SOUTH AFRICA'S CRIMINALIZATION OF "HURTFUL" COMMENTS: WHEN THE PROTECTION OF HUMAN DIGNITY AND EQUALITY TRANSFORMS INTO THE DESTRUCTION OF FREEDOM OF EXPRESSION

> The prohibition of hate speech . . . has as its ideal aspiration the elimination of discrimination and the promotion of dignity and equality. However, any regulation in these areas must curtail freedom of expression, which itself is held up as central to democratic freedom, equality and dignity.[1]

INTRODUCTION

In matters of international human rights, a tenuous balance must be struck between promoting rights and limiting freedoms. South Africa's attempts to criminalize hate speech in an effort to rise above the inequities endured under the apartheid regime exemplify this difficulty.

Recent hate speech legislation in South Africa has highlighted the conflict between the right to dignity and the right to freedom of speech.[2] The Draft Prohibition on Hate Speech Bill[3] ("Draft Bill") "penalizes any person who in public advocates hatred that is based on race, ethnicity, gender or religion that could, in the circumstances, reasonably be construed to demonstrate an intention to be hurtful, harmful . . . to incite harm[4] [or to] undermine human dignity."[5] The Draft Bill has been controversial since its public unveiling.[6] This is not the first time, however, that South Africa has introduced legislation which, according to

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1. CENTRE FOR APPLIED LEGAL STUDIES, INTRODUCTION TO THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 89 (Cathi Albertyn et al. eds., Witswatersrand University Press 2001).

2. Advocates share a concern that freedom of expression will be further limited. Press Release, International Federation of Journalists: African Bureau, FXI Warns of Dangers in Proposed Hate Speech Bill, (June 7, 2004), http://www.ifjafrique.org/english/dernouvelles/090604_2.htm [hereinafter FXI Warnings] (last visited Oct. 31, 2005).

3. Draft Prohibition of Hate Speech Bill, 2004, (Proposed Official Draft), *available at* http://www.pmg.org.za/bills/040430draftproh.pdf [hereinafter Draft Bill].

4. *See* Judith February, *This Week in Parliament* (*May 31–June 4, 2004*), POL'Y & L. ONLINE NEWS, June 4, 2004, http://www.polity.org.za/pol/opinion/judith/?show=51737 (examining the language of the Draft Bill and the evolution of the Equality Act) (last visited Oct. 31, 2005).

5. Draft Bill, *supra* note 3, art. 2, § 1(g).

6. FXI Warnings, *supra* note 2.

critics, undermines freedom of expression.[7] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("Equality Act") was met with similar concerns.[8]

This Note seeks to illustrate that post-constitutional legislation aimed at regulating hate speech is unnecessary, unworkable, and incapable of fulfilling its object and purpose.[9] Notions of the right to dignity are best preserved by eliminating such legislation and relying solely on provisions of the Constitution. Moreover, current constitutional provisions provide broad freedoms of expression while simultaneously meeting South Africa's international obligations.

To this end, Part I will explore the conflict between dignity and hate speech and will demonstrate the heightened importance of dignity in South Africa. Part II will describe the rights and limitations associated with the freedom of expression under the post-apartheid Constitution. Part III will analyze South Africa's Constitution, the Equality Act, and the Draft Bill, illuminating the flaws, inconsistencies, and the overly restrictive nature of the post-constitutional legislation. Part IV highlights the lack of necessity in regard to the post-constitution legislation. Finally, this Note concludes that, in order to preserve the rights and freedoms of the people of South Africa, and to further the notion of human dignity, it is in the South African government's best interest to eliminate the hate speech portions of the Equality Act and to refrain from endorsing the Draft Bill.

I. BACKGROUND

A. Emergence of the Right to Dignity and its Conflict with Freedom of Speech

Motivated by the horrors of World War II, representatives from forty-eight countries gathered to sign the Universal Declaration of Human Rights in 1948.[10] Their goal was to create a list of basic rights that the

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7. *Cf. South Africa Ushers In Controversial Equality Law*, REUTERS, Sept. 1, 2000, http://archives.cnn.com/2000/WORLD/africa/09/01/racism.safrica.reut/ (last visited Oct. 31, 2005).

8. *See id.* ("Government opponents and legal critics have criticized the [Promotion of Equality and Prevention of Unfair Discrimination Act] which . . . in some cases puts the onus on someone accused of discrimination to prove innocence.").

9. CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 3. The goal of the Equality Act and the Draft Bill is "to give substance to the constitutional commitment to equality, by providing a legal mechanism with which to confront, address and remedy past and present forms of . . . unfair discrimination and inequality . . . [and] to reinforce South Africa's international treaty obligations . . . ." *Id.*

10. Universal Declaration of Human Rights, G.A. Res. 217A, at 71 U.N. GAOR, 3d Sess., 1st

international community agreed were "inherent" and "equal" for all human beings.[11] The right to dignity was particularly prominent.[12] However, the right to freedom of speech is also considered to be a human right of the utmost importance, and was correspondingly articulated as a fundamental principle of the Declaration.[13] Hence, the initial codification of international human rights law recognized both the right of dignity and the right to freedom of expression; yet, ironically, the indiscriminate exercise of one right can nullify the opposing right.[14] This conflict between the right to dignity and freedom of speech is not unique to South Africa;[15] similar conflicts can be found in virtually every human rights convention that followed the UDHR.[16] Moreover, hate speech exacerbates tension

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plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), *available at* http://www.un.org/Overview/rights.html [hereinafter UDHR]; *cf.* The U.N. Ass'n in Can., *The Universal Declaration of Human Rights*, http://www.unac.org/rights/actguide/udhr.html (noting that UDHR was adopted without one dissenting vote, indicating the universal acceptance of the principles found therein).

11. UDHR, *supra* note 10, pmbl.

12. *Id.* ("[R]ecognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.") (emphasis added).

13. *Id.*

> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which *human beings shall enjoy freedom of speech* and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Id. (emphasis added). *See also* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 49 (1976).

> Freedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man . . . it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."

Id.

14. *See* UDHR, *supra* note 10, art. 30 ("Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.").

15. A multitude of State Constitutions include provisions codifying both the right to dignity and freedom of expression. *See, e.g.*, XIAN FA [Constitution] arts. 38, 41 (1982) (P.R.C.), *available at* http://www.usconstitution.net/china.html; GRUNDGESETZ [GG] [Constitution] arts. 1, 5 (F.R.G. 1949), *available at* http://www.lib.byu.edu/~rdh/eurodocs/germ/ggeng.html; INDIA CONST. arts. 14–19, *available at* http://www.constitution.org/cons/india/const.html.

16. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), pmbl. U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Jan. 3, 1976) [hereinafter ICESCR] ("Recognising that these rights derive from the inherent dignity of the human person . . ."); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), pmbl. U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1976) [hereinafter ICCPR] (using the same language found in the ICESCR); Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, Oct. 21, 1986, O.A.U Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ("[F]reedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples."); League of Arab States, Arab

between dignity and freedom of speech.[17] Recognizing this discord is crucial in analyzing the legitimacy of a state's legislation because the state often has obligations concerning hate speech based upon the conventions to which it is a party.[18] Yet, given the emphasis placed upon dignity by human rights declarations[19] and national constitutions,[20] it is apparent that the global community at large[21] finds the right to free speech subordinate to the right to dignity.[22]

Charter on Human Rights (*reprinted in* 18 HUM. RTS. L.J. 151 (1997) ("Given the Arab nation's belief in human dignity since God honoured it by making the Arab World the cradle of religions and the birthplace of civilizations which confirmed its right to a life of dignity based on freedom, justice and peace."); Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) (*reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)) ("All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.").

17. Note that hate speech is different from hate crimes. Hate crimes involve acts which are criminal offenses, the most common of which is assault. Hate speech involves only words, however, it can include language that incites others to take violent actions. *See* SAMUAL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 9 (1994). For an in-depth discussion of hate speech, see also CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); ALAN HAWORTH, FREE SPEECH (1998); and LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986).

18. For a complete list of relevant international treaty obligations binding South Africa on issues of equality and non-discrimination, see CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 3. These include: the ICCPR, *supra* note 16; the ICESCR, *supra* note 16; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., 107th plen. mtg., Supp. No. 46, U.N. Doc. A/34/46, (Sept. 3, 1981) [hereinafter CEDAW]; Convention on the Elimination of All Forms of Race Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, Annex 20, 1406th plen. mtg., Supp. No. 14, U.N. Doc. A/6014 (Jan. 4, 1969) [hereinafter CERD]; the Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., Supp. No. 49, U.N. Doc. A/44/49 (Sept. 2, 1990).

19. *See supra* note 16.

20. *See* Draft Treaty establishing a Constitution for Europe adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome on 18 July 2003, Article II-1 Human Dignity ("Human dignity is inviolable. It must be respected and protected."); XIAN FA art. 38 ("The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge, or frame-up directed against citizens by any means is prohibited."); S. AFR. CONST. 1996 art. 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected."); GG art. 1(1) ("The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.").

21. The United States, however, is an exception. Referencing recent incidents of hate speech in South Africa, Karthy Govender, the South African Commissioner of the Human Rights Commission, recently stated that "freedom of expression was a fundamental right in a democracy. By the same token our courts are clear that the freedom of expression is not a supreme right as in the United States of America Constitution." *Kill the Boer Slogan Outlawed* (July 17, 2003), http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1388921,00.html (last visited Nov. 1, 2005).

22. Of particular note are the similarities between Germany and South Africa. Considering Germany's policies is crucial to recognizing South Africa's aims and how those aims may manifest themselves. Close similarities exist between these two nations regarding historic discrimination, inequality, violence, and the resulting focus on the right to dignity in legislation. Germany's Constitution emphasizes the right to human dignity and relies on that right in interpreting the rest of

B. South Africa's Unique History[23]

The first South African laws aimed at criminalizing statements that could possibly lead to racial hostility were enacted in 1927.[24] These laws made it a criminal offense to articulate "any word or [engage in] any other act or thing whatever with intent to promote any feeling of hostility between natives and Europeans."[25] However, the 1927 Act and subsequent acts were used to curb any speech aimed at ending racial oppression made by the indigenous population.[26] Under the 1927 Act, "[a]ll the reported

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the document. Article 6 of the German Constitution or Basic Law (*Grundgesetz*) provides: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority." GG art. 6.

As Donald Kommers has noted:

> Germany's emphasis on dignity is nevertheless important, and for three reasons: First, the principle of human dignity makes normative demands on the state; second, it informs the scope and meaning of all the rights and guarantees of the Basic Law; and third, it is the source of the so-called objective value that the Federal Constitutional Court has inferred from the Basic Law's principles and structures. In short, the Constitutional Court envisions the Basic Law as a unified structure of objective principles and rights crowned by the master value of human dignity.

Donald Kommers, Address on Receiving Honorary Doctor of Law Degree at Karl's University, Heidelberg, Germany (July 1998), *available at* http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4904_2.pdf. For an in-depth discussion of the right of dignity's impact on speech in Germany, see Rainer Hofmann, *Incitement to National and Racial Hatred: The Legal Situation in Germany*, *in* ARTICLE 19: INTERNATIONAL CENTRE AGAINST CENSORSHIP, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 159 (Sandra Colivar et al. eds., 1992).

Delivering the Third Bram Fischer Memorial Lecture in May 2000, the President of the South African Constitutional Court, Judge Arthur Chaskalson, stated:

> The affirmation of human dignity as one of the founding values of the Constitution is significant. The interim Constitution emphasized the values of democracy, freedom and equality. Although dignity is immanent in these values and in the rights entrenched in the interim Constitution's Bill of Rights, its role as a foundational value of the constitutional order was not acknowledged in specific terms until the adoption of the 1996 Constitution. Consistently with this, the 1996 Constitution now refers to the "inherent dignity" of all people, thus asserting that respect for human dignity, and all that flows from it, as an attribute of life itself, and not a privilege granted by the state.

Arthur Chaskalson, President of the S. African Const. Ct. Third Fischer Memorial Lecture (May 18, 2000), *in The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order*, 16 S. AFR. J. HUM. RTS. 193, 196 (2000).

23. For a general discussion of the history of racial hostility laws in South Africa, see Gilbert J. Marcus, *Racial Hostility: The South African Experience*, *in* ARTICLE 19: INTERNATIONAL CENTRE AGAINST CENSORSHIP, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 208, 208–22 (Sandra Colivar et al. eds., 1992).

24. Native Administration Act of 1927, *cited in* Marcus, *supra* note 23, at 210.

25. *Id.*

26. *Id*. at 208–13 (discussing the Suppression of Communism Act of 1950; The Riotous Assemblies Act of 1956; The Publications and Entertainment Act of 1963; and The Publications Act of 1974).

cases concern[ed] charges of inciting hostility among blacks toward the white section of the community rather than cases of whites who cause[d] feelings of racial hostility by racially abusive comments."[27] Further, these measures were used to fine, imprison,[28] and forcibly remove members of the black population who spoke out against the apartheid system.[29] Thus, the laws had little to do with protecting individuals from racial abuse.[30] The final apartheid-era law used to oppress the indigenous population via limitations on speech was the Internal Security Act of 1982.[31] This law effectively prohibited all speech criticizing the government's race policies.[32]

The history of racism has left deep scars in South Africa. The legacy left to South Africans is one of humiliation, untold suffering, and death. Moreover, South African history demonstrates that "moral indifference toward or active encouragement of manifestations of hatred leads to the destruction of civilized living, war, [and] even holocaust."[33]

Following the end of apartheid, the African National Congress (ANC) became the dominant political party. The ANC had been very active in

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The Publications Act of 1974, for example, contains provisions aimed at preventing publication of anything that could incite racial hostility or could amount to an expression of ridicule or contempt for a section of the population. *Id.* As its predecessors, it looked race-neutral, but was used almost exclusively to bar anti-apartheid views. *Id.*

27. South African History Online, Chronology: 1900s, http://www.sahistory.org.za/pages/chronology/main-chronology-1920s.html (last visited Nov. 1, 2005). For a general discussion on the role of censorship in post-apartheid South Africa, see Lene Johannessen, *Should Censorship of Racist Publications Have a Place in the New South Africa?*, *in* ARTICLE 19: INTERNATIONAL CENTRE AGAINST CENSORSHIP, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 223–37 (Sandra Colivar et al. eds., 1992).

28. Marcus, *supra* note 23, at 214–19 (discussing key cases of prosecution under these laws).

29. *Id.*

30. *Id.* at 213–14. Based on parliamentary discussions, the goals of these acts were actually to suppress the governmental threat arising from the organization of the black working class, and to limit the influence of black community leaders. *Id.*

31. *Id.* This Act consolidated South Africa's existing laws concerning racial hostility.

> [A]ny person who, with the intent to achieve the object of bringing about or promoting "any constitutional, political, industrial, social or economic change in the Republic," causes, encourages or foments feelings of hostility between different population groups or attempts to do so, shall be guilty of the offense of subversion.

Id. Moreover, this Act provided for, *inter alia*, detention without trial, arrest without a warrant, exclusion of legal representation and the administrative infringement of basic human rights that could not be reviewed by the courts. *See* Stephen de la Harpe & Tharien van der Walt, *Can Security Legislation Stand up to the Challenge of Ensuring the Protection of Human Rights and Freedoms?: A South African Perspective*, NEW THINKING (Summer 2003), http://www.new-thinking.org/journal/securitylegislation.html (last visited Nov. 1, 2005).

32. *See* Marcus, *supra* note 23, at 212.

33. Kevin Boyle, *Overview of a Dilemma: Censorship versus Racism*, *in* ARTICLE 19: INTERNATIONAL CENTRE AGAINST CENSORSHIP, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 1, 2 (Sandra Colivar et al. eds., 1992).

reform movements in South Africa for over a half-century.[34] The ANC established the Freedom Charter ("Charter"), which was adopted in 1955.[35] This document embodied the conflict between the right to dignity and freedom of speech. The Charter guaranteed the "right to speak" and also provided that "preaching and practice of national, race, or colour discrimination and contempt shall be punishable as a crime."[36] When the South African Constitution was rewritten under the ANC government in 1996, it included many of the Charter's principles.[37] Hence, the conflict between these two rights was maintained.

C. The Role of Dignity in South African Jurisprudence

South Africa's troubled past has clearly influenced the development of its Constitution,[38] which was created to serve as an instrument of transformation.[39] The effort to overcome this history fostered the creation

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34. *See* Marcus, *supra* note 23, at 208.
35. *Id.*
36. *Id.* (citations omitted).
37. S. AFR. CONST. 1996.
38. As noted by South African Judge Kreigler:

> The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in light of our own particular history, and our vision for the future, a Constitution was written with equality at its center. Equality is our Constitution's focus and its organizing principle.

The President of the RSA and another v. Hugo 1997 (4) SA 1 (CC) at 68 (S. Afr.) (Judge Kreigler).

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> We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

S. AFR. CONST. 1996. *See also Dawood v. Minister of Home Affairs; Shalabi v. Minister of Home Affairs; Thomas v. Minister of Home Affairs* 2000 (3) SA 936 (CC) at 39 (S. Afr.) ("The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings."); *Soobramoney v. Minister of Health, KwaZulu-Natal* 1997 (1) SA 765 at 5 (CC) (S. Afr.); *Azanian Peoples Organization (AZAPO) and others v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) at 38 (S. Afr.); The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 [hereinafter Equality Act] ("The [Equality Act] attempts to regulate the promotion of equality to ensure that it becomes a reality in our country. This is an innovative feature of our Act, since equality legislation elsewhere in the world is usually only

of non-derogable rights.[40] Under the Constitution, the right to dignity is as important as the right to life; they are the only two rights that may not be compromised.[41] Many consider the right to dignity to be South Africa's most important right.[42]

Although it has engendered controversy,[43] the equality jurisprudence of the Constitutional Court is guided by the right to dignity.[44] The Equality Clause of the Constitution prohibits discrimination based on race, color, ethnic or social origin, sex, religion, or language.[45] Infringement on a

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concerned with preventing discrimination."). CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 4.

40. S. AFR. CONST. 1996 § 36(1).

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

Id.

41. *Id*.

42. CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 1 ("The South African Constitution establishes a new democratic order based on 'human dignity, the achievement of equality and the advancement of human rights and freedoms.'"); *see also* S. AFR. CONST. 1996 § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected."). The references to dignity in §§ 1, 7, 36, and 39 of the Constitution further elucidate the concept's importance. In South Africa, "a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]." *S v. Makwanyane* 1995 (6) BCLR 665 (CC) (S. Afr.); *S v. Makwanyane* 1995 (3) SA 328 (CC) (S. Afr.).

43. *See generally* Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. HUM. RTS. 248 (1998); DM Davis, *Equality: The Majesty of Legoland Jurisprudence*, 116 S. AFR. L.J. 398 (1999); Anton Fagan, *Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood*, 14 S. AFR. J. HUM. RTS. 220 (1998); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983); *see generally National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (2) SA 1 (CC) (S. Afr.); *Hoffman v. South African Airways* 2000 (1) SA 1 (CC) (S. Afr.).

44. *See generally Brink v. Kitschoff* 1996 (4) SA 197 (CC) (S. Afr.); *Prinsloo v. van der Linde* 1997 (3) SA 1012 (CC) (S. Afr.); *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC) (S. Afr.); *Harksen v. Lane* 1998 (1) SA 300 (CC) (S. Afr.); *Larbi-Odam v. MEC for Education (North West Province)* 1998 (1) SA 745 (CC) (S. Afr.); *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC) (S. Afr.); *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000(2) SA 1 (CC) (S. Afr.).

45. S. AFR. CONST. 1996 § 9.

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture,

person's right to dignity has also been found to be discriminatory.[46] Moreover, as a non-derogable right under the Constitution, dignity sets the restrictive standards by which other rights may be enjoyed.[47]

II. FREEDOM OF EXPRESSION UNDER THE SOUTH AFRICAN CONSTITUTION

The right to freedom of expression, which has been regarded as one of the quintessential principles of a democratic society, is one of the basic rights enumerated in section 16[48] of the Bill of Rights.[49] However, this right, although fundamental, is not absolute. From the inception of the new Constitution,[50] freedom of expression has been limited by common law rules,[51] by state interests,[52] by the non-derogable status of the right to dignity,[53] and by the speech provision of the Constitution itself.[54]

> language and birth. (4) No person may unfairly discriminate directly and indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Id.

46. *Harksen v. Lane* 1998(a) SA 300 (CC) (S.Afr.) at para. 47 ("There will be discrimination on unspecified grounds if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.").

47. S. AFR. CONST. 1996 § 36; *see also National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000(s) SA 1 (CC) (S. Afr.) at 57–58.

48. S. AFR. CONST. 1996 § 16.

49. Sections 7–39 of the Constitution are also known as South Africa's Bill of Rights.

50. *See* Explanatory Memorandum, Constitution of the Republic of South Africa 1996, *available at* http://www.polity.org.za/html/gordocs/constitution/saconst.html?rebookmark (last visited Nov. 1, 2005).

> This Constitution was drafted according to Chapter 5 of the interim Constitution (Act 200 of 1993) and was first adopted by the Constitutional Assembly on 8 May 1996. In terms of a judgement of the Constitutional Court, delivered on 6 September 1996, the text was referred back to the Constitutional Assembly for reconsideration. The text was accordingly amended to comply with the Constitutional Principles contained in Schedule 4 of the interim Constitution. It was signed into law on 10 December 1996.

Id.

51. *See* JONATHAN BURCHELL & JOHN MILTON, PRINCIPLES OF CRIMINAL LAW 513 (1997) ("*Crimen injuria* is the serious, unlawful and intentional infringement of the dignity (dignitas) of another.").

52. S. AFR. CONST. 1996 § 37, Table of Non-Derogable Rights.

53. *Id. See also S v. Mamabolo* (E TV and Others Intervening) 2001 (3) SA 409 (CC) at 37–38 (S. Afr.).

54. S. AFR. CONST. 1996 § 16(2).

A. Sections 16 and 36

Section 16 of the Constitution, which provides for freedom of expression, is divided into two parts which must be read in conjunction with one another in order to fully understand the scope of the right to freedom of expression under this part of the Constitution. Section 16(1) provides broad freedoms,[55] whereas section 16(2) modifies those freedoms.[56]

In addition to limitations placed on the freedom of expression within the enumeration of the right itself, freedom of expression is also limited by section 36 of the Constitution.[57] Section 36 provides a mechanism by which freedoms contained in the Bill of Rights may be limited in a manner beyond the scope of their respective provisions, to maintain the fundamental ideals of the State. However, a threshold standard does exist. Of particular note is the *Islamic Unity* case, in which the Court found that speech could only be regulated beyond the scope of section 16(2) if it meets the justification criteria of the limitations clause in section 36.[58] Nonetheless, both section 16(2) and section 36 act as direct checks on freedom of expression.

B. Sections 9 and 7(2)

In addition to the limits placed on freedom of expression through sections 16 and 36, certain Constitutional provisions related to discrimination also limited freedom of speech.[59] Based upon the provisions of the South African Constitution, hate speech is a form of discrimination.[60] Under section 9 of the Constitution, discrimination based

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55. *Id.* § 16(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.").

56. *Id.* § 16(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"); *see also Islamic Unity Convention v. Independent Broadcasting Authority and Others*, 2002(4) SA 294 (CC) at 22 (S. Afr.) (discussing the constitutional limitations placed on § 16(1), including § 36); Gilbert J. Marcus & D. Spitz, *Expression*, *in* CONSTITUTIONAL LAW IN SOUTH AFRICA 20–60 (Authur Chaskalson et al. eds., 1996) (noting that an additional effect of section 16(2) is that the government may regulate particular forms of speech without applying the standards of justification found in the limitations clause (Section 36)).

57. S. AFR. CONST. 1996 § 36.

58. *Islamic Unity*, *supra* note 56, at 23.

59. S. AFR. CONST. 1996 § 9.

60. CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 4 ("Hate speech is seen as a special form of unfair discrimination."). Note that this is very different from America, where hate speech is equated to racism instead of unfair discrimination when it occurs in public. *See* WALKER, *supra* note

on race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth is prohibited.[61] Hence, provisions exist which would allow hate speech to be addressed as a form of discrimination. Furthermore, under section 7(2), the State must respect, protect, promote, and fulfill the rights enumerated in the Bill of Rights,[62] one of which is the right to dignity.[63]

Although these provisions arguably provided the necessary instruments for the State to address the problem of hate speech, the drafters of the Constitution noted that the enactment of further legislation to prevent unfair discrimination on the grounds previously stated was compulsory.[64]

III. THE DELETERIOUS EFFECT OF POST-CONSTITUTIONAL LEGISLATION ON FREEDOM OF EXPRESSION

A. The Equality Act[65]

The adoption of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the "Equality Act") fulfilled the requirement that further legislation be enacted to prevent unfair discrimination under section 9.[66] The goal of the Equality Act is to give effect to the spirit of the Constitution through the prevention of unfair discrimination and the protection of human dignity.[67] The Equality Act strives to "provide measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability,"[68] and to meet South Africa's international obligations relating to various human rights conventions.[69] The Equality Act directly links the elimination of unfair discrimination and hate speech.

17, at 1–14.

61. S. AFR. CONST. 1996 §§ 9(3), 9(4).

62. *Id.* § 7(2).

63. *Id.* § 10.

64. *Id.* § 9(4).

65. *See supra* note 39.

66. *Id.* § 2(a).

67. *Id.* § 2(b).

68. *Id.* § 2(c). It is important to note that in addition to prohibiting the grounds for discrimination found in section 9 of the Constitution, the Equality Act also prohibits any other form of discrimination which "(1) causes or perpetuates systemic disadvantage; (2) undermines human dignity; or (3) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination . . . [on a ground provided in the Constitution].". *Id.* § 1(xxii)(b).

69. The Equality Act specifically mentions the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. Equality Act, *supra* note 39, pmbl.

The framers felt that to protect human dignity and prevent unfair discrimination, restrictions must be placed on freedom of expression. The State's arguments justifying the regulation of hate speech are founded on this principle.[70]

B. Section 10

Section 10 of the Equality Act prohibits hate speech.[71] Section 10 can be viewed as an attempt to distinguish between speech that furthers the principles found in the Constitution and speech that inhibits them.[72] To fulfill this aim, the Equality Act set standards for preventing hate speech and established the Equality Courts.[73] As of June 24, 2004, seventy-five cases had been lodged with the Equality Courts, twenty-three of which related to hate speech.[74] The methodology established by section 10 permits the court dealing with the case[75] to refer it to the Director of Public Prosecutions (DPP), in order to institute criminal proceedings under the common law and the appropriate legislation.[76] However, in order for proceedings to be brought against an individual, the conduct of the

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70. Leaving this area unregulated has been thought to further circumstances of discrimination, inequality and assaults on individuals' dignity. CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 89.

71. Equality Act, *supra* note 39, § 10.

> (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.

Id.

72. *Id.* §§ 2, 10.

73. *Id.* pmbl. "This Act endeavors to facilitate the transition to a democratic society, united in its diversity . . . and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom." *Id.*

74. Johnny de Lange, Deputy Minister for Justice and Constitutional Development, Opening Address at the National Equality Indaba, June 24, 2004, http://www.doj.gov.za/2004dojsite/m_speeches/sp2004/2004%2006%2024_dmin_eqaindaba.htm.

75. In addition to traditional courts, such matters may be handled by Equality Courts, which are established under the Equality Act. Similar to the procedure of a traditional court, the Equality Court, under the powers provided in section 21 of the Equality Act may determine whether unfair discrimination has occurred and may have the clerk submit the matter to the DPP. The Equality Act, *supra* note 39, §§ 10(2), 21(2)(u). Note, however, that like a traditional court, under section 10, the proceedings must occur under relevant pre-existing legislation, and the matter in question must already constitute a crime under that legislation. *Id.*

76. *Id.* § 21(n).

accused *must* constitute a crime under the body of law in existence before the ratification of the Equality Act. In this regard, section 10 does not establish new criminal offenses, but instead allows for the prosecution of those criminal offenses previously established by law.[77]

C. Section 30

Section 30 of the Equality Act provides the Minister for Justice and Constitutional Development with the power to adopt an additional regulation under which a person who acts contrary to the provisions of the Equality Act is guilty of an offense and is liable for a fine or a prison sentence not to exceed twelve months.[78] On January 21, 2000, a resolution adopted by the Ad Hoc Joint Committee on Promotion of Equality and Prevention of Unfair Discrimination Bill requested that the Minister for Justice and Constitutional Development give consideration to: (a) developing legislation in Parliament which criminalizes hate speech and creates hate speech offenses in a manner consistent with section 16 of the Constitution[79] and the Convention on the Elimination of All Forms of Racial Discrimination ("CERD");[80] and (b) taking other steps necessary to give effect to CERD and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") which have not already been provided by previous legislation.[81]

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77. *Id.* § 10(2).

78. *Id.* § 30(3).

79. *See also* S. AFR. CONST. 1996 § 16.

80. The Draft Bill, *supra* note 3, intro. CERD is an international treaty. Its goal is to eliminate racial discrimination by upholding the principles in articles 1(2) and 55(c) of the UN Charter, article 2 of the Universal Declaration on Human Rights (UDHR) and article 2 of both International Conventions on Human Rights. CERD, *supra* note 18, pmbl. In addition, the international concern regarding apartheid is considered a motivating factor in its creation. *Id.* Article 4 of the CERD mandates State parties shall "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin." *Id.* art. 4. The General Assembly adopted CERD in 1965. Karl Josef Partsch, *Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination*, *in* ARTICLE XIX: INTERNATIONAL CENTRE AGAINST CENSORSHIP STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 21 (Sandra Colivar et al. eds., 1992). It went into force in 1969 and has been ratified by over 129 states. *Id.* CERD was ratified by South Africa on December 10, 1998. Office of the United Nations High Commissioner for Human Rights, International Convention on the Elimination of All Forms of Racial Discrimination New York, 7 Mar. 1966, *at* http://www.ohchr.org/english/countries/ratification/2.htm (last visited Oct. 7, 2005). CERD is different from previous treaties dealing with discrimination in that it establishes lines by which States may implement measures to combat racism. It is left to the States, however, to determine how best to implement their obligations under the Convention. *See* CERD, *supra* note 18, art. 4.

81. The Draft Bill, *supra* note 3, intro. CEDAW was ratified by South Africa on Dec. 15, 1995. Office of the United Nations High Commissioner for Human Rights, Convention on the Elimination of

D. Comparison of Section 10 of the Equality Act and Section 16 of the Constitution[82]

Section 10 of the Equality Act clearly restricts hate speech to a greater degree than section 16(2)(c) of the Constitution. First, the Constitution restricts hate speech based on race, ethnicity, gender, or religion.[83] The Equality Act extends this list to include sex, pregnancy, marital status, social origin, color, sexual orientation, age, disability, conscience, belief, culture, language, birth, and any other ground where discrimination based on that ground "(i) causes or perpetuates systematic disadvantage, (ii) undermines human dignity or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground [previously stated]."[84] Although it could be argued that section 39 of the Constitution already restricted speech based on these grounds,[85] prior to the passage of the Equality Act, numerous

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All Forms of Discrimination against Women New York, 18 Dec. 1979, *at* http://www.ohchr.org/english/countries/ratification/8.htm (last visited Oct. 7, 2005). In addition to these covenants, South Africa ratified the ICCPR on December 10, 1998. Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights New York, 16 Dec. 1966, *at* http://www.ohchr.org/english/countries/ratification/4.htm (last visited Oct. 7, 2005). Article 20, paragraph 2 of the ICCPR requires the prohibition of "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." ICCPR, *supra* note 16, art. 20(2).

82. For an in depth discussion of section 16 of the Constitution, see Lene Johannessen, *A Critical View of the Constitutional Hate Speech Provision*, 13 S. AFR. J. HUM. RTS. 135 (1997). For an in-depth discussion of how section 16 may influence the interpretation of the Equality Act, see Albertyn, *supra* note 1, at 90–92; and Shaun Teichner, *The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, The Bad and The Ugly*, 19 S. AFR. J. HUM. RTS. 349, 350–52 (2003).

83. S. AFR. CONST. 1996 § 16(2)(c).

84. The Equality Act, *supra* note 39, § 1(1)(xxii). These grounds are identical to those found in section 9 of the Constitution, which establishes the right to equality. S. AFR. CONST. 1996 § 9. The justification for prohibitions based on these grounds is that "they have been used . . . to categorize, marginalise, and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity." *Harksen v. Lane* 1998(1) SA 300 (CC) (S. Afr.) at 49. Note also that section 34 lists additional grounds including: "HIV/AIDS status, socio-economic status, nationality, family responsibility and family status." The Equality Act, *supra* note 39, § 34. The Equality Review Committee is supposed to make necessary recommendations to the Minister regarding whether these grounds will be afforded the same status as those previously discussed in the near future. *Id.*

85. S. AFR. CONST. 1996 § 39.

1. When interpreting the Bill of Rights, a court, tribunal or forum

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

2. When interpreting any legislation, and when developing the common law or customary

academics interpreted the Constitution to only restrict speech which squarely fell within its language.[86]

Furthermore, the Constitution states that freedom of expression does not extend to "hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."[87] Section 10 states that freedom of expression does not extend to words "that *could* reasonably be construed to demonstrate a clear intention to," incite harm *or* promote hatred.[88]

In addition, under the Constitution, an individual must utter words of hatred, which constitute incitement to cause harm in order to commit hate speech.[89] Section 10 does not require that hate speech constitute incitement to cause harm, only that it could be reasonably construed as an intention to be verbally hurtful.[90] Therefore, violence, whether imminent or not, is no longer a requirement for restricting speech. This represents the Equality Act's shift away from the Constitutional restrictions of hate speech.

Clearly, the language of the Equality Act takes a broader definition of what language may be classified as hate speech. This new standard exceeds the scope of those limitations provided under the Constitution and therefore further limits freedom of expression.

Moreover, the Equality Act prohibits what has been termed as harmful conduct "in the air."[91] The language does not have to impact the person it is directed at; rather if a passerby construes the language to be hurtful, the speaker has committed hate speech."[92]

The only way to reconcile this matter is to interpret "incitement" in the Constitution to mean "intended," therefore enabling speech which may not actually result in violence to be prohibited under the Constitution. This interpretation would not only prohibit speech which is intended to incite

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law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Id.

86. *See* JOHAN DE WAAL ET AL., THE BILL OF RIGHTS [OF SOUTH AFRICA] HANDBOOK 228 (3d ed. 2001); Karthy Govender, *The Freedom of Speech*, 1 HUM. RTS. & CONST. L.J. S. AFR. 22 (1997).

87. S. AFR. CONST. 1996 § 16(2).

88. The Equality Act, *supra* note 39, § 10 (emphasis added).

89. S. AFR. CONST. 1996 § 16(2)(c).

90. The Equality Act, *supra* note 39, § 10.

91. CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 95.

92. *Id.*

one group to cause harm, but also prohibit speech which was intended to cause harm based on words alone, independent of any physical act.

The most troubling aspect of the Equality Act is the inclusion of the terms "hurtful" and "harmful." Before moving to hurtful, which must inevitably be less severe, the nature of conduct that can be classified as harmful must be determined. Conventional usage indicates that harmful would involve physical harm. Scholars have argued that harmful must not be interpreted in this way, however, because such an interpretation would effectively place "harmful" within the "incitement to imminent violence" provision of the Constitution.[93]

In the Canadian case of *R v. Keegstra*,[94] the court determined that "harm" resulting from hate speech included emotional damage, because it may have lasting psychological and social consequences.[95] In contrast, other scholars have argued that "harmful" must include physical harm.[96] Either interpretation conflicts with the Equality Act. If "harmful" is categorized as physical harm, it falls within the realm covered by incitement to imminent violence. If it is characterized by emotional harm, however, then it falls into the category presumably covered by the term hurtful.

These issues illuminate the more general problems with the Equality Act. The Act is both vague and overly broad.[97] The necessity of comparing various sections of the Act and the Constitution in order to make sense of the provisions virtually ensures that the average person will not be able to make any determination as to whether the speech she is using is prohibited.[98] The greater significance of this development is that if individuals become overly cautious in exercising their freedom of speech because they do not know where the lines are drawn, freedom of expression will be limited even further than required. Moreover, the definitions section of the Equality Act provides no assistance in this matter.

If current case law is to be followed, cases brought under the Equality Act which involve off-color comments, may only be able to be brought

93. WAAL, *supra* note 86, at 320.

94. R v. Keegstra, [1990] 3 S.C.R. 697, *cited in* Teichner, *supra* note 82, at 355.

95. *See supra* note 86.

96. CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 92; Gilbert J. Marcus & D. Spitz, *supra* note 56, at 20–63.

97. CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 96.

98. *Id.* In Kwa-Zulu Natal, a region of Southeastern South Africa, a man was recently found guilty for uttering a racial slur. Tania Broughton, *KZN Man Guilty in Racial Slur Case*, THE MERCURY, June 3, 2004, http://www.int.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20040603024707302C410527.

before the Constitutional Court. In *Islamic Unity Convention v. Independent Broadcasting Authority*,[99] the Court held that there is no bar to the enactment of legislation that prohibits the forms of expression set out in section 16(2) of the Constitution. Only "[w]here the state extends the scope of regulation beyond expression envisaged in section 16(2) it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution."[100] The broadness of the prohibitions in the Equality Act demand application of the limitations standards found in section 36 of the Constitution.[101] In this regard, jokes and sarcasm are sometimes hurtful and therefore may routinely engender constitutional analysis.[102]

E. The Draft Prohibition of Hate Speech Bill

South Africa's Draft Prohibition of Hate Speech Bill, 2004, is the result of the request made to the Minister for Justice and Constitutional Development by the Ad Hoc Joint Committee of Promotion of Equality and Prevention of Unfair Discrimination Bill.[103] The Draft Bill "penalizes any person who in public advocates hatred that is based on race, ethnicity, gender, or religion that could, in the circumstances, reasonably be construed to demonstrate an intention to be hurtful, harmful or to incite harm" or to undermine human dignity.[104] In terms of punishment, violating the proposed law could result in fines and prison sentences of up to three years for first-time offenders and six years for second-time offenders.[105] The Draft Bill finalized its period for public commentary on June 14, 2004.[106]

Given that the Equality Act was criticized on both ends of the spectrum for being vague and overly broad, it was anticipated that the new Draft Bill would better define hate speech.[107] However, it does little more than

99. *Islamic Unity Convention v. Indep. Broad. Authority*, 2002(4) SA 294 (CC) at 34.
100. *Id.* para. 34.
101. *See supra* note 54 and accompanying text.
102. *See* CENTRE FOR APPLIED LEGAL STUDIES, *supra* note 1, at 95.
103. The Draft Bill, *supra* note 3, intro.
104. *See supra* notes 4–5 and accompanying text.
105. Christelle Terreblanche & Angela Quintal, *SA Hate Speech Bill Compared to Zim Law*, INDEPENDENT ONLINE (S. Afr.), June 3, 2004, http://www.amren.com/news/news04/06/04/sabill.html.
106. The Draft Bill, *supra* note 3, intro.
107. *See* FXI Warnings, *supra* note 2 (discussing the dissatisfaction with the language of the Draft Bill).

perpetuate these flaws by adding undefined terms, creating inconsistencies, and providing penalties for violations.[108]

Moreover, instead of creating offenses and criminalizing the current standards of hate speech, as is the Draft Bill's intention,[109] it goes further, restricting speech to a greater degree than the Equality Act.[110] Similar to the Equality Act, the Draft Bill does nothing to distinguish between hurtful or harmful comments. Instead, the Draft Bill adds a list of new restrictions, beyond those listed in the Constitution and those found in section 10.[111] Furthermore, section 2(3)(a) of the Draft Bill applies to those who make statements "'in public,' without derogating from the ordinary meaning of those words."[112] This can be perceived as providing greater freedom, given that the Equality Act does not specify locations. However, the term "in public" is then defined as "in the sight or hearing or presence of the public," which is followed by the definition of "in a public place."[113] If all public places are included by the second definition, it logically follows that the first includes private places that are in earshot of the public.

Moreover, the Draft Bill no longer requires a "clear intention" as in the Equality Act, but only an "intention."[114] This change significantly lowers

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108. The prohibited grounds for hate speech under the Equality Act are those enumerated in section 9 of the Constitution. *See supra* note 84 and accompanying text. However, the Draft Bill's list of prohibitions uses section 16 of the Constitution, which is far more limited. *Compare* S. AFR. CONST. 1996 § 16, *with* the Draft Bill, *supra* note 3, § 2(1). This matter is further complicated by section 1 of the Draft Bill, which states, "[t]his Act does not exclude or limit the concurrent application of any other law in so far as the provisions of such other law are not inconsistent with this Act." *Id.* § 1. Essentially, the Draft Bill criminalizes hate speech based on race, ethnicity, gender, or religion only. Pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, conscience, belief, culture, language, and birth may then only be prosecuted through the process established by the Equality Court. The Equality Act, *supra* note 39, § 21. The Draft Bill could be applied to these limited grounds and the Equality Act could apply to others, requiring criminalization to occur through the equality court process. However, if this were to occur, the Draft Bill would be in conflict with the object and purpose of the Equality Act, which provided the machinery for the Draft Bill's inception. The Draft Bill, *supra* note 3, intro. The Draft Bill furthers this conflict, providing "[i]f any conflict relating to a matter dealt with in this Act arises between this Act and any other law, other than the Constitution or an Act of Parliament expressly amending this Act, this Act prevails." *Id.* § 1(2). The Equality Act has inherent conflicts with the Constitution regarding the scope of prohibited grounds. Moreover, the Equality Act provided the impetus for the Draft Bill. Even though the Draft Bill's grounds may be constitutional, the empowering document may not be. This again raises questions of constitutionality.

109. The Draft Bill, *supra* note 3, intro.

110. Freedom of Expression Institute, Annual Report (2003–2004) 19–20, http://www.ifj.org/pdfs/FXI%20Annual%20Report%202004_Digital%20Version.pdf.

111. The Draft Bill, *supra* note 3, § 2(1).

112. *Id.* § 2(3)(a).

113. *Id.*

114. *Id.* § 2(1).

the standard required to show that an individual intended his words to have a certain effect.

Perhaps the most shocking addition is that of vicarious liability under section 4 of the Draft Bill, which states, "[t]he common law principles of vicarious liability apply to the criminal liability established by this Act."[115] Under this provision, an individual may be criminally liable for another's jokes.

IV. NEITHER THE EQUALITY ACT NOR THE DRAFT HATE SPEECH BILL ARE NECESSARY

As demonstrated in Part II, the Constitution provides significant protections. Numerous organizations have indicated that the protections enumerated in the Constitution provide sufficient freedom of expression while preserving notions of dignity and equality to a greater extent than post-constitutional legislation.[116]

In addition to promoting equality and dignity, both the Equality Act and the Draft Bill seek to fulfill obligations provided by article 4 of the CERD ("article 4").[117]

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115. *Id.* § 4(1).

116. *See supra* note 6 and accompanying text.

117. The Equality Act, *supra* note 39, pmbl.; The Draft Bill, *supra* note 3, pmbl.; CERD, *supra* note 18, pmbl.

State parties to the Convention are obligated in numerous ways. Although hate speech is not specifically mentioned in the Convention, racism which does not rise to the level of inciting violence falls within the scope of article 2(1)(d) of the Convention. Partsch, *supra* note 80, at 23. Article 2(1)(d) states "[e]ach State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by the circumstances, racial discrimination by any persons, group or organization. . . ." CERD, *supra* note 18, art. 2(1)(d). The acts which are prohibited are not specifically articulated. *Id.* All acts of discrimination that are not serious enough to fall within article 4 should fall within this provision. Partsch, *supra* note 80, at 23. However, criminal sanctions are not per se necessary. *Id*. Alternative methods such as declaring specific acts unlawful or taking educational measures may be sufficient. *Id*. Article 4 provides:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: . . . [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof . . . .

CERD, *supra* note 18, art. 4.

The introductory paragraph of article 4, which contextualizes the requirements of subsection (a), was highly contested from its inception.[118] It provides that state parties shall condemn acts of discrimination "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention."[119] This matter accentuates the conflict between discrimination and freedom of speech. Numerous approaches were considered before the final wording could be agreed upon. The five Scandinavian countries maintained restrictions could only be imposed if they respected fundamental human rights, one of which is freedom of speech.[120]

Once the language was settled, the issue of interpretation began.[121] Three viable methods of interpreting the obligations in light of the "with due regard" clause exist.[122] First, parties may not take any action which would curtail any of the freedoms referenced in the "due regard" clause.[123] Second, parties must find a balance between the limitation of discriminatory acts and basic human rights referenced in the clause.[124] Third, parties cannot use the protection of civil rights as a justification for

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118. Partsch, *supra* note 80, at 24.

119. CERD, *supra* note 18, art. 4.

120. Partsch, *supra* note 80, at 24 (citing UN Doc. A/6181, para. 63 (1965)). These countries proposed that restrictions could not "limit[] or derogat[e] from the civil rights expressly set forth in Article 5." *Id.* Article 5 states that countries must guarantee *inter alia* freedom of thought, opinion and expression. CERD, *supra* note 18, art. 5.

121. Partsch, *supra* note 80, at 24.

122. *Id.*

123. *Id.* (citing 20 U.N. GAOR, U.N. Doc. A/C.3/SR. 1318, para. 59 (1965)). The United States is an example of a country that adheres to the first interpretation. Upon signing, the U.S. declared:

> The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution.

Id.

The position of the United Kingdom is similar to that of the United States. *Id.* The United Kingdom made a reservation, stating that legislative action is required in regard to the Convention only when it is necessary to achieve the goals of article 4. *Id.* The United Kingdom believed that the "due regard" clause adequately protected freedom of expression. *Id.*

124. *Id.* Numerous states, including Canada, Austria, Italy, and Belgium, have made statements indicating that they ascribe to this interpretation. *Id.* at 25 (citing Centre for Human Rights, *Status of International Instruments*, U.N. GAOR U.N. Doc. ST/HR/3, 99–126 (1988); Committee on the Elimination of Racial Discrimination, *Positive Measures Designed to Eradicate All Incitement to, and Acts of, Racial Discrimination* (1986) (previously published as U.N. GAOR U.N. Doc. A/CONF.119/10 in 1983) [hereinafter CERD Study]). Of particular note is the statement of the Canadian delegate, who beseeched the committee "to devise a balanced legal formula which would allow the law to reach such offenses without infringing human rights and freedoms." *Id.* at 25 (citing 20 U.N. GAOR, U.N. Doc. A/C.3/SR. 1315, para. 24 (1965)).

not implementing the restrictions on expression provided for in the Convention.[125]

Although South Africa's goal seems to be embodying principles represented by the second interpretation, in application, South Africa's policies have come to resemble the third interpretation. Similar to the non-derogable status of restrictions under the third interpretation, the Constitution makes the right to dignity non-derogable.[126] The third interpretation "presupposes that freedom of expression can be reduced to zero by relying on the limitation clauses."[127] South Africa is in danger of entirely eliminating freedom of expression by relying on the non-derogable status of dignity, the importance of equality, and the overly strict interpretations of its international commitments. Such actions cannot be justified.

Moreover, such actions directly conflict with other international obligations which South Africa must observe. Article 30 of the Universal Declaration on Human Rights ("UDHR") states, "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[128] Article 19 UDHR states, "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[129] Given the language already provided in the Constitution[130] and the various accepted interpretations of article 4, South Africa need not use the Equality Act or the Draft Bill to meet its international obligations. Further, the language of the Equality Act restricts expression beyond the language of the CERD,[131] which it was intended to support.[132]

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125. *Id.* at 25. This conceptualization was developed at a seminar on recourse procedures that was convened by the UN Human Rights Division in Geneva in July 1979. *Id.*

126. S. AFR. CONST. 1996 § 36.

127. *Id.* (citing CERD Study, *supra* note 24, at 108 (discussing the general consensus of the seminar)).

128. UDHR, *supra* note 10, art. 30.

129. *Id.* art. 19.

130. *See* S. AFR. CONST. 1996 § 16(2); *see also supra* notes 54–58, 83 and accompanying text.

131. CERD art. 4(a) ("[Parties] [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority and hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin."). Criminalizing hurtful comments goes far beyond the scope of this language.

132. The Draft Bill, *supra* note 3, pmbl.

CONCLUSION

Restricting speech in the manner provided in the Equality Act and the Draft Bill does not serve South Africa's goals. In a diverse society such as South Africa, there is a need for laws that prohibit incitement of racial hatred which results in violence.[133] South Africa's Constitution provides this protection.[134] It is understandable, given South Africa's past, that limitations on speech may be seen as a tool to promote dignity and equality. However, complete deterrence to the right of dignity can destroy virtually any other right, no matter how essential that other right is.[135] "Hate Speech" that could be construed as hurtful should not be a crime. The right to express one's thoughts and to communicate freely with others affirms the dignity and worth of every member of society, and allows each individual to determine what is true[136] and to realize his or her full human potential. Thus, freedom of expression deserves society's greatest protection.[137] South Africa's own Constitutional Court has demonstrated that freedom of speech is fundamental on numerous occasions.[138]

Concepts inherent in hate speech, such as ridicule, racism, contempt, harmfulness, and hostility are potentially open-ended and susceptible to widely divergent interpretations.[139] In early 1990, following the political

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133. JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 177 (1978).

134. S. AFR. CONST. 1996 § 16(2).

135. Davis, *supra* note 43, at 413. Laws which prohibit the dissemination of racial hatred, such as the non-derogable status of dignity in the South African Constitution, can be used as a powerful weapon by a government whose goal is muting those in opposition to the policies of the regime. *See generally* BOLLINGER, *supra* note 17.

136. Speech is "vital to the attainment and advancement of knowledge." As stated by John Stuart Mill, the "marketplace of ideas" is the greatest value of free speech. "Being exposed to all perspectives, whether good or bad, helps to challenge an individual's perspective, and therefore aids the individual in discerning the truth behind controversy." ACLU, *Freedom of Speech: The Backbone of American Human Rights*, No. 10, http://www.geocities.com/CapitolHill/Senate/9526/freesp01.html.

137. *Id.*

138. *See South African National Defense Union v. Minister of Defence* 1999 (4) SA 469 (CC) at 7 (S. Afr.); *S v. Mamobolo* 2001 (3) SA 409 (CC) at 37 (S. Afr.).

139. *See* WALKER, *supra* note 17, at 8. Hate speech has been defined as "any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women." *Id.* (citing FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981)). Hate Speech has also been defined as a "generic term that has come to embrace the use of speech attacks based on race, ethnicity, religion and sexual orientation or preference." *Id.* (citing KENT GREENAWALT, SPEECH, CRIME, AND THE USE OF LANGUAGE (1989)).

> If a suitable definition of racist speech can be settled upon, the problems of interpreting and applying the legal standard to concrete situations begin. One possible approach, of course, is that of a continuing censorship bureaucracy. In the end, history teaches us that the "boundaries of the forbidden" cannot be reliably drawn.

R. George Wright, *Racist Speech and the First Amendment*, 9 MISS. C. L. REV. 1, 23 (1988). "Restrictions on speech are almost always based on an individual viewpoint, and [u]nder current law

reforms initiated that February, the question was asked, "[i]s it possible to draft provisions . . . which would avoid making a future democratic South Africa vulnerable to arbitrary abuse of censorship?"[140] South Africa's history shows that control over speech leads to oppression,[141] under which individuals are stripped of their dignity. Prohibiting speech does not prohibit attitudes of racism,[142] intolerance, or bigotry, and perhaps only pushes them underground, where they may become more dangerous.[143]

Hate speech laws may be important in redrawing the limits of what is acceptable in any society and in setting new standards of behavior.[144] However, hate speech laws are not accomplishing these goals in South Africa. As Thomas Paine stated, "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[145] Dignity is a

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there is the strongest of presumptions against view-point based restrictions [on speech]. These restrictions are almost automatically unconstitutional." SUNSTEIN, *supra* note 17, at 13.

140. Johannessen, *supra* note 27, at 234.

141. It has been suggested that large numbers of white South Africans have adopted notions of racial superiority and the inferiority of indigenous peoples because of South Africa's regime of censorship prior to the new Republic. Marcus, *supra* note 23, at 222. South African laws against racial hatred were used systematically against the victims of its racist policies. *Id.* If the people are to be well informed in matters of their fate and that of their elected government, they must be well informed and have access to all information ideas and points of view. "Mass ignorance is the breeding ground for oppression and tyranny." ACLU, *supra* note 136. Even with hate speech restrictions under the Equality Act, black Africans, who are by far most often the victims of hate speech, have also had the most hate speech complaints filed against them. FXI Warnings, *supra* note 2.

142. Hate speech has not only been directed at white individuals. Recently, ANC party members have chanted the phrase "Kill the Farmer, Kill the Boer" at gatherings. *Kill the Boer Slogan Outlawed*, *supra* note 21. The Human Rights Commission initially found that the language did not constitute hate speech, but on appeal, due to an action brought by Freedom Front, reversed the decision. *Id.*

143. Denise Meyerson, *"No Platform for Racists": What Should the View of Those on the Left Be?*, 6 S. AFR. J. HUM. RTS. 394, 397 (1990).

> [T]here is [an] argument for intolerance, namely that tolerance of that which is evil serves the cause of oppression . . . [this view] overlooks the costs of intolerance. First, to drive an evil view underground can actually increase its strength; whereas to debate it out in the open is more likely to bring home its abhorrent nature . . . . Secondly, it is only too easy for censorship laws to be put to different uses from those originally intended and if we are happy for them to be deployed in one way, we make it much easier for them to be deployed in the other, more frightening, ways later. And a final consideration here is that, to the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge. Forced as we are to weigh up evils here, we should therefore conclude that tolerance is more beneficial than costly.

Id.

144. Michael Banton, *The Declaratory Value of Laws Against Racial Incitement*, *in* ARTICLE XIX: INTERNATIONAL CENTRE AGAINST CENSORSHIP, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 349, 353 (Sandra Colivar et al. eds., 1992).

145. THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT: CONCLUSION, *in* COLLECTED WRITINGS 296 (1995).

tool which can be used to inform individuals about the past and to provide a vision of the future.[146] It should not be used as a means to restrict essential freedoms, such as speech, thereby stripping individuals of the very qualities that they are trying to instill into society.

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146. *S v. Makwanyane* 1995 (3) SA 328 (CC) at 329 (S. Afr.).

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