PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL OF 2018 [B9-2018]:

Oral presentation by the South African Institute of Race Relations NPC (IRR) to the Portfolio Committee on Justice and Correctional Services, 29 March 2022

1 Introduction

This oral presentation is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

Given time constraints, this presentation cannot deal with all the points raised by the IRR in its written submission of 1st October 2021. It therefore highlights only some of the most disturbing clauses in the Combating and Prevention of Hate Crimes and Hate Speech Bill of 2018 (the Bill). However, there are many other problems with the Bill, as earlier highlighted by the IRR, that Parliament must also consider.

2 Important changes to the hate speech clauses in the Bill

Thanks to the thousands of people and organisations, including the IRR, that raised well merited objections to the 2016 version of the bill, many important improvements to the hate speech provisions have been made.

First, the 'insult' clauses have been dropped, which should protect cartoonists, journalists, and others from jail terms for intentionally bringing politicians (and others) into 'contempt or ridicule'.

Second, the listed grounds no longer include 'occupation or trade' in the hate speech context. This is a helpful shift, as 'occupation' could otherwise be used to penalise 'harmful' comments about politicians and others.

Third, the clauses making it a crime to 'aid', 'encourage', 'incite' or 'promote' the commission of a hate speech offence have been scrapped.

Fourth, the maximum prison term for a second or subsequent hate speech crime has been reduced from ten years to five. (Fines of unspecified amounts can also be imposed on both first and subsequent offences.)

Fifth, important defences have been introduced for journalists, academics, and artists among others. According to Section 4(2) of the Bill, the prohibition of hate speech does not apply to any communication that is 'done in good faith' and 'in the course of engaging in':

a) 'any bona fide artistic creativity, performance or other form of expression';
b) 'any academic or scientific inquiry';
c) 'fair and accurate reporting in the public interest'; or
d) 'the bona fide interpretation…or espousing of any religious tenet, belief,…or doctrine'.

However, many people will fall outside these exemptions, which would not apply to what political leaders tell their supporters, for example, or what most people post on social media.

The constitutional guarantee of free speech

Section 16(1) of the Constitution gives 'everyone the right to freedom of expression', which includes 'freedom of the press and other media' and 'freedom to receive or impart information or ideas'. However, under Section 16(2), this right does not apply to '(a) propaganda for war, (b) incitement to imminent violence, or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.

To count as hate speech, the communication must advocate or encourage 'hatred'. Hatred, according to the Canadian Supreme Court in *R* v *Keegstra*, means 'emotion of an intense and extreme nature that is clearly associated with vilification and detestation'. The hatred expressed must be intentional, as it is not possible to have 'an emotion of an intense and extreme nature' on a negligent, accidental, or subconscious basis.

The hatred that is advocated must be based on one of four listed grounds: these being race, ethnicity, gender, and religion. This list is a closed one. It is deliberately different from Section 9 of the Constitution, which bars unfair racial discrimination not only on these four grounds but also on 13 others. That the recognised grounds in Section 16(2) are limited to four is not an oversight and cannot be ignored.

The advocacy must also amount to incitement to cause harm. The mere advocacy of hatred is still protected expression unless it is accompanied by a call to action – an incitement to cause harm. Incitement has a specific legal meaning. It must also be intentional, as it cannot happen negligently, accidentally, or subconsciously.

The definition of hate speech in the Bill

By contrast, the Bill seeks to prohibit and criminally punish speech which has 'a clear intention to be harmful or incite harm, or to promote or propagate hatred'. This wording is far wider than that contained in Section 16(2) of the Constitution. So too is the Bill's list of 15 prohibited grounds, which extends far beyond the four grounds recognised in Section 16(2).

However, defenders of the Bill may argue that its definition is taken largely from the wording approved by the Constitutional Court in the *Qwelane* judgment and must therefore be accepted as constitutionally valid.

(Jon Qwelane, a journalist, had written a newspaper article in 2008 in which he strongly criticised same-sex marriage and urged that it be ended before 'some idiot' (not necessarily a homosexual) decided to 'marry' an animal. The Human Rights Commission (HRC) took him before an equality court, which found the article constituted hate speech under Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (Pepuda) of 2000. But Mr Qwelane contested the validity of the hate speech definition in Section 10 and the Supreme Court of Appeal (SCA) in time upheld his challenge. This prompted a further appeal to the Constitutional Court, which handed down its ruling in July 2021.)

Writing for a unanimous court, Judge Steven Majiedt found that Section 10 of Pepuda went too far in barring 'hurtful' speech. 'Hurtful' was so vague a concept that it undermined the rule of law. It was also so wide that it could be used to prohibit speech which merely 'offends, disturbs, and shocks'.

However, all that was needed to achieve constitutional compliance was for Parliament to amend Section 10 to excise the 'hurtful' criterion. The judgment thus instructed the legislature to make this change within 24 months, pending which Section 10 should be read as if the excision had already taken place.

Is the definition in the Bill validated ('saved') by the* Qwelane *judgment?

Since the definition in the Bill is largely the same as the Section 10 wording approved by Judge Majiedt, does this suffice to confirm the constitutionality of the definition in the Bill? The answer is 'No', for three key reasons.

First, Judge Majiedt failed to follow what he himself describes as the 'lodestar' precedent on hate speech: the Constitutional Court's ruling in the *Islamic Unity* case in 2002. This judgment makes it clear that 'all expression is protected, save anything that falls within Section 16(2)' of the Constitution.

Any legislation that limits protected speech must meet the 'justification' criteria laid down in Section 36 of the Constitution. The more a limitation departs from Section 16(2), the stricter the 'justification' scrutiny that must be applied. Since this is settled law, Judge Majiedt's failure to follow it provides good reason to discount his approach.

Second, Judge Majiedt's judgment is flawed in other ways as well. This is evident, in particular, in:

- the contradiction between his initial assessment – that Section 10 'on a plain reading, is broader than Section 16(2) in various respects' – and his subsequent finding that speech that is 'harmful' (or incites harm) nevertheless 'aligns' with the 'advocacy of hatred' in section 16(2)';
- his further assumption that words that 'promote' hatred (or propagate it) likewise 'accord' with the 'advocacy of hatred' in section 16(2), even though advocacy implies lobbying and a more intensive intervention; and
- his failure even to acknowledge that section 16(2) requires not only the 'advocacy of hatred' on a closed list of four grounds (not an open list of many more) but also 'incitement to cause harm'.

Third, Judge Majiedt was dealing with civil law liability under Pepuda, a statute which (as he noted) aims 'not to punish the wrongdoer, but [rather] to provide remedies for victims of hate speech'. By contrast, the Bill makes hate speech a crime that can be punished by prison terms of up to three years on a first offence and up to five years on any subsequent one.

In creating criminal liability for hate speech, the Bill exposes people to the same chilling effects as criminal defamation rules in various African states. The key risk with criminal defamation, notes legal expert Dario Milo of Webber Wentzel, is that it can be enforced by

governments in the same way as other crimes. Writes Mr Milo: ‘Criminal defamation is a crime in the same way that stealing a car is. A charge gets laid against you, the police investigate the charge, and you may be arrested.’

Much the same point was made by Zimbabwe’s highest court in 2014 when it struck down the criminal defamation rules often used to punish merited criticism of former President Robert Mugabe. As the court stressed, ‘the very existence of the crime creates a stifling or chilling effect on reportage’. Even if people are eventually acquitted, they will still have ‘undergone the traumatising gamut of arrest, detention, remand, and trial’.

Back in 2010, the African Commission on Human and Peoples’ Rights resolved that criminal defamation laws should be repealed across the continent. Said the commission: ‘Criminal defamation laws constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners from practising their profession without fear and in good faith.’ Despite the commission’s resolution, however, little has been done to bring about the necessary reforms.

In September 2015, moreover, Jeff Radebe (then minister in the presidency and head of policy for the ANC), stated that the ruling party planned to rid South Africa of criminal defamation rules, which it regarded as unconstitutional. Said Mr Radebe: ‘No responsible citizen and journalist should be inhibited or have the shackles of criminal sanction looming over him or her.’

However, the ruling party has since reneged on this commitment. No legislation putting an end to criminal defamation has been prepared. Instead, the hate speech provisions in the Bill – which will be far more chilling to free speech than criminal defamation rules – stand to be enacted into law.

Yet ‘the shackles of criminal sanction’ (to cite Mr Radebe’s words once again) are unnecessary when effective remedies against hate speech already exist under the civil law of defamation, relevant codes of conduct for the print and electronic media, and Section 10 of Pepuda – though its definition of hate speech must still be amended to echo the wording of Section 16(2) of the Constitution.

The justification criteria in Section 36 of the Constitution

The definition in the Bill cannot be saved under the ‘justification’ criteria in Section 36 of the Constitution. Section 36 provides, in essence, that a guaranteed right may be limited only to the extent that the limitation is ‘reasonable and justifiable in an open and democratic society’, in the light of all relevant factors. These include ‘(a) the nature of the right, (b) the importance of the purpose of the limitation and (e) whether ‘less restrictive means’ could have been used to achieve the purpose of the limitation.

The Bill does not satisfy these criteria. First, the right it limits is the right to free expression. This is a particularly important right, which the Constitutional Court has described as ‘the lifeblood of an open and democratic society’.

Second, as regards 'the purpose' of the Bill, the reprehensible racial utterances of the few are clearly not representative of the many, as the great majority of South Africans recognise. Hence, there is no pressing need to go further than Section 16(2) allows in curbing hate speech, especially in a criminal law context.

Third, 'less restrictive' means to achieve the purpose of curtailing hate speech are readily available. Hate speech is already prohibited under Pepuda (though Section 10 still needs to be brought into line with Section 16(2) of the Constitution) and can also be curbed under the civil law of defamation.

Problems with the hate crime clauses in the Bill

A hate crime is defined in the Bill as 'an offence recognised under any law, the commission of which is motivated…[by] prejudice, bias, or intolerance towards the victim' which is based on the victim's race or other 'characteristics'. A list of 17 characteristics is set out in the Bill, many of which are the same as the 15 listed grounds in the hate speech clause.

Requiring the prosecution to prove the commission of hate crimes will pose various problems. All elements of the new crimes, including the racial (or other) 'prejudice, bias or intolerance' that 'motivated' the perpetrators, will then have to be proved beyond a reasonable doubt. But this standard of proof might in practice be difficult to meet, especially if the accused were to claim a different motive.

Take, for example, the notorious 'coffin assault' case in 2016, in which Theo Martins Jackson, the foreman at a Mpumalanga farm, and his colleague Willem Oosthuizen were charged with assaulting a black man and forcing him inside a coffin. The incident came to light some three months after the event, when a 20-second video clip of it went viral. The victim of the attack, Victor Mlotshwa, said he had been walking near the farm when the two white men approached him and accused him of being a thief. 'They beat me up and forced me into a coffin,' said Mr Mlotshwa.

If the Bill had already been in force, the prosecution would have to prove not only the usual elements of the relevant offences, but also that the accused had been 'motivated by prejudice or intolerance' towards Mr Mlotshwa, based on his race. They would also have had to prove this motivation beyond a reasonable doubt. In this instance, the prosecution might have been able to discharge this onus with the help of the video. But what if there had been no video and the accused had claimed they were motivated not by racial prejudice but rather by a fear of intruders sparked by a high number of farm murders in the country?

Proving the necessary racial motivation beyond a reasonable doubt might be difficult in such a situation. The need to do so would also make the trial longer and more complex, thereby adding to the burden on an already struggling criminal justice system. Under the existing common law, by contrast, the existence of aggravating factors relevant to sentence may be proved on a balance of probabilities, which is easier to do.

According to the Bill, it is only if Section 51 of the Criminal Law Amendment Act of 1997 does *not* apply – in other words, if the trial court is *not* bound by minimum sentencing rules for serious offences such as murder and rape – that the commission of the hate crime will be

regarded as ‘an aggravating circumstance’ in deciding on sentence. In addition, this consequence will follow only where the victim has suffered ‘physical or other injury’ or some economic loss (damage to property, for instance, or a loss of money or support).

This wording is distinctly odd, for it suggests that racial hatred may no longer count as an aggravating factor for murder, rape, and other particularly serious crimes once the Bill has been enacted into law.

Why these hate crime provisions are needed at all remains unexplained. The courts already have the capacity, under the common law, to treat a racial motive for murder, rape, robbery, and other crimes as an aggravating factor that justifies an increased punishment.

As Mr Jeffery told a meeting of the Hate Crimes Working Group in February 2015, it was ‘a misconception’ to think that, ‘in the absence of specific hate crimes legislation, those who commit hate crimes will get away it. They do not get away with it – they still face the full might of the law’, including the likelihood of a harsher penalty.

This was illustrated by the sentence handed down in the Duduzile Zozo case. Ms Zozo was a young lesbian from Thokoza (east Rand), who was murdered because of her sexual orientation. In handing down sentence, said Mr Jeffery, ‘Judge Tshifiwa Maumela acknowledged the problem of hate crimes in South Africa… He said…a harsh sentence…would serve as a warning to those who threatened the vulnerable… He [therefore] sentenced [the perpetrator] to an effective 30 years in prison’.

The best way forward

The hate speech provisions in the Bill are clearly unconstitutional, which is a fatal defect and means they cannot lawfully be adopted by Parliament. In addition, the hate crime provisions are so poorly worded as to undermine the rule of law. The hate crime clauses are also unnecessary, as the courts already have the capacity to take a racial motivation into account as an aggravating factor in deciding sentence.

Overall, the Bill is both unconstitutional and unnecessary and should be abandoned rather than pursued. The government should instead focus on amending the hate speech provisions in Pepuda so that Section 10 echoes the wording of Section 16(2) of the Constitution.

The amended Pepuda provisions should be applied in an even-handed way, as Judge Roland Sutherland urged in the case of Velaphi Khumalo (a Gauteng official who had called in January 2016 for whites to be ‘hacked and killed like Jews’). Judge Sutherland stressed that people from different racial groups should not be treated differently in deciding on liability for hate speech. It would be harder to overcome the rift between the different races if the black group was ‘licensed to be condemnatory because its members were the victims of oppression’, while whites were ‘disciplined to remain silent’. To ‘other’ any racial group was also inconsistent with constitutional values. However, once liability had been established on this even-handed basis, then social context should be considered in deciding on appropriate remedies for hate speech.

According to the ANC, the hate speech provisions in the Bill are needed to help curb what Mr Jeffery has described as 'the plethora of racial incidents happening on social media'. But eight opinion polls commissioned by the IRR – the first conducted in September 2001 and the remainder in every year from 2015 to 2021 – show relatively little public concern about racism and little demand for strong action against it.

In the 2016 survey, despite the furore around Ms Sparrow and several other racial utterances, a mere 3% of South Africans (and 2% of black respondents) identified racism as a serious unresolved problem. Subsequent opinion polls conducted for the IRR have revealed much the same perspective among ordinary South Africans over many years.

In the IRR's most recent poll, conducted in September 2021, the proportion of people who identified racism as a key problem for the government to address stood at a mere 2% in general and at 1% among black respondents. Most respondents were far more concerned about unemployment, crime, service delivery failures, corruption, poor education, and inadequate housing.

The government's main aim should be to build on the racial goodwill already strongly evident across the country. Towards this end, it should abandon its own racial rhetoric, clearly commit itself to the Constitution's founding value of non-racialism, jettison policies that depend on racial classification and racial preferencing – and set about promoting the growth, investment and employment that are most needed to promote social cohesion and help the poor and disadvantaged get ahead.

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