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THE POVERTY OF LAW: A CRITICAL ANALYSIS OF HATE SPEECH JURISPRUDENCE IN SOUTH AFRICA

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Dedicated to the victims of *Gukurahundi*[1]

[1] ***Gukurahundi*** was a series of massacres of Ndebele civilians carried out by the Zimbabwe National Army from early 1983 to late 1987. The massacres were supported by hate discourses which continue today to ensure that the victims remain second class citizens and deprived from a range of opportunities and rights in Zimbabwe.

Incident

Now I was eight and very small,

And he was no whit bigger,

And so I smiled, but he poked out

His tongue, and called me "Nigger."

I saw the whole of Baltimore

From May until December;

Of all the things that happened there

That's all that I remember.

Poem by Countee Cullen

(1934)

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My vision for this project has always been big as I tackled the question from a conflicted personal space. I hope that this paper will constitute a reference point for equality court judges and their training.

Acronyms

AWB	Afrikaner Weerstandsbeweging
ANC	African National Congress
CPRS	Centre for Peace and Reconciliation Studies
CLS	Critical Legal Studies
CRT	Critical Race Theory
CDA	Critical Discourse Analysis
CSO	Civil Society Organisation
CERD	Convention of Elimination of Racial Discrimination Act
DA	Democratic Alliance
DOJ & CD	Department of Justice and Constitutional Development
EFF	Economic Freedom Front
ECHR	European Court of Human Rights
FPA	Films and Publications Act
HEI	Higher Education Institutions
ICCPR	International Covenant on Civil and Political Rights
PAB	Publications Act Board
PEPUDA	Promotion of Equality and Prevention of Unfair of Discrimination Act
R2K	Right2Know Campaign
SCA	Suppression of Communism Act
SAHRC	South African Human Rights Commission
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific Cultural Organisation
US	United States of America

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Chapter 1: Introduction

1.1 Background

What one can say and cannot say is a long standing philosophically winding debate. In 2016, the subject of hate speech re-entered South Africa's public discourse in an impactful way. Prior to this incidences of hate speech had received some attention however, not in the scale that they did in the beginning of 2016. During this period, in South Africa, racist statements were recorded on social media and these stirred up intense debates within the public.[2] The debates were highly emotive but equally stimulating for purposes of understanding South Africa's progress on the "transformation bridge."[3] In order to understand the nature of hate speech in South Africa, it is useful to make reference to some of the recent happenings.

On 3 January 2016, one Penny Sparrow, a white woman, compared black people to monkeys and expressed her frustration at the sight of black people using and littering Scottburgh beach in Durban during the festive season.[4] Sparrow's comments were shared widely on the internet, causing a stir and a prolonged interest on this story by mainstream media. On 4 January 2016, media personality Gareth Cliff posted a comment on Twitter in which he stated that "People really didn't understand free speech at all". This was interpreted by online users to mean that he supported Sparrow's comments. This triggered more discourse on the topic, leading to Cliff not having his work contract renewed.[5] Sparrow was also let go by her employer in the real estate sector and suspended as a member by her political party the Democratic Alliance (DA).[6] Around this same period, a well-known Economist and commentator, Chris Hart suggested, on Twitter, that victims of apartheid had started to have a growing sense of entitlement.[7] This too roused shock and criticism leading to Hart being suspended by his employer, Standard Bank.[8]

Some of the responses by black South Africans were extreme. For instance, one Velaphi Khumalo, a black man, caught the attention of the media with his Facebook post in which

[2] Nyathi and Rajuili (2017) 2 *Conflict Trends* 41.
[3] Shabalala & Others v Attorney-General of the Transvaal & Another 1995 12 BCLR 1593 (CC) par 26.
[4] https://mg.co.za/article/2016-01-04-twitter-erupts-after-kzn-estate-agent-calls-black-people-monkeys
[5] (2016) 2 All SA 102 (GJ).
[6] https://mg.co.za/article/2016-01-04-da-to-suspend-sparrow-over-racist-comments
[7] https://mg.co.za/article/2016-01-13-standard-bank-chief-executive-takes-hardline-on-racism
[8] https://www.fin24.com/Companies/Financial-Services/standard-bank-suspends-chris-hart-over-racist-tweet-20160104

called for the skinning and killing of white South Africans "as the Germans did to the Jews."[9] Some months after these incidences, another Twitter post by a young white male calling the government a bunch of "kaffirs" emerged; once again causing the discussions around hate speech to re-surface. *(Please see Annexure A).*

Outside online activity, discourses of a racial or racist nature occupied South Africa's socio-political space. The "#FeesMustFall" protests led by university students across the country, in 2016 were one of the platforms where young people commented not only about the high tuition fees in Higher Education Institutions (HEI) but also about persisting socio-economic inequalities underlined by racial inequalities.[10] Young black students used this campaign, together with the ideologies of a predecessor movement (#RhodesMustFall) to challenge racist structures embedded in universities. Within these discourses some bold and at times extreme expressions emerged. For instance, a University of Witwatersrand student wore a t-shirt written "Being black is shit- Fuck white people"[11] during the protests. The particular student mentioned that he was reacting to people like Sparrow and that her comments showed him that many whites hated blacks.[12] The main complaint from some white South Africans was that there was a double standard in the manner in which hate speech incidences were reported by the media.

> "Where the transgressor was white, media coverage was relatively extensive, whereas when the transgressor was black, the coverage followed a more normal pattern of distribution." Representative of a Civil Society Organisation (CSO) called Solidarity.

Another example of an offline activity which influenced discourses on freedom of expression and hate speech was the artwork of the President of South Africa Jacob Zuma engaging sexually with allegedly corrupt businessmen (known as "Gupta brothers"). This piece by Ayanda Mabulu, a black male artist, caught the attention of the media and ultimately the public. Here, conversation about the President's dignity and artistic expression was also explored through public media engagement. However, "hate speech" was also explored as an

[9] http://ewn.co.za/2016/01/08/Velaphi-Khumalo-to-learn-his-fate-after-racist-Facebook-rant
10 https://mg.co.za/tag/fees-must-fall
11 http://www.sabreakingnews.co.za/2016/02/08/wits-students-proclaim-f-white-people-its-not-racist/
12 http://www.micampusmag.co.za/2016/02/wits-student-taken-to-human-rights-commission-over-the-fuk-white-people-t-shirt/

element of this instance. The Citizen newspaper for instance published a story with the headline "Mabulu's paintings are 'hate speech'."[13]

In all the instances illustrated above, a range of concerns were consistently raised. One of these was the question of the extent to which racism was still rife in South Africa. Other public reactions pertained to the question of how transgressors should be reprimanded for such speech; with others suggesting imprisonment as a way forward. Also at the core of deliberating on "hate speech" was the issue of how to define "hate speech" in a manner that does not infringe on freedom of expression. This concern was expressed mainly by CSOs, such as the Right2Know Campaign (R2K) which took the stance that hate speech legislation was a distraction from dealing with "structural vestiges and institutional causes of racism, patriarchy, xenophobia and related intolerances."[14] This dissertation seeks to focus on the legal side of the problem, noting, in particular that government's primary reaction to the issue was to resort to law. Two documents namely the "National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP)"[15] and the "Prevention of Hate Crimes and Hate Speech Bill"[16] (Hate Bill), respectively were released for public comment. As these documents are not yet finalised, government's inclination to legal solution stands to questioned.

1.2 Research Problem

There have been numerous "post-apartheid" studies which have noted the spillages of the apartheid system into present day South Africa. The history of South Africa's legal culture and law's former role as an anchor to racism and discrimination requires that a critical analysis such as this is carried out. According to Hoexter and Olivier "apartheid was a legal order."[17] In fact, between 1948 and 1990 the apartheid government enacted numerous laws to impose racial segregation on many aspects of South African life.[18] The courts were the enforcers of these laws. To exacerbate the problem, there was no or little fair representation

[13] https://citizen.co.za/news/south-africa/1214931/mabulus-paintings-are-hate-speech/
[14] http://www.r2k.org.za/2017/02/03/hate-crimes-hate-speech-bill/
[15] South Africa (2016) Department of Justice and Constitutional Development. National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.
[16] South Africa (2016) Department of Justice and Constitutional Development. Prevention of Hate Crimes and Hate Speech Bill
[17] Hoexter & Olivier (2014) 26.
[18] Hoexter & Olivier (2014) 26.

in the judiciary as the judiciary was exclusively white and almost exclusively male.[19] This suggests that judges adjudicating over matters to do with non-white peoples, women and other minority peoples, were not well equipped to relate to the extra-legal identity matters that underpinned certain cases. On paper, judges were independent from political influence; however the reality was that they were manifestly corrupt and impartial.[20]Apartheid judiciary failed to display a commitment to justice, by continuing to operate within a system that was deeply flawed.[21] In addition to this, Chasklason J in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*[22] noted that the jurisprudential philosophy underpinning judicial reasoning during this time was that of Parliamentary supremacy, which ensured that the judiciary, was always subject to parliament's policies. With such a history, courts and the law ought to be viewed suspiciously as they may still embody traits of an old repressive legal system.

1.3 Assumptions

The following assumptions were made prior to the study;

a) Law is one of the important tools to address hate speech but it is far from adequate.
b) Law is inherently unable to deal with matters of a psychological and cognitive nature such as hate speech.
c) Equality court judges are more likely to err in their judgments than not..
d) Presiding officers are not well equipped to discuss the necessary key philosophical tenants of hate speech law during the handing down of judgments.
e) Equality courts are formalistic institutions.

1.4 Motivation

A jurisprudential study is necessary to take stock of the trends emerging in post – apartheid South Africa. While the current post-apartheid Constitutional order is based on values of racial equality, non-sexism, democracy, and reconciliation this does not translate to an instant reality because the nature of transformation, as foreseen by Mohamed DP in *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*[23]

[19] Hoexter & Olivier (2014) 26.
[20] Hoexter & Olivier (2014) 26.
[21] Hoexter & Olivier (2014) 27.
[22] 1995 (4) SA 877.
[23] 1996 (4) SA 672 par 18.

is a slow process requiring both the victims and perpetrators of apartheid have to hobble on, rather than walk on. It is submitted that when hate speech is conceptualised as a discourse it can be a useful indicator to challenges in social interaction across race, gender and other group identities.

One key motivation for this jurisprudential take on hate speech is the apparent need to address the spike in hate speech cases in South Africa. In 2015, the SAHRC reported that hate speech cases increased to 22% of matters investigated, in comparison to 3% in the previous 2014.[24] The SAHRC Chief Executive Officer was quoted saying;

> "There has been an interesting development over the past 21 years. Just after 1994, it was very difficult to find a racist anywhere in the country. Now we see that people are letting their guard down more as apartheid becomes a distant memory for many people."[25]

Although the statement is flawed in that it assumes that there were no racists after 1994, it is accurate that South Africans have increasingly become freer to vent their prejudices through social media. The cases outlined in the "background" section are indicative of this.

Another motivation, similar to the aforementioned point, is that hate speech is proven in history to co-exist with violent crimes hence an important indicator of social discord.

With regards to the second motivation, it is noted that there are too few published articles on hate speech, focusing on South Africa. This is tantamount to a lack of deliberation or interest amongst South African human rights scholars on the subject. It is ironic that this should be the case since South Africa sits on a continent that is marred with intense social strife where systems of ethnic hatred and violence accompanied by institutionalised hateful discourses have caused horrific crimes against humanity[26] such as the Gukurahundi ethnic killings in Zimbabwe in the 1980s, the Rwandan genocide of 1994 and Kenya's post-election violence of 2007.

[24] http://ewn.co.za/2015/02/09/sahrc-experiences-increase-in-hate-speech-cases
[25] http://ewn.co.za/2015/02/09/sahrc-experiences-increase-in-hate-speech-cases
[26] Report of the Office of the United Nations High Commissioner for Human Rights http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Nairobi/HenryMaina.doc (accessed on 12 November 2017).

1.5 Literature Review

Theoretical Base

This dissertation is premised on three tools of thought, namely Critical Legal Studies (CLS), Critical Race Theory (CRT) and Critical Discourse Analysis (CDA). These theories are in line with what Legal Philosopher; Costas Douzinas calls "the poverty of law". Douzinas used this phrase during a lecture in 2009, where he highlighted two types of law's poverty. [27] One form of law's poverty is epistemological. This is refers to the fundamental challenge of law as a sheer listing of rules. The second type of poverty relates to the mirage that law is value free and that it is neutral. Douzinas rejects this fiction, arguing that interpreters of law bring their morality in the practice of law.

Several scholars also critique the abilities of law to solve social issues. For instance law has been criticised for oversimplifying complex power relations.[28] The CRT argument that hate speech uses racist and sexist structures as currencies suggests that words carry deeper implications than they may seem.[29] Delgado and Stefancic argue that, many at times, those who use hate speech have power and authority under existing social, political and historical conditions.[30] Similarly, Mann argues that aggressors of hate speech tap into the deep roots of psychological and social domination and subordination. Thus, the impact of hate speech relies on systemic oppression[31], and in enforcing group based social and economic exclusions.[32] Law may fall short of properly contextualising the backstories of certain remarks.

Another limitation of human rights law in particular is that it is characterised by clashes between rights which forces courts to engage in the exercise of balancing competing rights. A United Nations Educational, Scientific Cultural Organisation (UNESCO) report summarized this challenge stating that "hate speech lies in a complex nexus with freedom of expression, individual, group and minority rights, as well as concepts of dignity, liberty and equality."[33]

[27] https://youtu.be/PlzmdFTuWfY
[28] Smart (1989)144.
[29] Delgado & Stefancic (1999) 44 *Wake Forest Law Review* 66.
[30] Delgado & Stefancic (1999) 44 *Wake Forest Law Review* 66.
[31] Mann (1995)258.
[32] Meyers (1995) 203.
[33] World Trends In Freedom of Expression and Media Development: Special Digital Focus (2015) UNESCO Report 5.

While it is convenient for temporary problem solving, the requirement to choose one value over another results in compromises that solve the issue for the short term, however not for the long run.

Another limitation as identified by Douzinas is that, rights have become commodified in ways that have turned them into "an ideological gloss of an emerging empire."[34] Here, Douzinas is referring to the popularity and credibility that has become associated with human rights discourses. Smart draws a similar observation in her assertion that rights have become an influential political language through which certain interests can be advanced.[35] McKinnon gives an example of how in the US towards the early 1990s, sexual harassment was dealt with under "employment rights" so that it conforms to "rights speak." As such the limitation is that human rights law can become mere rhetoric. CDA warns about how rhetoric can be used as a linguistic tool to persuade or manipulate language in order to conceal prejudice. It may also be submitted that, the prestige that is then associated with rights discourses is in itself an "external system of exclusion,"[36] that is used by those privy to legal skill to apply the law for lay people. In the study, I have construed this challenge as the problem of "reconciliation discourse or jurisprudence."

Finally, the way in which rights law is formulated to protect individuals from the state or the weak from the strong makes it prone to being manipulated by the powerful.[37] One of the judicial approaches that have ensured that the powerful remain protected by the law is through a colour blind conceptualisation of transformation. A look at South Africa's post-1994 legal history reveals this trait. Commenting on the judgment in *Afriforum v Malema*[38] De Vos criticized the judgment for being built on colour blind philosophy and impractical legal recourse.[39] Modiri, commenting on the same case found it strange that the judgment presented whites as a vulnerable minority. To Modiri, this conclusion failed to acknowledge the systemic power of whites through their socio-economic power.[40]

Social identity theory shows that categorising people as "weak" or "powerful" is not useful. In a research with 614 individuals in the US, Leets drew some conclusions about how whites

[34] Douzinas (2008) 19 *European Journal of International Law* 863.
[35] Smart (1989) 143.
[36] Hook (2001) 11 *Theory and Psychology* 521.
[37] Smart (1989) 145.
[38] 2011 (6) SA 240 (EqC).
[39] https://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/
[40] Modiri (2013)130 SAJHR 278.

and ethnic minorities perceived hate speech.[41] The study revealed that European Americans perceived racial slurs as more harmful than ethnic minorities (particularly Asian Americans) had perceived them. [42] From these results Leets speculated why ethnic minorities perceived direct racist statements as only moderately discriminatory. There are four possible reasons for this. These are that ethnic minorities may have accepted the negative self-concept and stigmatisation; they are secure in their identity that external comments do not affect them; or that they have enhanced their in-group value so much that their sense of value is not affected by racist feedback; or[43] that ethnic minorities maybe simply be desensitized as a result of repeat exposures to discrimination.[44]

Whatever the case maybe, Leets' findings reveal that "power" or "weakness" are nuanced concepts and that law may not be equipped to theorise these notions accurately. As Modiri, correctly notes that whites in South Africa are a powerful minority, the same can be said about blacks having political power while at the same time lacking in economic power.

1.6 Methodology

The study is based on a desktop research which entails consulting books, journal articles, newspaper articles, social media, case law, legislation and YouTube videos.

As stated above, the dissertation is premised on CLS, CRT and CDA as the main schools of thought. As such, the text that has been consulted is grounded on these approaches.

In Chapter two, the historical analysis outlined is derived primarily from legislation, and books which address the legal history on hate speech. Whereas in chapter three, themes on hate speech jurisprudence have been identified and discussed in terms of case law.

1.7 Research questions

The dissertation addresses two main research questions, namely,

a) What is South Africa's history with restricting freedom of expression and what is the current legal framework?

[41] Leets (2001) *Journal of Social Issues* 676.
[42] Leets (2001) *Journal of Social Issues* 678.
[43] Leets (2001) *Journal of Social Issues* 680.
[44] Leets (2001) *Journal of Social Sciences* 681.

b) How do equality courts address race based and gender based hate speech and are there any trends in how judgments are drawn?

Chapter 2: The Legal Framework of Hate Speech in South Africa

2.1 Introduction

Long before South Africa adopted hate speech legislation, the apartheid government had been implementing draconian laws to police what citizens could say and could not say. These laws resembled present day hate speech laws however fell short of a core element of hate speech, particularly the goal to protect the dignity of minority people. This chapter focuses on setting out the history of hate speech laws, in particular the history of "racial hostility laws."It will juxtapose these with current laws in order to draw conclusions about the extent to which apartheid's legacy may or may not have creeped into today's laws.

2.2 Juxtaposing old and new laws

This section will highlight six main differences between apartheid and post –apartheid laws. It will show that while the legal framework on freedom of expression has changed drastically, it is still characterised by a resistance to absolute freedom of expression.

2.2.1 "Racial hostility laws" versus "Hate Speech Laws"

Unlike hate speech laws, racial hostility laws were vast and well developed over a period as long as 67 years. The Native Administrative Act of 1927 is one of the oldest laws to criminalise speech in South Africa. Section 29 of this Act made it a criminal offense to utter words which were deemed to promote any feelings of hostility between the nativesand the Europeans.[45] Similarly, the Riotous Assemblies Amendment Act of 1930 whose main object was to regulate gatherings, prohibited publications which were deemed to be intended to engender feelings of hostility.[46] A number of cases were dealt with under this Act. For example, in 1930 the African National Congress (ANC), Western Cape branch President,

[45] Act 30 of 1927.
[46] Act 19 of 1930.

James Thaele was tried under this Act for making a speech in which he expressed that blacks were used as "kitchen boys" and "girls."[47] In the same speech he added that the land belonged to the "aboriginal races" and that the "white man pushes you down, and when you are down he is happy".[48] The court held that these words were intended to promote hostility.[49]

The institutionalisation of apartheid in 1948 saw the enactment of yet another repressive legislation called the Suppression of Communism Act (SCA) of 1950.[50] This Act was established to prohibit the Communist Party of South Africa.[51]Through this Act, the Governor-General of the state could declare "liberation orientated" and anti-apartheid organisations, unlawful.[52] This led to the banning of political groupings and curtailing of their ability to disseminate so called "communist ideas."[53] According to the Act, communism was a "doctrine or scheme which aimed to encourage feelings of hostility between the European and non-European races of the Union, the consequences of which were calculated to further the achievement of any object referred to in the establishment of a despotic system of government based on the dictatorship of the proletariat or bringing about any political, industrial, social or economic change within the union."[54] As resistance increased, it became criminal for individuals whom the state identified as "communists" to make speeches, write, print, and publish their ideas. It was also a crime to disseminate the ideas of people whom the state had listed as communists.[55]

Laws limiting freedom of expression were further reinforced through the amended Riotous Assemblies Act of 1956.[56] The object of this Act was to "consolidate laws relating to riotous assemblies and the prohibition of the engendering of feelings of hostility between the European and the non-European inhabitants of the Union."[57] People who convened,

[47] *Coliver (ed)(1992) 216.*
[48] *Coliver (ed)(1992) 216*.
[49] *Coliver (ed)(1992) 216.*
[50] Act 44 of 1950.
[51] *Coliver (ed)(1992) 210.*
[52] *Coliver (ed)(1992) 210.*
[53] Section 2 Act 44 of 1950.
[54] Section 1 Act 44 of 1950
[55] Section 11 Act 44 of 1950 as amended by section 8 of act 15 of 1954, section 10 of act 76 of 1962.
[56] Act 17 of 1956.
[57] Act 17 of 1956.

addressed gatherings, printed, published and distributed notices of meetings that were speculated to be calculated to engender racial hostility were guilty of a criminal offense.[58]

In 1974, the state passed the Publications Act. [59] This Act prohibited the printing, publishing, manufacture, making or production of any "undesirable publication." An "undesirable publication", according the Act, "brought any section of the inhabitants of the Republic into ridicule or contempt."[60] "Undesirable publications" were those that were considered harmful to the relations between any sections of the inhabitants of the Republic or was prejudicial to the safety of the state, general welfare, or peace and good order.[61] The dissemination of publications which met this criterion was prohibited.[62] The term "Section of the inhabitants" referred to "a substantial number of people who, as a result of an inherent characteristic or characteristics, regard themselves as a distinctive community and are accepted as such by the rest of the community."[63] This broad description of people no longer features in post-apartheid law.

In comparison to the above, current laws against hate speech are much more explicit however cover a broad spectrum in terms of grounds of discrimination. The Equality Act of 2000 describes hate speech as the publishing, propagating, advocating and communicating words that could reasonably be construed to be i) hurtful ii) harmful or inciting harm and iii) propagating hatred, based on prohibited grounds.[64] When compared to the "racial hostility laws" which focused primarily on racial and to an extent religious categorisations, the hate speech clause in section 10 of the Equality Act is concerned with a broad range of grounds of discrimination namely "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[65] If the "Hate Bill" which currently awaits Parliamentary approval is passed as it is, this list will include "occupation" as a ground of discrimination thus broadening the scope of hate speech. What the current or proposed law does not do however is recognising the diversity of hate speech. CRT scholars argue that hate speech should also be quantified in

[58] *Coliver (ed)(1992) 211.*
[59] Act 26 of 1963.
[60] Section 47 (2) (c).
[61] Section 5 (1) a read with section 1 and 5 (6).
[62] Section 5 (1) a.
[63] Johannessen 228.
[64] Section 10 of the Equality Act.
[65] Section 9(3) of the Constitution.

terms of campus (university) varieties, direct or indirect; veiled or overt; single or repeated; backed by power, authority, or threat, or not.[66]

2.2.2 Law as politics

Another striking difference between apartheid "racial hostility laws" and "present day hate speech laws lies in the extent to which law and politics intersect. Racial hostility laws were explicit in the manner in which law and politics were deeply intertwined. Many at times, anti-apartheid expressions were construed in the same vein as "racial hostility." An example, in addition to the above illustrated case of James Thaele is the case of one Abdul Mohammed who was deported back to Zanzibar after a court ruling which decided that the words blacks must "fight the government" and "get freedom"[67] were tantamount to "racial hostility." Mohammed received a fine of fifteen pounds. The very basis of the SCA to curb speech of a communist nature also confirms the political motivations of such laws. A realist CLS approach would claim that apartheid laws were in fact "politics" [68] because court decisions served the political agenda to manage opposition by the civilians. Another earlier example was that of *R v Vanga*[69], where the accused had distributed pamphlets to farm workers encouraging poor communities to rise up and confiscate land from rich white farmers, cattle and all the grain for distribution to the poor. The court considered this a promotion of hostility.[70]

The fact that laws were drafted to control civil and political rights such as freedom of association and freedom of assembly is also telling of this interface between law and politics. As a result of "racial hostility laws" organisations were banned and persons and expressions categorised as "undesirable" in the interests of maintaining the apartheid order. In the case of the SCA, the Governor General and not the courts had power to arbitrarily decide that certain persons in the state were purely interested in causing racial tensions in the state.[71] As such, it is evident that the apartheid state construed racial hostility laws within the order of the time so that the structure of racism was defended. Indeed some of the judges did not hide their biases. The judge in the James Thaele case commented that "they (blacks) are rather inclined to speak this way, and we have to be careful in judging them, not to judge them by our own

[66] Delgado & Stefancic (2004) 11.
[67] *Coliver (ed)(1992) 214.*
[68] Van Marle & Motha (2013) 20.
[69] 1932 EDL 219.
[70] 1932 EDL 219.
[71] *Coliver (ed)(1992) 210.*

standards." Overt statements clearly reinforced an "us" and "them" factor no longer exist post-apartheid South Africa discourse.

The limited scholarship on this subject indicates that South African scholars have not reached a consensus on whether to view hate speech law in particular, as "politics" or as "political." On observing the phrasing of section 10, alone it is clear that hate speech law is not as explicitly politically as in the apartheid legal order. The main difference is that section 10 of the Equality Act is set against the backdrop of promoting equality rather than protecting the state and instilling order. It is submitted that the moderate view that law is "political" as contended within CLS movement applies to modern day law. This perception is vested in the use of "language" as a key manifestation of the "political." The understanding that law is political suggests that law is "a site of ethical contestation, an ontological problem of plural existence, or a problem of justice."[72] Set on the ideological tenants of the South African Constitution, it can be concluded that hate speech laws are based on an idea that Klare calls "transformative constitutionalism."[73] Under this notion, judges should aim to set aside their political and moral values in order to interpret legal text in a manner that advances the post liberal vision of the Constitution. This vision prioritises the spirit of the community and not the only the individual.[74] It is observed that the interface between law and politics has become subtler and primarily identifiable through the use of rhetoric. The liberal and egalitarian dispensation that South Africa now embodies has made it impossible for politics to reign over law. However, as Klare has acknowledged it is also impossible for judges to be value free and as such it is illogical to assume that the improved legal framework will lead to value free, non-political adjudication.[75]

[72] Van Marle & Motha (2013) 20.
[73] Klare (1998)14 SAJHR 146.
[74] Klare (1998)14 SAJHR 146.
[75] Klare (1998)14 SAJHR 146.

2.2.3 A comment on "Intention"

In *R v Brown*[76] the accused had allegedly uttered the words:

> "You remember how the natives were shot down under the union jack at Bulhoek…To hell with King George. To hell with General Hertzog. To hell with General Smuts. We shall bury a lot of parliamentarian parasites six feet under."

Brown was acquitted on appeal as the court held that he had not intended to promote hostility.[77] From this, it is gleaned that apartheid courts considered "intention" as an element of racial hostility. This is an important difference between pre-1994 and post-1994 laws, as in current hate speech interpretations "intention" is not considered in making a ruling, as equality courts focus not on the intention but the impact of the speech. [78]

The hate speech clause as articulated in section 10 of the Equality Act contains the text that hate speech should be "reasonably construed to demonstrate the intention to be hurtful, harmful or incite harm", propagate hatred. Yet in post –apartheid jurisprudence judges have highlighted that intention is immaterial as what really matters is the impact of the speech on the victim.[79] This coupled with section 15 of the Equality Act which provides that hate speech may not be subject to a fairness test, indicates a new legal culture by which Equality courts operate from the biased presumption that minorities and powerless people always have a legitimate case of hate speech.

2.2.4 Identifying some ideological differences

A key difference between the "racial hostility law" embedded in the SCA for example and present laws is that in the past one could be punished for belonging to a certain organisation. In this way, the apartheid state ensured that freedom of expression was a highly subjective and not a basic right. Through its policing strategies it could be said that the apartheid state were more proactive in finding "racial hostility" or "communist doctrines" than the current government is when it comes to searching for instances of hate speech. Today, extremely expressive organisations that could very well be subjected to a similar scrutiny such as the Afrikaner Weerstandsbeweging (AWB) and at times the Economic Freedom Front (EFF) are

[76] 1929 CPD 221.
[77] *Coliver (Ed) (1992) 215*.
[78] *Sonke Gender Justice v Malema* 2010 (7) BCLR 729 (EqC).
[79] Afriforum v Malema and Mdabe v Reid.

left to exist. Evidently, this indicates that the post-apartheid state is increasingly separating law and politics, so as to emphasize the right to freedom of expression. There are YouTube videos of AWB members emotively expressing their apartheid belief system.[80] This organisation has not been reprimanded through law, presumably because their right wing ideology entails complex discourses. The AWB members can be heard claiming that they are not racists, they simply believe in the separation of races. [81] Post-apartheid jurisprudence has not tested these type of discourse as has been done by foreign jurisprudence with similar histories of racism and social conflict. In Germany and Canada for instance, denial and or revisionism of the holocaust or expressing favour for anti-Semitism constitutes hate speech.[82] In this context, a shortcoming of law; that it is reactive rather than proactive is highlighted. It seems that jurisprudence is only developed when someone institutes a case. Arguably, the Equality Act is more progressive than it has been utilised for. The Act establishes an Equality Review Committee whose powers can be used creatively under the pretext of its powers "to determine its business as it sees fit."[83] This body, for instance can explore more proactively how to categorise hate speech in more detail as CRT scholars suggest that hate speech should be understood in its numerous manifestations.[84]

2.2.5 Comparing Punitive measures

The stark difference between apartheid and post-apartheid laws is that in apartheid so called "racial hostility laws" were criminalised. Penalties such as fines, hard labour and imprisonment were typical of racial hostility laws. The Internal Security Act of 1982[85] for instance created an offense called "subversion."[86] This crime included quoting in a publication any person whose name appeared on the government's list of banned people. This could lead up to a sentence of three years imprisonment.

Current hate speech law provides a range of remedies that are of a civil nature and open ended. These include interim orders, declaratory orders, damages, an order restraining discriminatory conduct, an order of a deterrent nature, an appropriate order of costs to any of

[80] https://www.youtube.com/watch?v=6krvEDOEimo
[81] https://www.youtube.com/watch?v=6krvEDOEimo
[82] *R v Keegstra* 1990 (3) S.C.R. 697.
[83] Section 33(2).
[84] Delgado & Stefancic (1999) 44 *Wake Forest Law Review* 66.
[85] Act 74 of 1982.
[86] Section 54 (2) Act 74 of 1982.

the parties and "special measures to address hate speech".[87] While the punitive measures are largely civil based, section 10 provides that failure to comply with a court order could lead to imprisonment of not more than 12 months.[88] The proposed "Hate Bill" introduces imprisonment of a period of no longer than 12 months. Civil Society Organisations (CSOs) such as LGBTI organisation, the Triangle Project have criticised the states' plans to include imprisonment as a remedy, saying that this may be understandable where violence is threatened however extreme when it comes to the speech that is merely insulting or causes discomfort.[89] This observation points to another shortfall of law as at times, inconclusive.

2.2.6 Institutional bodies: A comparison

One of the poverties of law listed above is its proneness to manipulation. The Publications Act Board (PAB) formed to govern the implementation of Publications Act of 1994 operated in a manner that was "unable to appreciate black aspirations for a society which was free of racial oppressions or to grasp the extent to which racial discrimination victimised and humiliated the black population".[90] One of its purported principles was the "clear and present danger doctrine". [91]This doctrine referred to the rule that government must only persecute a speaker only if their statement is "intended or likely to produce imminent and serious violence or unlawful acts."[92] This doctrine is also a US doctrine to which commentators concluded that PAB's claim was only an attempt for South Africa to appear as if its laws were up the standard of a democratic world power. In reality the PAB did not actually apply this test to decide to censor expression.[93] Another positive test that guided the PAB was the "Absolute necessity test.".This referred to the principle that the PAB would only infringe on freedom of expression no more than is "absolutely necessary."[94] Under this principle, the PAB claimed to only ban publications that were "offensive" and "revolting" and not merely "annoying."[95] As such, for the PAB an expression which caused slight strain in relations

[87] Section 21 of the Equality Act.
[88] Section 21 (3) of the Equality Act.
[89] https://mg.co.za/article/2017-01-27-00-yes-be-worried-about-the-hate-bill
[90] *Coliver (Ed) (1992) 219.*
[91] *Coliver (Ed) (1992)* 224.
[92] *Coliver (Ed) (1992) 227.*
[93] *Coliver (ed)(1992) 228.*
[94] Johannessen (1992) in *Coliver (ed)* 228.
[95] Johannessen (1992) *Coliver (ed) 228.*

between racial groups but did not pose serious threat to the state was not subject to censorship. [96]

A body that was set up in post-apartheid South Africa is the Films and Publications Board (FPB). This body was set up to implement the Films and Publication Act (FPA) of 1996. This institution is empowered to prohibit films or games which incite imminent harm or advocate hatred based on advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm.[97] Unlike the Publications Board which was exclusively white[98], the FPA requires that this body be diverse along the race, ethnicity, gender and religion.

2.3 Conclusion

In this chapter it was demonstrated that radical changes have taken place in terms of positivized laws and that post –apartheid laws have enriched human rights in many ways, including the separation between law and politics, making law more neutral.. In this way the public today have greater leeway to exercising their civil and political rights without the legal threats against political expression. It was also shown in the chapter that the Equality Act and courts are a lot more grounded on the ideals of protecting the weakest in society, as opposed to those of a specific race.

Additionally, it was shown that today there is a much more developed legal consciousness where a range of social groups are acknowledged and protected in the equality clause of the Constitution.

The differences between apartheid and post-apartheid laws are distinct, however recent state's contemplations to criminalising hate speech is characteristic of the return of censorship. It is suggested that this is a "post-liberalism based censorship" where equality and dignity are prioritised, however it is also one which is prone to being manipulated as will be shown in Chapter 3.

[96] Johannessen *Coliver (ed)(1992) 228.*
[97] Section 3 (a) of the Films and Publications Act 65 of 1996.
[98] Johannessen (1992) *Coliver (ed) 228.*

It was also established in this chapter that "intention" was a viable element to determine racial hostility. It is presumed that this is attributable to the rules of criminal law which were applied because such speech was criminalised.

Chapter 3: Hate Speech Jurisprudence: A critical analysis

3.1 Introduction

In Chapter two, the differences between apartheid and post-apartheid laws pertaining to hate speech were discussed. This Chapter seeks to further the discussion by turning attention to the adjudication. Klare contends that adjudication is a law –making process of a democratic society.[99] He encourages continued study of adjudication because South Africa faces a new culture of justiciability and the judiciary is now bestowed with greater power in the post-apartheid state in comparison to the past.[100] As such, judges ought to be conscientious, meaning they have to professionally promote and fulfil the fundamental rights to human dignity, equality and freedom.[101] This chapter seeks to critically analyse adjudication in Equality courts over "hate speech matters" as it has been shown that this is a fairly new issue for the courts to tackle. As stated by Mureinik's "The study of what judges do is the most instructive way to understand the law itself."[102] As such, the value of this chapter lies in its exposure of judicial "hobble" on the "transformative bridge" (*in the words of Mohammed DP in AZAPO)*[103] .

Following an analysis of a number of hate speech cases, five cases were selected because they highlight a theme that is critical to understanding judicial performance if judicial conscientious is the goal. Specifically, the themes to be explored will be as follows;

a) How judges construct narratives in the courtroom
b) Identifying the differences in how judges interpret hate speech
c) Addressing Spatial injustice in a hate speech case
d) How judges perceive apologies in hate speech matters

[99] Klare (1998)14 SAJHR 146.
[100] Klare (1998)14 SAJHR 147.
[101] Klare (1998)14 SAJHR 149.
[102] Mureinik (1988) 181.
[103] 1996 (4) SA 672 par 18.

In the conclusion of the chapter, I will summarise the trends of post- apartheid hate speech jurisprudence in order to make a comment about South Africa's progress in its transformative process.

3.2 How judges construct narratives in the court room

Foucault's main contribution to philosophy was the idea that the study of discourse can help to illuminate power relations at play in society.[104] Kendall and Wickham suggest five steps to carrying out a discourse analysis, however to accommodate the limited scope of this dissertation, this study will focus on how Lamont J's constructed his statements in order to manipulate the judgment to his own moral and political biases. This argument is set on the backdrop that judges are never totally neutral. As noted by Edwin Cameron;

> "Judges do not enter public office as ideological virgins. They ascend to the bench with built-in and often strongly held sets of values, preconceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting the inarticulate premises in the process of judicial reasoning."[105]

South African scholars such as Modiri and De Vos have criticized Lamont J in *Afriforum v Malema*[106] for employing colour blind philosophy and sheer racial bias.[107] Modiri's critique, centres on the legal realist argument that because the judge himself is a white male, the song in question could haveroused fear in him, personally, that the song could incite violence against people of the group he belongs to.[108] Modiri's critique in sum, is that the judgment showed that law is ideologically impoverished when it comes to addressing race and identity issues.[109] De Vos' argument on the other hand problematizes the judge's conceptualisation of South Africans as a unified identity. According to De Vos, "South Africans" particularly in this case should be construed as per their racial identities.[110] As a rhetorical strategy the judge painted the false picture of a colour-blind society so that he could escape the reality that different racial groups would have interpreted the song differently.

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[104] Hook (2001) 11 *Theory and Psychology* 521
[105] Cameron (1990) 6 *SAJHR* 251.
[106] 2011 (6) SA 240 (EqC).
[107] Modiri (2013)130 SAJHR 275.
[108] Modiri (2013)130 SAJHR 281
[109] Modiri (2013)130 SAJHR 275.
[110] https://constitutionallyspeaking.co.za/malema-judgment-a-rethink-on-hate-speech-needed/&hl=en-ZA

The summary facts of *Afriforum v Malema*[111] are that this case involved the inquiry whether or not the song known as *Dubulibunu* (translated Shoot the Boer) constituted hate speech. The song is a struggle song, which like many other struggle songs was compiled to galvanise solidarity among black Africans in their fight against apartheid.[112] The matter was instituted by Afriforum; a civil society member organisation whose objective is to "protect the rights and culture of the statistical minority Afrikaner people and to encourage their participation in public debate and civil action." [113]

Afriforum argued that the song constituted hate speech and that the "utterances caused and perpetuated systemic disadvantage to Afrikaners and Afrikaner farmers at the very least."[114]

Lamont J held that the struggle song constituted hate speech because it demonstrated the intention to be hurtful, to incite harm and propagate violence against white Afrikaans speakers.[115] The court passed an order to restrain the respondent and the ANC from singing the song at any public or private meeting held by or conducted by them. [116] The judge based his judgment on the values of *ubuntu* in which he highlighted ideals such as non-vengeance, inclined to restorative justice, civil dialogue and mutual tolerance. [117] In the course of the judgment, Lamont J indicated that the song was dehumanising and that dehumanisation was one of the essential elements of inciting genocide.[118]

Borrowing from CDA, I would also add that Lamont J softened the extent of racial strife between the Boers and blacks in order to further his submission that white South Africans are a vulnerable minority.[119] His use of vague and ambiguous narrative is telling of bias.. [120] One striking observation in the judge's use of language was in his description of "Boer identity."

The judge used vague descriptions, notably, the word "other" to describe the victims of apartheid. Examples of this narrative are as follows;

> *"They (the Boers) were able to and did to a large extent impose the norms customs and morality of their former societies upon* ***other inhabitants*** *of the Republic"*

[111] 2011 (6) SA 240 (EqC).
[112] 2011 (6) SA 240 (EqC) par 54.
[113] https://www.afriforum.co.za/tuis/
[114] 2011 (6) SA 240 (EqC) par 49.
[115] 2011 (6) SA 240 (EqC) par 109.
[116] 2011 (6) SA 240 (EqC) par 120.
[117] *Afri-Forum and Another v Malema and Others* 2011 (4) All SA 293 (EqC).
[118] 2011 (6) SA 240 (EqC) par 62.
[119] Modiri (2013)130 SAJHR 278.
[120] Van Dijk The language of racism 227.

*"Their morality did not recognize **others** as having rights of any significance. They proceeded to trample upon the rights of **others** and seize control of the assets of the Republic for themselves."*

*"Apartheid was the only way to retain control and power. This policy was pursued without regard for the growing clamour worldwide that it be discontinued and that the rights of **others** be recognised."*

The problem with this construction of words is also seen in how positive words are used to describe a negative action. For instance the idea that the Boers imposed "norms" as opposed to "racist laws" or "morality" as opposed to "immorality" softened the reality of Boer aggression towards non-white peoples.

A proper historical account would have included examples of the specific actions which created animosity between the blacks and the Boers. This would have contextualised the need for a legal challenge a lot more substantially. For example, a relevant memory is that farmers, primarily Afrikaner farmers (Boers) have a long history of applying unfair and cruel labour practices. The Boers were often reliant on black labour tenants who worked on the land for no pay and permission to reside on the land.[121] On the farms, the relationships between the farmers and the workers was notoriously characterised by the use of physical violence by the Boers against the black workers. Generally in the republic, physical violence was used to enforce compliance and submissiveness of rural black men in particular.[122] The farmers/Boers were so insistent on a racist state of affairs such they ensured that the "whipping clause" was incorporated in farm labour legislation in the 20th century.[123] By concealing the cruel reality of the exploitative social relations, and erasing the identity of the victims of imperialism through constant use of the word "others", the judge managed to soften the image of the Boers.

[121] Evans (2009) 9.
[122] Evans (2009) 9.
[123] Evans (2009) 9.

Picture taken between 1913 to 1949 on a farm somewhere in South Africa[124]

In his narrative, the judge referred to an extract by Mohammed DP in *AZAPO v President of South Africa.*[125] This reinforced the kind of jurisprudence that was inherited from the Truth and Reconciliation Commission (TRC). The quote referred to by the judge was as follows:

> *"The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. By adopting that Constitution the nation signalled its commitment to reconciliation and national unity, and its realisation that many of the unjust consequences of the past can never be fully reversed but that it would nevertheless be necessary to 'close the book' on the past".*

It is submitted that the use of Constitutional court jurisprudence serves as an exclusionary tool, where certain discourses become so authoritative they are reproduced without question. The quote coupled with the *Ubuntu* narrative continues to delegitimise the right of the respondent to be aggrieved by apartheid.

Lamont J furthered the "colour blind philosophy" by reading the preamble of the Constitution where he surprisingly interpreted the Constitution as an "agreement" between South Africans.

[124] http://ancarchives.org.za/kaffirs-will-be-shot/

According to the judge, the dawn of democracy was a collective agreement to "recognise the injustices of the past, to honour those who suffered justice and freedom, to believe that South Africa belongs to all those who live in it, to unite in diversity, and to build a united and democratic South Africa."[126]

The narrative that the Constitution was an agreement ignores prevalent right wing resistance to democracy,[127] thus a denial to recognise the existence of white right wing elements that through reconciliatory strategies of post-apartheid South Africa were able to escape black vengeance.

Lamont J continued to offer a sympathetic narrative in which he used language to continue softening the narrative of the social relations between blacks and whites. The judge stated;

> "People who had lived lives separately from each other, who had hurt, tormented and **degraded each other** and who in particular, were not accustomed to each other in any way commenced associating and interacting with each other."

Through this statement the idea that there was equal, mutual animosity and violence was promoted instead of the reality that power relations were tilteed. This is far from the truth as whites held a superior political, social and economic status and were generally privileged by the system. To argue that blacks also degraded whites is pretence only necessary to further a liberal narrative.

The judge also insisted on referring to the song in question as *Dubulibunu* and not its correct title, namely *Ayesaba amagwala*.[128] The title *Dubulibunu*, meaning "Shoot the Boer" was the name that was popularised by the media to emphasize the most violent part of the song. Instead of acknowledging that the ANC referred to the song as *Ayesaba amagwala*, the judge was quick to assume the complainant's title of the song. As a rhetorical tool, this placed the song in a much more contentious and negative light than if it had been referred to in its original name. The other lyrics in the song refer to whites as "cowards", "dogs", "rapists" and "robbers."[129] Arguably, if these lyrics were contextualised properly, through a more factual narrative they would indicate that this song is a really a lamentation for forced removals, violence, segregation, indignity, exclusion, oppression in the hands of whites.

[126] The Preamble of the Constitution of South Africa.
[127] Schutte (1994) 124.
[128] 2011 (6) SA 240 (EqC) par 71.
[129] 2011 (6) SA 240 (EqC) par 59.

During the judgment, Lamont J referred to a possible connection between the song and its incitement to genocide. Contrary to Modiri's contention that this was undue reasoning,[130] it is submitted that this argument was appropriate. Modiri identifies this as an exaggeration, contending that whites were instead a majority because they have socio-economic and cultural power.[131] Modiri further validates his submission by arguing that the status of whites in South Africa, in a country where the experience of the black majority consisted of "structural poverty, low social mobility, lack of adequate education, and generally poor standards of living as a result of over three hundred years of colonial apartheid" made whites a "majority" and not a minority.[132] This argument is problematic because it perpetuates the idea that blacks are constant victims and that they have no capacity to inflict harm on another groups. A study of the genocides in Rwanda and Germany shows that political power is critical to implementing genocide and that genocides are created over time.[133] The poverty of law here lies in its inability to engage critically with complex questions such as these. The suggestion that white South Africans may be protected from genocide due to their positionality in society or that they are in fact vulnerable because they are a numerical minority is a question that the court could deliberate on to begin to create more concrete norms around the subject.

3.3 Identifying the differences in how judges interpret hate speech

An analysis of case law shows that judges understand the technical aspects of adjudicating a hate speech matter differently. One way by which judges differ in their adjudication of hate speech is in how they construe the use of symbols and gestures. Another issue is in how judges have explained their reasoning on whether section 10 of the Equality Act should be interpreted conjunctively or disjunctively.

3.3.1 Non- verbal hate speech?

In *Afriforum v Malema*[134] Lamont J considered the hand gestures that Malema used as he sang the song "Dubulibunu" to interpret the song. The judge said he followed the precedence

[130] Modiri (2013)130 SAJHR 275.
[131] Modiri (2013)130 SAJHR 278.
[132] Modiri (2013)130 SAJHR 282.
[133] Both the Holocaust and the Rwandan genocide were state backed (the politically powerful) as recorded in the Nuremberg trials and International Criminal Tribunal for Rwanda.
[134] 2011 (4) All SA 293 (EqC).

of *S v Sheehama*[135] and *Phillips v Director of Public Prosecutions* [136] to conclude that gestures were relevant when investigating the meaning of words.[137] An analysis of *Phillips v Director of Public Prosecutions*[138] shows that this case was a freedom of expression case where an alcohol license owner sough to challenging the Liquor Act 27 of 1989 for prohibiting him to carry out striptease performances and other adult entertainment at the place where he sold alcohol. This judgment did not suggest that the interpretation of words could be supported by body gestures, as such a misrepresentation of precedence by Lamont J.

In another gender based hate speech matter, *Sonke Gender Justice v Malema,*[139] Collins JS emphasized that the hate speech clause referred to words and not a picture or non-verbal communication.[140] The presiding officer made this statement as a matter of emphasis, not that it had substantial input to the case. This rather narrow interpretation of hate speech stemming from the phrasing of the Equality Act brings to question South Africa's position of hate symbols. In foreign jurisdictions such as Germany, the Swastika is considered hate speech, while in the US the burning of a cross in from of black person's house or space is considered a form of prohibited speech. In 2003, in *Virginia v Black*[141], the US Court held that cross burning on the yard of an African American household symbolised racial hatred as it was normally practised by the racist group the Ku Klux Klan. The court also ruled that the case constituted a "true threat" because of its history as an intimidation tactic. [142]

In *Fáber v. Hungary*[143], a case held in the European Court of Human Rights (ECHR) that the applicant complained about the display of the striped Árpád Flag during a march against racism and hatred had been declared hate speech by the state of Hungary. Acknowledging that the flag had negative historical connotations, the ECHR held that this violated Article 10 (freedom of expression) read in the light of Article 11 (freedom of assembly and association of the European Convention on Human Rights. The court acknowledged that the flag may have caused some uneasiness however indicated that this symbolic gesture could not be limited because the applicant had not behaved in an abusive or threatening manner. In this

[135] 1991 (2) SA 879.
[136] 2002 (5) SA 555 (W) par17.
[137]2011 (6) SA 240 (EqC) par 56.
[138] 2003 (3) SA 345.
[139] 2010 (7) BCLR 729 (EqC).
[140] 2010 (7) BCLR 729 (EqC)par 12.
[141] *Virginia v Black* 538 U.S. 343 (2003).
[142] *Virginia v Black* 538 U.S. 343 (2003).

matter, the court required symbols to be accompanied by violent behaviour for them to constitute a prohibited conduct.

Using the wisdoms of foreign law, it is submitted that Equality courts should endeavour to create a solid jurisprudence to standardise the manner in which symbolic forms of hate speech are construed.

3.4.3. Conjunctive or disjunctive interpretation

There is a consensus in equality courts that section 10 of the Equality Act should be interpreted disjunctively. This was illustrated in *Mdabe v Reid*[144] and *Herselman v Geleba*[145].

In the appeal case of *Herselman v Geleba,*[146]the appellant argued against the Equality Court decision that declared that his reference to a black cleaner at his premises as a "baboon" constituted hate speech. The appellant argued that he said the respondent must not act like a baboon, and not that the respondent was a baboon. He also contended that section 10 of the Equality Act should be read conjunctively and that it was a mistake for the courts to read the clause disjunctively. He asked the courts whether the elements of hate speech in section 10, namely be "hurtful; be harmful or to incite harm; promote or propagate hatred" should be read with "or" or "and" between them. The appellant based his argument on a legal tradition in South African law where courts can apply a disjunctive and/or conjunctive depending on the legislation in question. The appellant brought this up because in *Ngcobo and Others v Salimba CC*[147], the Constitutional court noted that the words "and" and "or" are sometimes used inaccurately by the legislature and there are many cases in which one of them has been held to be equivalent of the other."

The court upheld the decision of the court of first instance, maintaining the position that the use of the term "baboon" towards a black person was a long standing racial epithet. The court relied on the precedence on *S v Stagie and Another* [148] where it was held held that "it is clear where the legislature uses semicolon between (a) and (b) it is not to be read as "and". As a result the court held that the respondent only needed to satisfy either (a) or (b) or (c) of

[144] 9/2004.
[145] 231/2009.
[146] 231/2009.
[147] 1999 2 All SA 491 (A)
[148] 2003 (1) BCLR 43 (C).

section 10 and not (a) and (b) and (c) to establish that the conduct of the appellant fell within the ambit of the definition of hate speech."[149]

In *Mdabe v Reid*[150]the complainant launched an application in the Durban Equality Court, asking the court to investigate the statement;

> "Look at your government. That government is a real monkey government and does not provide anything to you. Thabo Mbeki is the biggest baboon that is controlling the other monkeys like Jacob Zuma who is stealing his money."[151]

This statement was made by the respondent, a colleague of the complainant. According to the complainant the respondent had previously been hostile to his black co-workers for a period of time. Before resorting to a court application the complainant averred that he had confronted the respondent about the statement, but the respondent was dismissive and instead maintained that what he said was true.

The respondent initially claimed that he used the statement in jest then later saying he was under- pressure to meet deadlines and had directed the statement to another co-worker who was late coming. The respondent admitted to using the statement in a fit of anger.

The court found the case in favour of the complainant, holding that although the statement was not made directly to the complainant, the complainant belonged to the same group of persons that the respondent directed his racial slur. The presiding officer then went on to deal with respondent's claim that section 10 (b) and (c) of the Equality Act should be read conjunctively so that hate speech should be qualified by both its elements of "harmful or to incite harm' and "promote or propagate hatred". The presiding officer dismissed this submission, simply stating;

> "I cannot agree that a, b, c are to be read conjunctively but rather these provisions should be read disjunctively."

The presiding officer did not provide reasons for his decision to dismiss the respondent's submission. The lack of explanation is a disappointment in the face of value of justiciability, which requires judges to explain their decisions.

[149] 231/2009.
[150] 9/2004.
[151] 9/2004.

It is evident that there is no conflict between the decisions of the two courts to rule that the hate speech clause should be read disjunctively. But the difference lies in the judges' diligence to provide explanations to the courts. The court in *Herselmen v Geleba*[152], unlike in *Mdabe v Reid*[153] took the time to refer to judicial precedence.

The question whether section 10 should be interpreted conjunctively or disjunctively requires closer attention if South Africa is to develop hate speech and freedom of expression jurisprudence more diligently. Waldron argues that hate speech laws should not be put in place to protect people from being offended; but rather they should be used to protect the dignity of people.[154] He distinguishes indignity from offence by defining dignity as the status of anyone in the community they inhabit as an equal, entitled to basic justice and to the fundamentals of reputation.[155] Indignity is an attack on these virtues, particularly through a group directed attack which proclaims that all or most of the members of a given group are, by virtue of their race or some other inscriptive characteristic not worthy of being treated as members of society in good standing.[156] Offense on the other hand refers to the subjective elements of feelings such as hurt, shock or anger.[157] While the emotional aspects can flow with the indignity, it is important that hate speech laws are not implemented to protect people from hurt feelings only. [158]

The current framework as promoted in *Mdabe v Reid*[159] and *Herselman v Geleba*[160] demonstrates that courts have resolved that speech that is simply hurtful on the basis of a prohibited ground can constitute hate speech, and is punishable by law. This type of speech mainly encompasses name-calling without incitement to violence. While it is true that "names" can deeply hurtful because of the past, the extent to which the victim community remains offended or stripped off their dignity changes. It has been noted that some communities that are previously oppressed can become numb or apathetic to the use of hate speech against them. Offensive terms such as "nigga" or "bitch" have to an extent lost their power making it a complex task to decide whether these terms are still offensive enough.

[152] (231/2009) 2011 ZAEQC 1.
[153] 9/2004.
[154] Waldron (2012) 106.
[155] Waldron (2012)106.
[156] Waldron (2012) 106.
[157] Waldron (2012)106.
[158] Waldron (2012) 106.
[159] 9/2004.
[160] (231/2009) 2011 ZAEQC 1.

Assuming that formerly oppressed people can become less sensitive to sheer insults over time; a conjunctive read would ensure that hate speech contains both insults and advocacy element. Such a read would satisfy more clearly the "indignity requirement" that Waldron advocates.

3.4 Addressing spatial injustice in a hate speech case

Earlier in this chapter I argued that courts are unable to engage critically. They are instead fixated with reproducing a reconciliation discourse at the expense of developing hate speech jurisprudence. In *ANC v Sparrow*,[161] the judge came close to achieving a critical analysis by insinuating that the real issue behind the respondent's utterances had to do with race and spatial injustice.

"Space" is an important notion to consider as Kruger's research suggests that most of the hate speech in South Africa takes place in residential areas and in the work place.[162] Observably, these are spaces which were previously segregated making the conflict a direct result convergence of formerly exclusive spaces.

ANC v Sparrow,[163] among other cases illustrates an instance of hate speech which is based on a conflict about the legitimacy of black people to be present in formerly white spaces.

The case involved a Facebook post where the following words were uttered;

> *"These monkeys that are allowed to be **released** on New Year's Eve and onto **public beaches**, towns, etcetera absolutely have no education whatsoever. So to **allow them loose** in inviting huge dirt and troubles and discomfort to others…"*

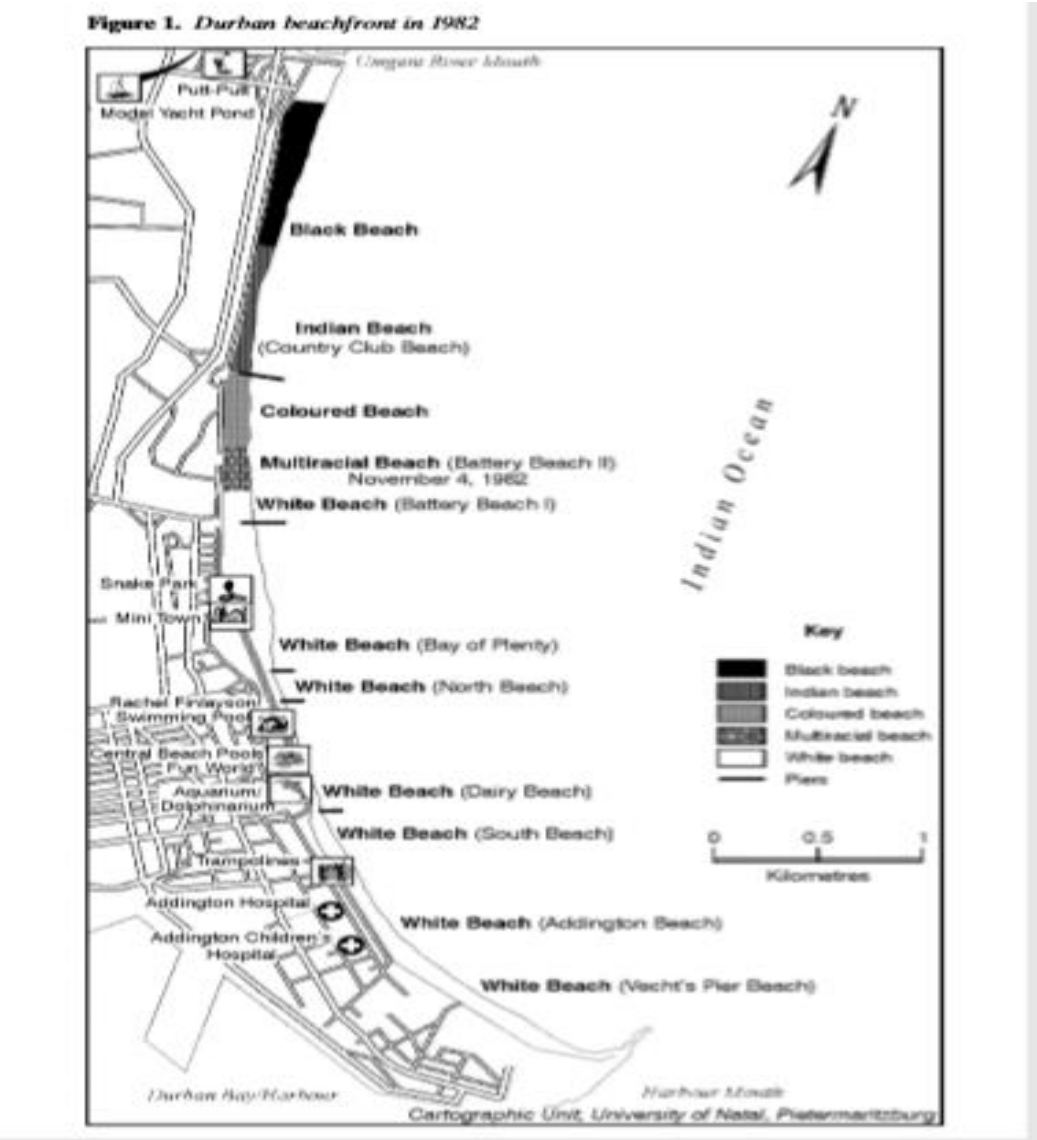
The judge dissected the words and interpreted the words "released" and "allow them loose" to mean that Sparrow believed black people should have their freedom of movement restricted. Unlike in the above highlighted matters, the judge made reference to past laws such as the Native Land Act[164] and the Separate Amenities Act[165] to draw links between

[161] (01/16) (2016) ZAEQC 1.
[162] Kruger, Rosaan (2008) Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts. Unpublished PhD thesis.
[163] *ANC v Sparrow* (01/16) [2016] ZAEQC 1.
[164] Act 27 of 1913.

historically repressive laws and their influence on the psyche of South Africans. The judge expressed the challenge of spatial injustice that was created by apartheid citing the history of forced removals of black Africans from their homes and lands so that they would be relocated to areas where they faced poverty and misery. He then contrasted the privilege that whites had through their access to well-maintained amenities including "whites only" beaches including Scottburgh in Durban.

In order to properly contextualise issues of space on South Africa's beaches, it is necessary to recall the history of beach apartheid. It is well recognised that spatial and temporal categories are important in the reproduction of racism. [166] The diagram below shows how the beach was previously segregated. The larger part of the beach was designated for whites, while the smallest chuck was designated for blacks. The "white part" of the beach shared proximity with the mixed race and "Indian designated" spaces. What this diagram shows is that blacks in their majority had little access to the beach and that the advent of a non – racial South Africa would inevitably shock the racist spatial order.

[165] Act 49 of 1953.
[166] Durrheim and Dixon (2001) 433.



Said postulates that the construction of "others" is closely linked to how places are constructed.[167] Racist narratives are often linked to space so that space becomes associated with a perspective. Apartheid space perspective meant simply that white spaces were better that black spaces, and that if a black person or any other non-white peoples entered a white space, that place would seize to be as valuable. In the words on the respondent, the former white beach became dirty literally because of a black presence. Seen this way, the beach is place of ideological struggle where the new South Africa converges with the imprints of apartheid political struggle.[168] Beaches were also governed by racist principles of non-

[167] Durrheim and Dixon (2001) 433.
[168] Durrheim and Dixon (2001) 434.

contact.[169] This is the reason why, according to Sparrow, black bodies on former white beaches are foreign and unwelcome.

Perhaps what is troubling in terms of discourse is the fact that for many years black South Africans faced discourses of exclusion where signs such as "Beware of Natives" were a consistent reminder of not being worthy to enjoy certain spaces. In other words the black experience has always been of an institutionalised hate speech discourse by the power of the state. Of course this suggestion would require a conscientious or radical thinking judge to consider in order formulating better remedies.

Apartheid signage in the 1950s

In sum, it is concluded that judges recall history and narrate history in subjective ways. Van Marle refers to this as a materialistic approach to memory as it is interested only in certain material aspects.[170] The inherent function of courts as spaces for timeous dispute resolutions renders them spaces for focussed accounts of history thus courts are prone to hastened and biased storytelling.

However, by conceptualising the *ANC v Sparrow*[171] as a matter of race and spatial justice the judge recalled the relevant part of history. He could have, however explored remedies that challenge the respondent's racist ideas about space ownership. Recognising this and if change of behaviour is the goal, community service coupled with equality training could have served a more appropriate remedy to challenge the respondent's ideas about space.

3.5 How judges perceive apologies in hate speech matters

Apologies are commonly ordered in hate speech cases. In the spirit of fulfilling corrective and restorative measures as prescribed in Section 4 (1) (d) of the Equality Act, this section

[169] Durrheim and Dixon (2001) 436.
[170] Le Roux and Van Marle 18.
[171] (01/16) 2016 ZAEQC 1.

will evaluate how apologies are contrived as court orders by Equality court and how equality courts construe them.

This section explores the application of apologies in *ANC v Sparrow*[172] and in *Mdabe v Reid*[173], in order to deduce some observations about the functional use of the apologies in Equality courts.

In *Mdabe v Reid*[174], the respondent had tendered an apology to which the court deemed dismally inadequate. The court ordered an apology based on s 21 j of the Equality Act, and required the respondent to submit another apology that meets the dictum of Curlewis J who in *Ward Jackson v Cape Times ltd*[175] who said;

> *"An apology should not only contain an unreserved withdrawal of all imputations made, but should also contain an expression of regret that they were ever made. A mere retraction cannot be called a full and free apology"*

According the judge the apology did not meet this requirement, illustrating how seriously some equality court judges view apologies. In fact, the presiding officer in this matter, Abrahams J, ordered as the main remedy. No fine was granted and each party was ordered to pay its own costs.

In *ANC v Sparrow*[176], a case which occurred a year after *Mdabe v Reid*[177], the presiding officer questioned the complainant's plea for a written apology. The presiding officer was of the mind that the respondent had had enough time to apologise to the public and that an apology contrived through a court order would be insincere and a matter of routine.[178] The complainant concurred with the presiding officer's view and offered to leave the decision to make an order of an apology to the court's discretion. Consequently, the court did not make an order for an apology.

In order to make an analysis of different views about the usefulness of apologies, particularly those that are ordered by the courts, it is necessary to glean from the views of other subject experts. Andrew Rigby, Director of the Centre for Peace and Reconciliation Studies (CPRS)

[172] (01/16) 2016 ZAEQC 1.
[173] 9/2004.
[174] 9/2004.
[175] 1910 WLD 257.
[176] *ANC v Sparrow* (01/16) [2016] ZAEQC 1.
[177] 9/2004.
[178] *ANC v Sparrow* (01/16) [2016] ZAEQC 1.

for example, refers to apologies as "cheap reconciliation".[179] Reverend Mxolisi Mpambani, a South African religious leader agrees with this saying apologies are not a priority where justice should be the priority. He tells a short story to illustrate what the absurdity of apologies as follows;

> *"There were two friends, Peter and John. One day Peter steals John's bicycle. Then, after a period of some months, he goes up to John with outstretched hand and says 'Let's talk about reconciliation.'*
>
> *John says, 'No, let's talk about my bicycle.'*
>
> *'Forget about the bicycle for now,' says Peter.*
>
> *'Let's talk about reconciliation.' 'No,' says John.*
>
> *'We cannot talk about reconciliation until you return my bicycle.'*

In this story the victim is being asked to reconcile with loss. By withholding what has been taken away from the victim, the perpetrator prioritises a peaceful situation before restoring what the victim has lost.

While agreeing with Mphambani's anecdote, I propose that an apology is useful in a hate speech matter because the primary loss experienced by the victim is often of an emotional and psychosocial matter. In the defamation case of *Dikoko v Mokhatla,*[180] Sachs J's minority judgment discouraged the preoccupation with financial compensation and instead encouraged courts apologies. Sachs J's view was that courts currently do little to encourage reconciliation.[181]For Sachs apologies have reparative value of retraction thereby encouraging the repair of the relationship rather than a punishment.[182] Despite his encouragement for apologies, Sachs J was well aware that some people could undermine law, defame other persons and then offer an insincere apology knowing that it would not cost anything.[183] As such Sachs J also saw the value in fines as deterring however discouraged against exorbitant

[179] Corntassel & Holder (2008) *Human Rights Review* 3.
[180] 2006 (6) SA 235 (CC).
[181] 2006 (6) SA 235 (CC) par116.
[182] 2006 (6) SA 235 (CC) par112.
[183] 2006 (6) SA 235 (CC) par120.

fines and the preoccupation of fines by parties.[184] In this context Sachs himself encourages apologies but is unsure how the law could enforce genuine apologies.

Like Sachs J, Swart sees apologies as a form of symbolic reparation. She argues that apologies are important even if they fall short of the sincerity that is expected in an apology.[185] She adds that apologies also serve the function of shaming a perpetrator. The prime function of an apology, according to Swart is on healing a relationship between victims and offenders as well as the offender and the community. [186] Swart argues that an apology need not be construed as a form of punishment. In other words an apology can coexist with a punishment.[187]

In this critique of law, it is suggested that the value of apologies is best appreciated through other disciplines such as Psychology and Theology, as apologies appeal to cognitive and spiritual faculties rather than legal aspects of life. According to some psychology scholars, people can tell a genuine apology from an insincere one, and have the choice to accept or reject the apology on this basis.[188] Equality court apologies are submitted to the court in letter form and relayed to the complainant by the court. Through this method complainants do not have a chance to fully assess other expressions such as body language to ascertain the sincerity of the apology. Additionally, complainants do not have the chance to express whether they accept or reject the apology. As such the reconciliation agenda purported by some equality courts is incomplete.

With this synopsis, it is summed that different judges construe the value of apologies differently. There is also an inherent weakness in apologies contravened by the court because they are first and foremost forced, they are written, relayed by the court and are not a two way process because they lack the feedback of the complainant. In sum, apologies though the Equality court have been implemented mechanically. It is suggested that courts further Sachs' thoughts so as to decide whether to apply apologies uniformly or not.

3.6 Conclusion

The chapter illustrated the poverty of law in dealing with hate speech, particularly the lack of critical engagement with the issues that stem out of these incidences, such as whether to

[184] 2006 (6) SA 235 (CC) par120.
[185] Swart 51.
[186] Swart 53.
[187] Swart 52.
[188] Hatcher (2010) Evaluations of Apologies: The Effects of Apology Sincerity and Acceptance Motivation. Unpublished Phd Thesis.

define South Africa whites as a minority or a majority, imagining hate speech as an issue of spatial injustice, establishing a position whether apologies have value or not. In the chapter, it was also shown that law is prone to bias, reproduction of reconciliation discourse over innovation and critical thought on the issue and the lack of justiciability.

Chapter 4: Conclusion

4.1 Summary

The main purpose of this dissertation was to illustrate the ways in which law is limited when it comes to addressing hate speech. The dissertation was set on the premise that law is fundamentally lacking in its capacity to deal with hate speech. Using a combination of approaches the dissertation exposed various gaps of law.

Chapter one provided a synopsis of the current South Africa experience with race based hate speech. Most of the highlighted cases took place online, a new dynamic in social conflict. It outlined a number of assumptions which were reiterated throughout the paper.

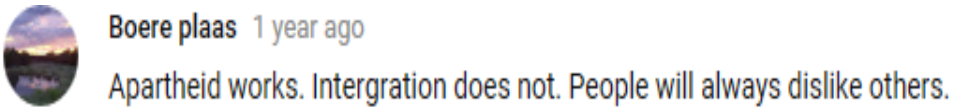
The second chapter compared apartheid and post-apartheid laws and revealed the key shortcoming of current hate speech legislation. It was proven that post-apartheid South Africa is drastically different from apartheid law, particularly the fact that so called racial hostility laws were criminalised, while today speech categorised as hate speech is treated as a civil matter. It was also demonstrated that the ideologies informing racial hostility laws included suppressing anti-apartheid voices, whereas current laws are rooted in promoting the basic rights to equality and dignity. On the negative side is the interest of the state to make imprisonment one of the penalties for "hate speech" through the awaited Hate Bill.

The third chapter attempted a thematic critique of how courts adjudicate over hate speech cases. It was found that matters involving identity politics are complex and that these cases are at the risk of being watered down through reconciliatory discourses, including the Ubuntu discourse. South Africa's law is implicated in not affording apartheid's victims to express their anger hence hate speech is a potential silencing tool. As such continued reproduction of reconciliatory narratives appears to have stifled courts from thinking more innovatively about developing hate speech jurisprudence of substantive aspects.

It was also found that some judges apply themselves critically however seem to be constrained by the nature of law. Indeed a judge must sift the facts of a case and deliver a judgment that could have long lasting implications in society. Beyond this intrinsic limitation is the limitation of discourse. If Foucault is correct, it could be argued that reconciliation jurisprudence has arrested the judiciary so that radical and perhaps more open dialogue is an impossible goal to achieve through the judiciary. The media and CSOs for example are some of the entities to garner such conversation; however this too is possible through the legal system if judges realise and address their constraints.

The issue of apologies as remedies was explored to identify the two camps within hate speech jurisprudence. While some judges see it as a perfect fit to pass a court order for an apology alone, such as in *Mdabe v Reid*[189], others view apologies as a useless gesture as seen in *ANC v Sparrow*. In *Mdabe v Reid*[190] parties were ordered to pay their own costs. This decision is negative because it causes ordinary people to dread to take matters to court because this can be a costly exercise. *ANC v Sparrow* instead focused on a fine of R150 000 as a deterrent. These differences render hate speech case outcomes inconsistent and unpredictable.

4.1 Recommendations



The above quote was extracted online to acknowledge the truth that people cannot always like each other. The goal however is not to like each other but to be a society that uses more speech to fight speech. As Mill suggests, more open speech develops a society deliberative capacities and ultimately its democracy. [191]

Four recommendations are suggested, two of which are institutional and two are issue based.

a) It is recommended that Equality Court judges with the support of the Equality Review Committee work proactively to ensure that the structural systems that generate inequality are identified and included in future policy and plans. These exercises however are not intended to diminish the threat of hate speech as on its own hate speech has proven historically to be dangerous particularly where the state backs such discourses. In the instance of South Africa,

[189] 9/2004.
[190] 9/2004.
[191] Brink (2001) 7 Legal *Theory* 120.

this recommendation includes creating more spaces or valves to release the frustration of persistent social economic inequality. The court itself can take an informal, mediatory approach.

b) It is recommended that community service, much like apologies are made a mandatory remedy. Through community service one is better placed to express their apology through working with the people he or she hates.

c) There needs to be more empirical research to find out how people feel about hate speech, as societies' sensitivities evolve. To blindly formalise the view that specific terms offend a certain group is not progressive in that it closes down the chances of a community demonstrating that they are no longer affected by a certain insult. In fact oppressed or ridiculed people are known to appropriate their insults over time thus reducing the power of the particular term. It is recommended that the participants of researches are people in low socio-economic band. By virtue of being powerless, potentially uneducated and disempowered these individuals are at the risk of experiencing racism, xenophobia, gender discrimination. Farm workers, domestic workers, rural LGBTI people should be the target of the research.

d) Based on the outcome of the research mentioned in (c), courts should revisit the question whether hate speech should be interpreted conjunctively or disjunctively.

Bibliography

Books

- Coliver S (1992) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*: Essex: University of Essex.
- Delgado R & Stefancic J (2004) *Words that wound*: Avalon Publishing.
- Dubow S (1995) *Scientific Racism in Modern South Africa*: Cambridge University Press.
- Evans I (2007) *Cultures of Violence: Racial Violence and the origins of segregation in South Africa and the American South* Manchester: United Kingdom.
- Hoexter C & Olivier M (2014) *The Judiciary under Apartheid* Claremont: Cape Town.
- Le Roux W & van Marle K(2007) *Law, memory and the legacy of apartheid: Ten years after AZAPO v President of South Africa.* Pretoria University Law Press.
- Mureinik E (1988) *Dworking and Apartheid in Hugh Corder (ed) Essay on Law and Social practice in South Africa*
- Schutte G (1994) *What Racists Believe: Race relation in South Africa and the United States*. SAGE Publications.
- Smart C (1989) *Feminism and the Power of Law*. Routledge.
- Van Dijk T (2006) *Ideology and Discourse*. Pompeu Fabra: University. Barcelona.
- Waldron J (2012) *The Harm in hate speech*: Harvard University Press.

Journals

- Brink D "Millian Principles, Freedom of Expression, and Hate Speech" (2001) 7 *Legal Theory* 119.
- Brock A "From the Blackhand Side: Twitter as a Cultural Conversation" (2012) 56 *Journal of Broadcasting & Electronic Media*.
- Cameron E "Judicial accountability in South Africa" (1990) 6 *SAJHR* (251).

- Holder C & Corntassel J "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru" (2008) *Human Rights Review*.
- Delgado R & Stefancic J "Four Observations About Hate Speech" (1999) 44 *Wake Forest Law Review* 66.
- Hook D "Discourse, knowledge, materiality, history; Foucault and discourse analysis" (2001) *Theory and Psychology* 521.
- Huckin T, Andrus. J and Clary-Lemon J "Critical Discourse Analysis and Rhetoric and Composition" (2012) 64 *College Composition and Communication*. 107.
- Klare K "Legal Culture and transformative Constitutionalism" (1998) 14 *SAJHR* 147.
- Leets L "Explaining Perception of Racist Speech" (2001) *Journal of Social Issues*.
- Nyathi N & Rajuili K "South Africa and Kenya's Legislative Measures to Prevent hate Speech" (2017) 2 *Conflict Trends* 41.
- Swart M "Sorry Seems to be the Hardest Word: Apology as Form of Symbolic Reparation" (2008) *South African Journal on Human Rights* 50.

Case Law

- *Afri-Forum and Another v Malema and* Others 2011 (6) SA 240 (EqC)
- *ANC v Sparrow* 2016 ZAEQC 1
- *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672
- *Cliff v Electronic Media Network (Pty) Ltd* (2016) 2 All SA 102
- *Ward Jackson v Cape Times ltd* 1910 WLD 257
- *Dikoko v Mokhatla* 2006 (6) SA 235 (CC)
- *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877
- *Herselman v Geleba* (231/2009) 2011 ZAEQC 1
- *Mdabe v Reid (9/2004)*
- *Ngcobo and Others v Salimba CC* 1999 2 All SA 491
- *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC)
- *S v Sheehama* 1991 (2) SA 879
- *S v Stagie and Another* 2003 (1) BCLR 43 (C)

- *R v Brown* 1929 CPD 221.
- *R v Vanga* 1932 EDL 219
- *Phillips v Director of Public Prosecutions* 2003 (3) SA 345
- *Virginia v. Black* 538 U.S. 343 (2003)

Legislation

- Films and Publications Act 65 of 1996.
- Liquor Act 27 of 1989.
- National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) 2016.
- The Internal Security Act 79 of 1982.
- Suppression of Communism Act (SCA) of 1950.
- Riotous Assemblies Amendment Act 19 of 1930.
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
- Publications Act 24 of 1974.
- Prevention of Hate Crimes and Hate Speech Bill 2016.

Unpublished Thesis

- Hatcher I (2010) Evaluations of Apologies: The Effects of Apology Sincerity and Acceptance Motivation. Unpublished Phd Thesis: Marshall University.
- Kruger, Rosaan (2008) Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts. Unpublished Phd thesis: Rhodes University.

International Conventions

- International Covenant on Civil and Political Rights
- Convention of Elimination of Racial Discrimination Act
- Universal Declaration of Human Rights

Reports

- Office of the United Nations High Commissioner for Human Rights. The prohibition of incitement to hatred in Africa: Comparative review and proposal for a threshold (2011). Report. Nairobi.

Annexure A

Penny Sparrow
These monkeys that are allowed to be released on New years Eve And new years day on to public beaches towns etc obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others. I'm sorry to say I was amongst the revellers and all I saw were black on black skins what a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don't want to even try. But think they can voice opinions about statute and get their way dear oh dear . from now I. Shall address the blacks of south Africa as monkeys as I see the cute little wild monkeys do the same pick drop and litter.

Sat at 1:30 PM · Like · 15

Chris Hart
@chrishartZA

Follow

More than 25 years after Apartheid ended, the victims are increasing along with a sense of entitlement and hatred towards minorities....

RETWEETS 194 LIKES 110

6:36 AM - 3 Jan 2016


"I WANT TO CLEANS THIS COUNTRY OF ALL WHITE PEOPLE. WE MUST ACT AS HITLER DID TO THE JEWS."
Velaphi Vel-hova Khumalo
white people in south Africa deserve to be hacked and killed like Jews. U have the same venom moss . look at Palestine . noo u must be bushed alive and skinned and your off springs used as garden fertiliser .
Penny Sparrow
These monkeys that are allowed to be released on New years Eve And new years day on to public beaches towns etc obviously have no education what so ever


Matt Theunissen
9 mins
So no more sporting events for South Africa.. I've never been more proud than to say our government are a bunch of KAFFIRS.. yes I said it so go fuck yourselves you black fucking cunts
Like
Comment
Share