 (clause 2(a) of the Code of Conduct of the Independent Broadcasting Authority).

²¹ *Islamic Unity Convention v Independent Broadcasting Authority* (n 2) para 27.

²² *Id* para 30.

reflected in the hate speech provision, Langa DCJ stated that racist speech impinged on human dignity and stereotyped people based on immutable characteristics.²³

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.²⁴ The pre-eminence of human dignity, as both a value and a right, has been confirmed by the Constitutional Court in a number of cases.²⁵ Courts are under a legal duty to be steered by the quest for dignity in its decision-making process.²⁶ Dignity is indispensable to the balancing of conflicting interests,²⁷ and is itself shaped and developed by the exercise of freedom of expression.²⁸

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.²⁹ ³⁰ 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’.³¹

An added challenge to the analysis of hate speech arises in the form of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.³² While

²³ *Id* para 33.

²⁴ Section 37(5) of the Constitution.

²⁵ 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.

²⁶ Cowen ‘Can “dignity” guide South Africa’s equality jurisprudence?’ (2001) 17 *SAJHR* 34 at 47.

²⁷ *Ibid*.

²⁸ Davis ‘Freedom of expression’ in Cheadle *et al* (eds) *South African constitutional law – Bill of Rights* (2012) Issue 9 (2nd ed) 11-5.

²⁹ *Islamic Unity Convention v Independent Broadcasting Authority* (n 2) para 27.

³⁰ 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 11) 153-154, 155-156 and 161-162.

³¹ *Islamic Unity Convention v Independent Broadcasting Authority* (n 2) para 29. See also, Milo *et al* (n 12) 42-76.

³² Hereinafter referred to as ‘PEPUDA’.

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;
- (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 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.³³ Exploring these provisions in any detail is beyond the scope of this paper, however, it is important to mention that these 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.³⁴

In summary, the Constitutional Court adopts a balancing approach to competing interests.³⁵ Each case is engaged on an *ad hoc* case-by-case analysis,³⁶ the

³³ Milo *et al* (n 12) 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* 1990 3 SCR 892.

³⁴ See further 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 12) 42-86 – 42-88, Davis (n 28) 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').

³⁵ See *S v Mamabolo* (n 13) para 40-41.

³⁶ *Case v the Minister of Safety and Security* (n 12) para 16.

outcome of which depends on the extent to which the court will place value on freedom of expression or other competing interests.³⁷ Section 16 must necessarily be interpreted in a manner that best fits within a particular constitutional democracy.³⁸ In South Africa, this means giving due consideration to the three conjoined, reciprocal and covalent constitutional values. Ultimately, individualized justice may necessarily take priority over the general interests of the community.³⁹

3 THE ROLE AND FUNCTION OF THE SAHRC IN SOCIETY

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.⁴⁰ The SAHRC, inaugurated on 2 October 1995, is one such independent human rights monitoring institution.⁴¹ The Constitution establishes the autonomy and impartiality of the SAHRC.⁴² It entrenched constitutional democracy and marked a decisive break with the country's apartheid past.

It is unfortunate that there is a curious dearth in 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 rights and the combating of racism in the country.⁴³ 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.

³⁷ Pillay (2010) (n 3) 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.

³⁸ 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 (2010) (n 3) 478 and 488 and Davis (n 28) 11-1 at 11-4.

³⁹ Chaskalson 'The third Bram Fischer lecture – human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 193 at 204.

⁴⁰ 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).

⁴¹ See ss 115-118 of the interim Constitution which set up the first manifestation of the Commission.

⁴² 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.

⁴³ The SAHRC's reports and publications are available online at <http://www.sahrc.org.za/home/?ipkMenuID=5> (accessed 2014-11-03).

The SAHRC is a creature of statute⁴⁴ and derives its powers, functions and duties principally from the Human Rights Commission Act 54 of 1994⁴⁵ and the Constitution.⁴⁶ It derives additional powers and duties from other national human rights and sectoral legislation.⁴⁷ 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 and the PAIA; and
- monitoring and reporting annually on the state's progress in realising socio-economic rights in the country.

Govender, in emphasizing 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'.⁴⁸ 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

⁴⁴ For an overview of the extent to which ch 9 institutions are creatures of statute and not creatures of the Constitution, see Klaaren (n 7) 24C-16 – 24C-17.

⁴⁵ Hereinafter referred to as 'the Human Rights Commission Act'.

⁴⁶ 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 7) 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 (hereinafter referred to 'Report on the review of chapter 9') for more on the SAHRC's mandate in terms of the Human Rights Commission Act.

⁴⁷ PEPUDA and the Promotion of Access to Information Act 2 of 2000 (hereinafter referred to as 'PAIA'). See s 184(4) of the Constitution.

⁴⁸ 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.

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.⁴⁹ Despite the Constitutional Court's calling for the financial and administrative independence of these institutions,⁵⁰ this remains an ongoing challenge.⁵¹

The problem of funding and resources is linked to the third point – the tenuous relationship between the SAHRC and the government.⁵² 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.⁵³ 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.

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.⁵⁴ 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 PEPUA. Both refused; despite the SAHRC extending the

⁴⁹ See *Report on the review of chapter 9* (n 46) 185.

⁵⁰ See *New National Party of South Africa v Government of the Republic of South Africa* (n 40).

⁵¹ 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.

⁵² The SAHRC, as an independent institution, is not only dependent 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 51) 113). For a discussion on the doctrine of separation of powers and the issues of independence and accountability, see Klaaren (n 7) 24C-11–24C-15.

⁵³ 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 51) 111 and 134.

⁵⁴ 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).

deadline for the ultimatum. The SAHRC threatened Malema and Vavi with legal action in the Equality Court.⁵⁵ 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.⁵⁶

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 in the interests of 'moving forward'.⁵⁷ 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.⁵⁸ Govender asserts that this duty must be taken more seriously if the SAHRC is to discharge its mandate effectually.⁵⁹

This incident also illustrates the next point which is that the SAHRC has in certain instances not asserted itself enough 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.⁶⁰ The incident, rather unfortunately, dented the image of the SAHRC and this was reflected in the public,

⁵⁵ See <http://www.businessday.co.za/Articles/Content.aspx?id=50111> (accessed 2011-10-18).

⁵⁶ *Ibid.*

⁵⁷ <http://www.businessday.co.za/Articles/Content.aspx?id=50247> (accessed 2011-10-18).

⁵⁸ Klaaren states that '[a]lthough rendered in rather empathetic terms, this duty appears to be honoured in the breach' Klaaren (n 7) 24C-15. See also *Report on the review of chapter 9* (n 46) 179-181.

⁵⁹ Govender (n 48) 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 together with the courts have been given a legitimate overseeing role by the drafters.

⁶⁰ See Robbina *et al Organisational behaviour – global and southern African perspectives* (2009) 309.

media and political response.⁶¹ 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 that it ought to have 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,⁶² 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.⁶³

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 with consequences.⁶⁴

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

⁶¹ 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).

⁶² 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).

⁶³ See <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=252703&sn=Detail&pid=72308> (accessed 2011-10-21).

⁶⁴ 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-vooordeel-teen-wittes/> (accessed 2011-10-21).

other forums including the Internet and email.⁶⁵ 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.⁶⁶ 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 effectiveness 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.⁶⁷ Although a drastic approach, the SAHRC should, if need be, invoke this provision in the future, including against the state.⁶⁸

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. In 2011, the SAHRC expressed concern about the unregulated nature of communications on these sites.⁶⁹ 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 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.⁷⁰ Users often use fictional profiles making it impossible to trace their locations and so

⁶⁵ 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[.]

⁶⁶ 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.

⁶⁷ Section 18 of the Human Rights Commission Act. See further Lawrence (n 51) 155.

⁶⁸ 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 53) 14.

⁶⁹ See <http://www.news24.com/SciTech/News/SAHRC-concerned-about-Facebook-Twitter-20110829> (accessed 2011-10-18).

⁷⁰ *Ibid.*

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.⁷¹

In the previously published version of this paper, it was argued that the SAHRC's inability to respond to complaints arising from social media was unfortunate in this new era where the exponential growth of social networking and media sites have connected hundreds of millions of people around the world,⁷² placed enormous power in the hands of ordinary people to express themselves freely, and created a commanding platform for the dissemination of information.⁷³ It was further argued that this left a definite void in its mandate specifically in the context of protecting against the human rights violations that arise from online hate speech.⁷⁴ It was also noted that, in this respect, the CHRT is able to fulfil its mandate far more effectively than the SAHRC.⁷⁵ However, despite the challenges outlined above, the SAHRC has, in the past three years, made significant progress in tackling hate speech related matters arising from social media platforms. For one, a recent development is that the SAHRC now has a presence on social media, and its social media handles occupy a prominent place on the home page.⁷⁶ Below is an outline of some of the recent social media related incidents that the SAHRC received complaints from the public and thereafter intervened.

On 3 May 2012, three former Cape Peninsula University of Technology students posted racist comments on Facebook which amounted to 'prima facie utterances of hate speech with the potential of inciting violence'.⁷⁷ The SAHRC made preliminary findings that the 'utterances were hurtful and infringed on the dignity of black South Africans'.⁷⁸ The SAHRC welcomed the apologies by two of the three students who

⁷¹ 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.*

⁷² Facebook, for instance, has 1.32 billion registered users (as at June 2014).

⁷³ Pillay & Azriel (n 1) 277.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ <http://www.sahrc.org.za/home/> (accessed 2014-11-03).

⁷⁷ <http://www.sahrc.org.za/home/index.php?ipkArticleID=108> (accessed 2014-11-03).

⁷⁸ *Ibid.*

expressed that they had both acted impulsively.⁷⁹ The two students also agreed to meet with the Commission. The SAHRC used this opportunity to engage with the students and their parents in a meaningful way,⁸⁰ and also capitalized on their willingness to make amends by becoming involved in community outreach programmes. The SAHRC thereafter stated that the students' actions could not be viewed in isolation, and that '[r]acist ideology pervades our society and institutions of learning and therefore needs to be addressed in a systemic manner'.⁸¹ The SAHRC also indicated its plan to engage with the Cape Peninsula University of Technology, other institutions of learning and the Department of Education 'with a view to address how these institutions are dealing with the issue of racism and what steps are being taken to foster greater tolerance and integration'.⁸² The SAHRC further articulated their deep concerns over the abuse of social media platforms:

'This complaint must be seen in light of the many complaints received by the Commission on the use of social media in ways that are derogatory or hateful towards others. Users of these platforms do not realize that their comments are publicised and instantly available online. Once these comments are posted they are in a public domain.'⁸³

Soon thereafter, on 7 May 2012, the SAHRC made a statement wherein it 'observed with concern the abuse of social media to perpetuate racism and discrimination'.⁸⁴ While the SAHRC acknowledged the increasingly important role that social media plays as a communication platform that advances and promotes free speech, it expressed its concern over the consequences, both intended and unintended, arising from people having a space to express 'hurtful and offensive messages'.⁸⁵ This statement followed the SAHRC receiving forty five complaints from the public against FHM model, Jessica Leandra dos Santos, regarding her racist tweet about her encounter with a black African male at a local supermarket by referring to him using the k-word.⁸⁶ She also appeared to suggest that African males were responsible for the rape of young girls.⁸⁷ This incident was met with another offensive tweet by a member of the public, Tshidi Thamana, in response:

⁷⁹ The SAHRC indicated that the third student had not responded to requests to meet, and that the Commission would continue its investigations in this regard. *Ibid.*

⁸⁰ The process was reported to be 'constructive and helped to address the damage done in a positive way'. *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ <http://www.sahrc.org.za/home/index.php?ipkArticleID=96> (accessed 2014-11-03).

⁸⁵ *Ibid.*

⁸⁶ <http://www.channel24.co.za/News/Local/Racist-complaints-Jessica-45-Tshidi-0-20120508> (accessed 2014-11-03).

⁸⁷ *Ibid.*

‘Dear Peter Mokaba?? I wish all whites had been killed when you sang “Kill the Boer”, then we wouldn’t have to experience @JessicaLeandra’s racism.’⁸⁸

Dos Santos’ post was then removed and she posted an apology on her website while Thamana’s social media account was deactivated. The SAHRC stated that there was distinct and disturbing pattern of discriminatory speech emerging on social media spaces. The Commission stated that speech, such as that of Dos Santos, have the ‘potential to undermine social relations’ and may potentially also violate the provisions of the Constitution and PEPUDA.⁸⁹ The SAHRC further highlighted that PEPUDA seeks to give effect to the letter and spirit of the Constitution providing measures to facilitate the eradication of unfair discrimination, hate speech and harassment.⁹⁰ The SAHRC, with an intimation of disappointment, stated that incidents such as this, as well as other complaints of racism on social media, indicate that the ‘constitutionally envisaged non-racist society has not yet been attained’ despite the ‘laudable transformation agenda of building a society based on the fundamental human rights of equality, freedom and dignity’.⁹¹

Then on 24 January 2013, a young unemployed journalist, Zama Khumalo, posted a comment on Facebook relating to a school bus accident that occurred in 1985 in Westdene, Johannesburg where a number of school children died:

‘On 23 March 2013, I will send out an invite to invite you to come to the Westdene Dam for a BIG Black Braai, (100% Blacks), fireworks, DJ – Black-People, celebrating their death... and we will always celebrate the death of whiteness.’⁹²

This led to the SAHRC receiving thirteen complaints from the public, including Media 24, against Khumalo from 6–14 February 2013. The SAHRC expeditiously conducted a mediation process between the complainants and Khumalo with the aim to:

[P]ermit a process which encouraged constructive, responsible forward growth and understanding; to convey and confirm the relief sought by the complainants; and to reach agreement regarding the terms to be included in a settlement agreement, finalised by the respective parties made public through the Commission.’⁹³

The measures adopted by the SAHRC included not only eliciting a public apology from the respondent, but also negotiating a very comprehensive settlement agreement that took into account factors such as the age of the respondent, remorse

⁸⁸ *Ibid.*

⁸⁹ <http://www.sahrc.org.za/home/index.php?ipkArticleID=96> (accessed 2014-11-03).

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² <http://www.sahrc.org.za/home/index.php?ipkArticleID=178> (accessed 2014-11-03).

⁹³ *Ibid.*

shown, suggestions on appropriate remedies by the complainants and the Commission's recommendations.⁹⁴

⁹⁴ *Ibid.* The full settlement agreement was made public by posting it on a website that was dedicated to the victims of the 1985 tragedy as well as the SAHRC's website. The terms of the agreement were as follows:

TERMS OF SETTLEMENT

7.1. On a consideration of the age of the respondent, remorse shown, other forms of relief suggested by the complainants, feedback from the complainants regarding the Commission's recommendations and all other relevant factors, the following terms of have been agreed to:

7.1.1. An undertaking for the adoption of the settlement agreement by the respondent;

7.1.2. A public apology to form part of the Commission's settlement as stated hereunder;

7.1.3. A public apology specifically directed to the families of those who lost loved ones during the Westdene Bus Crash, to be posted on the following website: www.westdene1985.co.za;

7.1.4. A public apology on the Facebook page of the respondent;

7.1.5. The settlement agreement to be made public to the media and the complainants;

7.1.6. That the respondent visits the website: www.westdene1985.co.za to take note of some of the photos and articles written about the accident to afford the respondent an opportunity to truly appreciate the trauma caused by the event; and

7.1.7. An undertaking to participate in suitable diversity training programmes or educational workshops, as recommended by the Commission;

7.1.8. That the respondent visits the Westpark Graveyard where many of the children who lost their lives were laid to rest to clean the graves and to place flowers at the tombstones, taking into account the following:

7.1.8.1. The respondent has indicated his need for security during this visit, which the Media 24 representatives undertook to provide in conjunction with monitored support from the Commission.

7.1.9. Further to the terms set out above and specifically requested by Media 24 Limited:

7.1.9.1. That the respondent will not submit any articles / posts / articles / text in respect of Daily Sun, City Press, Sunday Sun or any other Media 24 Limited Publication on the respondent's Facebook, LinkedIn, Google, Twitter profiles or on any other website, social media network or platform which would be considered unlawful in South Africa;

7.1.9.2. That the respondent shall, at any stage of submitting articles / posts / articles / text on the respondent's Facebook, LinkedIn, Google, Twitter profiles or on any other website, social media network or platform, clearly state the period during which he was employed with Media 24 to avoid the impression that he is currently employed at Media 24 Limited;

7.1.9.3. That the respondent must provide a written undertaking not to publish any further articles / posts / articles / text which are prohibited in South African law regarding the Westdene Dam Tragedy;

7.1.9.4. That the respondent will ensure the removal of all posts and comments published by the respondent on his Facebook page (Zama Khumalo) which are unlawful in terms of South African law;

7.1.9.5. That the respondent will ensure the removal of all unlawful posts and / or comments relating to Media 24 Limited;

7.1.9.6. That the respondent will ensure that the public does not have access to any photographs through his Facebook, LinkedIn, Google and / or Twitter profiles or on any other website or social media network or platform which indicate an employment relationship between the respondent and Media 24 Limited;

7.1.9.7. That the respondent provides an unconditional apology to the family and loved ones of every victim of the Westdene Dam Tragedy (which can be done through the following website: www.westdene1985.co.za), the South African Public, Media 24, Daily Sun and City Press.

The most recent incident which has made headlines involved anti-Semitic message sent by Ziyaad Kayat to the South African Jewish Board of Deputies via the latter's Facebook inbox in July 2014. The message stated:

'All Jews are pigs and I think we should kill you SA Jews and kill your kids and let you feel what the Palestinians are feeling.'⁹⁵

Upon receiving a complaint by the Jewish Board, the SAHRC engaged in a series of meetings with Kayat, and thereafter found that the comments were in contravention of, among other laws, the right to freedom of expression in section 16 of the Constitution.⁹⁶ The speech constituted hate speech in terms of s 16(2)(c) of the Constitution. Kayat responded to the SAHRC's call for an apology by signed an unequivocal apology to the Jewish Board, the Commission as well as the public, and asserted his commitment to the Constitution.⁹⁷

These cases⁹⁸ clearly illustrate that the SAHRC is now comfortably extending its role as watchdog to social media spaces, and swiftly intervening on allegations of hate speech and other discriminatory expressions. The approach adopted by the SAHRC seems to be a conciliatory one 'aimed at reaching consensus in line with principles of reconciliation, directed at understanding motives, perception, nation building and interests'.⁹⁹ The SAHRC's approach to steer away from an adversarial style with the

7.1.9.8. That the apology from the respondent must be published in full on the respondent's Facebook page and that related thereto:

7.1.9.8.1. The respondent will continually monitor all comments made on his Facebook page relating to his apology and will remove all unlawful comments within a reasonable period of time after having been requested to do so by Media 24; and

7.1.9.8.2. Media 24 has undertaken to monitor the Facebook page of the respondent for a reasonable time in the foreseeable future to ensure compliance herewith.

7.1.9.9. That the respondent's apology be made available to Media 24 Limited, to be published on its websites and be provided to SAPA, at its discretion together with a statement urging the South African public not to engage in further conduct of a similar nature;

7.1.9.10. That the respondent attends a diversion / rehabilitation course regarding race relations in South Africa (as per the Commission's proposals).

7.1.10. That subject to the above, the complainants agree to the following:

7.1.10.1. To cease pursuit of all ongoing or intended legal action against the respondent, whether criminal or civil in nature;

7.1.10.2. To regard this agreement as a final settlement of their complaints against the respondent and to desist from any further actions against him arising from the complaint.

⁹⁵ <http://www.news24.com/SouthAfrica/News/SAHRC-man-retracts-anti-Semitic-statements-20141006> (accessed 2014-11-03).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ See also <http://www.sahrc.org.za/home/index.php?ipkArticleID=211> (accessed 2014-11-03). Here the SAHRC's investigations included an analysis of international and domestic statutory frameworks on the rights to equality and expression, relevant common law, prevailing social attitudes and norms as well as the relevant facts of the incident, and thereafter reached a similar conciliatory outcome.

⁹⁹ <http://www.sahrc.org.za/home/index.php?ipkArticleID=178> (accessed 2014-11-03).

objective of apportioning blame is one which is highly commendable and it ties in with the spirit of nation-building.¹⁰⁰ Engaging the offenders in community service and other outreach programmes to educate the youth allows the respondents to make amends and thereby be a part of the solution. A challenge in this regard however is that such an approach relies on the co-operation and willing participation of the persons involved.

On a critical note, apart from the incident involving the anti-Semitic comments posted via Facebook, what is not clear from the use of the SAHRC's language in the statements that it issued is whether it arrived at its decisions using the hate speech provisions in the Constitution and/or PEPUDA or whether the utterances were simply branded as 'offensive', 'hurtful', harmful, discriminatory and 'racist' without analysis and application of the respective hate speech clauses.

The role of the SAHRC in respect of hate speech matters has overall been progressive and constructive. The SAHRC enjoys powers of mediation, adjudication, litigation and interpretation which it has to some extent exercised in the context of freedom of expression.^{101 102} 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.

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

¹⁰⁰ *Ibid.*

¹⁰¹ See the Human Rights Commission Act. See also Klaaren (n 7) 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).

¹⁰² 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 Equality Court on the ‘Kill the Boer’ song,¹⁰³ the SAHRC indicated its intention to host a provincial dialogue series on arising hate speech matters.¹⁰⁴ The SAHRC has played an active role in combating racism which has undoubtedly been a positive step towards protecting against hate speech in society.¹⁰⁵ 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.¹⁰⁶ 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.

In 2011, the SAHRC made a statement that it was in a process of repositioning itself with the goal of being more responsive and addressing its challenges in a meaningful way.^{107 108} 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 utilizing its limited resources to ensure increased organizational 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.¹⁰⁹

This reflects that the SAHRC is certainly aware that there is room for improvement in certain areas of its mandate. Its progressive approach is reassuring.

¹⁰³ *Afri-Forum v Malema* (n 4). See also *Freedom Front v SAHRC* 2003 11 BCLR 1283 (SAHRC) where the Commission made a finding in respect of the same song.

¹⁰⁴ On 11 November 2011, the SAHRC launched the Commission’s National Dialogue Series on Freedom of Expression and Hate Speech. <http://www.sahrc.org.za/home/index.php?ipkArticleID=83> (accessed 2014-11-03).

¹⁰⁵ The SAHRC has, for instance, 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.

¹⁰⁶ For instance, 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 34).

¹⁰⁷ See <http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=76> (accessed 2011-09-28).

¹⁰⁸ The *Report on the review of chapter 9* (n 46) 182-183 indicates further challenges faced by the SAHRC in terms of institutional governance issues.

¹⁰⁹ *Ibid.*

4 SELECTED HATE SPEECH CASES ARISING FROM THE SAHRC

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.¹¹⁰ 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;¹¹¹ thirdly, there is strong support for the Canadian Supreme Court's emphasis on dignity in cases involving hate speech¹¹² and, lastly, reliance on Canadian jurisprudence in the interpretation of the elements for the hate speech test.¹¹³ 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.¹¹⁴

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 SABC*,¹¹⁵ it was the SAHRC who lodged a complaint with the Broadcast Complaints Commission of South Africa¹¹⁶ against the South African Broadcasting Commission.¹¹⁷ 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.¹¹⁸ The BCCSA's found that the song polarised the Zulu and Indian populations (the latter being a minority group) by

¹¹⁰ 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 34).

¹¹¹ See 'Discussion Document: Freedom of Expression' (n 34).

¹¹² *R v Keegstra* (n 136) cited as authority in *Human Rights Commission of South Africa v SABC* 2003 1 BCLR (BCCSA) 99 at 107. See also *Freedom Front v SAHRC* (n 103) 1288-1289, 1293 and 1298.

¹¹³ See *Freedom Front v SAHRC* (n 103) 1289-1295.

¹¹⁴ For instance, like the Constitutional Court, the SAHRC has been alert to the dangers of disallowing speech. See *Freedom Front v SAHRC* (n 103) 1288.

¹¹⁵ *Human Rights Commission of South Africa v SABC* (n 112).

¹¹⁶ Hereinafter referred to as 'the BCCSA'.

¹¹⁷ Hereinafter referred to as 'the SABC'.

¹¹⁸ *Id* 101-108.

demeaning Indians, and this amounted to hatred.¹¹⁹ 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.¹²⁰ The song threatened the safety of the Indian people and placed their constitutional right to security at risk.¹²¹ The intention of the songwriter and the broadcaster was irrelevant as the test for hate speech is an objective one.¹²²

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 emphasized the importance of giving weight to the medium that was used and how effective that medium was in the context of the expression.¹²³ In this case, the medium was not ‘an intricate poem in a serious literary work’,¹²⁴ 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.¹²⁵ Song, as a medium, was an extremely powerful one because it reached and connected with people from all walks of life irrespective of their levels of literacy. The BCCSA also considered the significance of song as a form of art and raised the pertinent issue of where art ends and hate speech begins.

Lastly, the BCCSA considered the constitutional protection of minority groups. In this case, the targeted group was Indians who are a minority group that forms 2.6% of the South African population, and who are largely based in KwaZulu-Natal where the Zulu language is most predominant.¹²⁶ Referring to constitutional jurisprudence, specifically the *Islamic Unity judgment*¹²⁷ and *Christian Education South Africa v*

¹¹⁹ *Id* 106.

¹²⁰ *Id* 107.

¹²¹ *Id* 107-108.

¹²² *Id* 108.

¹²³ *Id* 104-105 and 108.

¹²⁴ *Id* 108.

¹²⁵ *Ibid*.

¹²⁶ *Id* 105.

¹²⁷ *Islamic Unity Convention v Independent Broadcasting Authority* (n 2).

Minister of Education,¹²⁸ the BCCSA emphasized 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.¹²⁹ In essence, constitutional interests are not dependent on a 'counter-balancing of numbers, but a qualitative one based on respect for diversity'.¹³⁰

The case *Freedom Front v SAHRC*¹³¹ 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.¹³² 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.¹³³ This case was thereafter heard by an appeal panel of the SAHRC in terms of section 12(a) of its regulations.¹³⁴ 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*¹³⁵ as cited by the Supreme Court of Canada in *R v Keegstra*¹³⁶ 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 interpretation of section s 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.¹³⁷ The

¹²⁸ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

¹²⁹ *Human Rights Commission of South Africa v SABC* (n 112) 105.

¹³⁰ *Christian Education South Africa v Minister of Education* (n 128) para 112, quoted in *Human Rights Commission of South Africa v SABC* (n 112) 105-106.

¹³¹ *Freedom Front v SAHRC* (n 103).

¹³² 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).

¹³³ Discussion Document: Freedom of Expression' (n 34).

¹³⁴ Notice 1465 of 1996.

¹³⁵ *R v Andrews* 1990 3 SCR 870

¹³⁶ *R v Keegstra* 1990 3 SCR 697.

¹³⁷ See for instance, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) where the Court held that expression, in relation to the requirement of hatred, must be analysed by the perspective of the vulnerable group.

Keegstra case is once again instructive here.¹³⁸

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*¹³⁹ where the Supreme Court of Canada described the types of harm that be caused by hateful speech.¹⁴⁰ 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.¹⁴¹ 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).¹⁴²

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,¹⁴³ 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

¹³⁸ In *R v Keegstra* (n 136) 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* (n 135): ‘Hatred is not a word of casual connotation. To promote hatred is to instil detestation and malevolence in another (211). 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.

¹³⁹ *R v Keegstra* (n 136). 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.

¹⁴⁰ See also *Freedom Front v SAHRC* (n 103) 1293 where *R v Keegstra* (n 136) was quoted.

¹⁴¹ See Pillay (2010) (n 3) 485-486 and Currie & 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’.

¹⁴² *Ibid.*

¹⁴³ *Freedom Front v SAHRC* (n 103) 1295.

its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm'.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ Following the approach of the Constitutional Court, the SAHRC advocates a purposive approach in constitutional interpretation, and this has been followed by the SAHRC.¹⁴⁷ 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 more 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, Zapiro¹⁴⁸ 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'.¹⁴⁹ 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.

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

¹⁴⁴ *Id* 1298.

¹⁴⁵ *Id* 1289-1290, 1296 and 1298.

¹⁴⁶ *Id* 1289 read together with 1295.

¹⁴⁷ *Id* 1289-1290. See also *R v Big M Drug Mart Ltd* 1985 1 SCR 295.

¹⁴⁸ This was the cartoonist who drew the cartoon depicting the Prophet Mohammed with a bomb-shaped turban.

¹⁴⁹ *Manamela, Buti v Shapiro* case reference no GP/2008/1037/E Mokonyama.

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,¹⁵⁰ 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.¹⁵¹ The SAHRC also articulated that rights should be 'balanced in accordance with their worth' in a democracy.¹⁵²

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.¹⁵³ The SAHRC referred to *Holomisa v Argus Newspapers*¹⁵⁴ 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.¹⁵⁵

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.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸

What is evident from these cases¹⁵⁹ is that the SAHRC has, through its decisions,

¹⁵⁰ *Freedom Front v SAHRC* (n 103).

¹⁵¹ *Manamela, Buti v Shapiro* (n 149).

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Holomisa v Argus Newspapers* 1996 6 BCLR 836.

¹⁵⁵ *Manamela, Buti v Shapiro* (n 149).

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ The SAHRC has also in recent years dealt with a flurry of disputes on hate speech. See, for instance, <http://www.sahrc.org.za/home/index.php?ipkArticleID=73> (accessed 2014-11-03); <http://www.sahrc.org.za/home/index.php?ipkArticleID=74> (accessed 2014-11-03); <http://www.sahrc.org.za/home/index.php?ipkArticleID=122> (accessed 2014-11-03); <http://www.sahrc.org.za/home/index.php?ipkArticleID=184> (accessed 2014-11-03);

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 marketplace of ideas.

5 THE CANADIAN HUMAN RIGHTS TRIBUNAL

The Canadian Human Rights Tribunal (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.¹⁶⁰ The law criminalizes 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.¹⁶¹ 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'.¹⁶² In 2001, Parliament amended the Canadian Human Rights Act to include Internet-based communication.¹⁶³ This amendment reflects the fact that the government keeps up with the how technology can impact the delivery of hate speech. The CHRT is able to use this body of law in its decision-making process.

The 1977 federal statute that created the Canadian Human Rights Act included both the Canadian Human Rights Commission¹⁶⁴ and the CHRT institutions.¹⁶⁵ 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:

- organising and conducting public information programs;

<https://za.news.yahoo.com/lecturer-faces-hate-speech-charges-062341473.html> (accessed 2014-11-03); <http://www.sahrc.org.za/home/index.php?ipkArticleID=243>; (accessed 2014-11-03); <http://citizen.co.za/138857/ff-plus-ask-sahrc-probe-officials-racist-comment/> (accessed 2014-11-03); <http://mg.co.za/article/2014-10-04-equality-court-to-address-anti-indian-statements> (accessed 2014-11-03); <http://www.citypress.co.za/politics/hate-speech-pamphlet-incites-afrikaner-murders/> (accessed 2014-11-03).

¹⁶⁰ RSC 1985, c H-6. Hereinafter referred to as 'the Canadian Human Rights Act'.

¹⁶¹ Section 2 of the Canadian Human Rights Act.

¹⁶² *Id* s 13 (1).

¹⁶³ *Id* s 3(2).

¹⁶⁴ Hereinafter referred to as 'the CHRC'.

¹⁶⁵ 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.

- 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.¹⁶⁶

Thus the CHRT's role is secondary to the CHRC. The CHRT is the legal entity that has the mandate to decide if an individual has acted in a discriminatory manner against a victim, including public hate propaganda.¹⁶⁷ 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.¹⁶⁸ All of its decisions are posted online for the public and published in the Canada Gazette.¹⁶⁹ 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.¹⁷⁰ A decision by the CHRT can be appealed to the federal courts of Canada including the Supreme Court of Canada.¹⁷¹ The CHRT's main goal is to ensure that the Canadian Human Rights Act is interpreted and applied fairly and impartially at all hearings.¹⁷² Its first online hate speech decision was in 2002. Since the CHRT is the federal agency that mediates hate speech allegations, the remainder of this paper will focus on this institution.

6 A COMPARATIVE ANALYSIS OF CANADIAN AND SOUTH AFRICAN CONSTITUTIONAL DOCTRINES AND THE RESPECTIVE HUMAN RIGHTS INSTITUTIONS

Generally, the dicta of the Constitutional Court of South Africa have cautioned against uncritical borrowings from comparative jurisprudence (specifically that of the US),¹⁷³ however, the Court has relied on Canadian hate speech jurisprudence as a source of law.¹⁷⁴ While both countries share substantial legal and philosophical

¹⁶⁶ *Id* s 27.

¹⁶⁷ *Id* s 53(2).

¹⁶⁸ Canadian Human Rights Tribunal available at http://www.chrt-tcdp.gc.ca/index_e.asp (accessed 2011-11-22).

¹⁶⁹ Section 48.9(3) of the Canadian Human Rights Act.

¹⁷⁰ See <http://chrt-tcdp.gc.ca/NS/about-apropos/download/pn2-np-eng.asp> (accessed 2012-03-12).

¹⁷¹ See <http://chrt-tcdp.gc.ca/NS/about-apropos/jurisdiction-competence-eng.asp> (accessed 2011-11-22).

¹⁷² *Ibid*.

¹⁷³ *De Reuck v Director of Public Prosecutions* (WLD) 2003 12 BCLR 1333 (CC) para 48. See also Davis (n 28) 11-4(1).

¹⁷⁴ 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*

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 take a comparative look at both countries' 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 recognize 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 marginalized, ignored or devalued, and is enhanced when laws recognize the full place of all individuals and groups.¹⁷⁵

The Constitutional Court of South Africa, despite having found it a challenge to ascertain the meaning of this intricate concept of dignity,¹⁷⁶ has embraced the Canadian understanding of the concept, and this has been reflected in a number of its judgments.¹⁷⁷ In both countries, the concept of human dignity is intrinsically

Independent Broadcasting Authority (n 2); *Human Rights Commission of South Africa v SABC* (n 112); and *Freedom Front v SAHRC* (n 103). 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 3) 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.

¹⁷⁵ *Law v Canada* 1999 170 DLR 4th 1 (SCC) para 53.

¹⁷⁶ See *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 137) para 29.

¹⁷⁷ The Court in *S v Dodo* 2001 3 SA 382 (CC) affirmed that individuals should not be treated simply as 'instruments of objects of the will of others' (para 38) and *Khumalo v Holomisa* (n 15).

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.¹⁷⁸

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,¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

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',¹⁸² 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.¹⁸³

¹⁷⁸ 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.

¹⁷⁹ See *SABC v National Director of Public Prosecutions* (n 174).

¹⁸⁰ Barendt (n 174) 57.

¹⁸¹ *Ibid.*

¹⁸² Currie & De Waal (n 141) 377.

¹⁸³ *R v Andrews* (n 135) 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 beyond the protected scope of expression in terms of s 16(1). See Davis (n 28) 11-17. See also *Islamic Unity Convention v Independent Broadcasting Authority* (n 2) and *Freedom Front v SAHRC* (n 103).

Finally, both countries have a shared understanding of hatred and the harm it can do.¹⁸⁴ 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.¹⁸⁵ In the Taylor decision in the same year, Dickson CJ stated that hate propaganda is contrary to Canada's overall goal of furthering equality.¹⁸⁶ 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, PEPUA 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'.¹⁸⁷ 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.¹⁸⁸

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-

¹⁸⁴ See *R v Andrews* (n 135).

¹⁸⁵ See *R v Keegstra* (n 136) 771.

¹⁸⁶ See *Canada v Taylor* (n 33) 918.

¹⁸⁷ Johannessen (n 11) 150.

¹⁸⁸ See further Milo *et al* (n 12) 42-73–42-79.

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.¹⁸⁹ Those decisions provide a sound 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.¹⁹⁰ 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 rationalization of functions and roles among the various chapter 9 institutions. This will ensure that greater protection is awarded to vulnerable and marginalized sectors.¹⁹¹ 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.

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

¹⁸⁹ See *R v Keegstra* (n 136), *R v Andrews* (n 135) and *Canada v Taylor* (n 33).

¹⁹⁰ *Human Rights Commission of South Africa v SABC* (n 112).

¹⁹¹ *Report on the review of chapter 9* (n 46) 184.

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.¹⁹² 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.¹⁹³ 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.¹⁹⁴ 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 recognizes and fully supports the CHRT's active role in investigating and deciding hate speech complaints that are not resolved by the CHRC.

7 CONCLUSION

*Freedom, justice and equality are our principle ambitions.*¹⁹⁵

The SAHRC has this adage by Malcom X on its home page. It strongly ties in with the institution's vision of transforming society, securing rights and restoring dignity.¹⁹⁶

¹⁹² See also *Report on the review of chapter 9* (n 46) 167.

¹⁹³ As indicated in the *Report on the review of chapter 9* (n 46) 184, the legislation governing the SAHRC is outdated and is in need of amendment.

¹⁹⁴ *Report on the review of chapter 9* (n 46) 167.

¹⁹⁵ Malcolm X. Cited on the home page of the SAHRC.

¹⁹⁶ <http://www.sahrc.org.za/home/index.php?ipkContentID=1> (accessed 2014-11-03).

The work done by the SAHRC undoubtedly make a significant contribution to the establishment, entrenchment, and deepening of democracy and the achievement of a vibrant human rights culture in South Africa. 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 continues to make to make significant progress since its establishment, the challenges that the institution faces can potentially weaken its effectiveness. Inequalities also remain embedded in social and political attitudes and relations, and this continues to have a direct impact on the marginalization 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.