South African Institute of Race Relations NPC (IRR)
Submission to the
Department of Justice and Constitutional Development
regarding the
Prevention and Combating of Hate Crimes and
Hate Speech Bill of 2018 [B9-2018]
Johannesburg, 1st October 2021

Contents

Introduction

The Portfolio Committee on Justice and Constitutional Development (the Committee) has invited interested people and stakeholders to submit written comments, by 1st October 2021, on the Prevention and Combating of Hate Crimes and Hate Speech Bill of 2018 [B9-2018] (the Bill).

This submission on the Bill 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.

The 'hate speech' provisions in the Bill

Under the Bill's wide definition, 'the offence of hate speech' has essentially the following elements:[1]

First, there must be a 'publication' or 'communication', either to one person or more. Publication is not further described, but communication is broadly defined to include any 'written, illustrated, visual, or other descriptive matter', along with any 'oral statement' or 'electronic communication'.[2] This definition is wide enough to include a speech, a song, a cartoon, a tweet, a posting on Facebook, or a confidential e-mail to a single recipient.

Second, this publication or communication must be 'intentional'. It must also be done 'in a manner that could reasonably be construed to demonstrate a clear intention' either:[3]

- to 'be harmful or to incite harm', or
- to promote or propagate hatred'

on one or more of the 15 grounds listed in the Bill (see below).

This wording is much better than that contained in the 2016 draft. The earlier draft defined hate speech far too broadly to include, for example, any wording, image or gesture that was 'abusive or insulting' towards a person and was clearly intended to bring that person 'into contempt or ridicule'.[4]

Third, the (15) listed grounds set out in the Bill range from age, disability and ethnic or social origin to HIV status, nationality, race, and religion. Also listed are gender or gender identity, sex (including intersex) and sexual orientation.[5]

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[1] Section 4(1)(a), Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016

[2] Sections 1 and 4(1), Bill

[3] Section 4(1)(a)(i) and (ii), Bill

[4] IRR submission, January 2017, check add full biblio details

[5] Section 4(1), Bill

The previous draft bill also included 'occupation or trade' as a listed ground, even though these grounds are not intrinsic to individual dignity or identity and cannot be seen as analogous to 'race, ethnicity, gender, or religion' – the four grounds recognised in Section 16(2) of the Constitution. The earlier wording thus suggested that publishing insulting comments about corruption among MPs or cabinet ministers could be punished as hate speech. That this ground has been omitted from the current Bill is thus another notable improvement.[6]

Further offences, which are punishable in the same way as hate speech itself, are also committed by those who 'intentionally distribute' or 'make available' any material they know to be hate speech through 'electronic' (or other) communications systems which are 'accessible by any member of the public' or 'by a specific person who can be considered a victim of hate speech'.[7] Hence, anyone who re-tweets a racially (or otherwise) harmful message will herself be guilty of hate speech and likewise punishable by a fine or imprisonment.

This prohibition extends to any journalist or other commentator who electronically distributes an analysis that includes a racially (or otherwise) 'harmful' message. That the journalist or other commentator is not herself the author of the message – and does not herself intend to 'be harmful' to any person – is not in itself a defence against conviction and punishment.

However, the current Bill now includes important provisions that protect 'fair and accurate reporting in the public interest' and various other forms of expression. According to Section 4(2) of the Bill, the prohibition of hate speech in Section 4(1) does not apply to any publication or communication that is 'done in good faith' and 'in the course of engaging in':[8]

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 and proselytising or espousing of any religious tenet, belief,…or doctrine'.

However, several other requirements must also be met. Bona fide artistic and religious expression is protected only if it 'does not advocate hatred that constitutes incitement to cause harm'. Fair and accurate reporting must be 'in accordance with Section 16(1) of the Constitution', which gives everyone 'the right to freedom of expression', including 'freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research'.[9] (Hence, it is

[6] IRR submission, p2

[7] Section 4(1)(b) and (c), Bill [Section 6(3), Bill

[8] Section 4(2), Bill

[9] Section 16(1), Constitution of the Republic of South Africa, 1996

only ‘any academic or scientific inquiry’, as set out in (b) above that is protected under the Bill without any further qualification.)

In addition, many people will fall outside these exemptions, none of which would have applied (as further described below, and in the *Ramifications* section) to:

- retired estate agent Penny Sparrow, for comparing black beachgoers to monkeys;
- motorist Vicki Momberg, for calling a police officer a ‘k….r’ close on 50 times;
- businessman Adam Catzavelos for applauding the absence of any ‘k…..s’ on a Greek beach;
- Gauteng official Velapi Khumalo for urging that whites to be ‘hacked and killed like Jews’ and for their children to be ‘used as garden fertiliser’; and
- EFF leader Julius Malema for telling his supporters that whites had ‘slaughtered…peaceful Africans…like animals’, but ‘we are not calling for the slaughtering of White people, at least for now’.

Under the draft bill of 2016, any attempt to commit a hate speech offence was also itself a crime. So too was ‘inciting’, ‘promoting’, or ‘encouraging’ hate speech offences, or ‘conspiring with others’ to commit them.[10] These provisions have been removed from the text of the current Bill, which is another important improvement.

Any person convicted of hate speech or the intentional further distribution of hate speech is liable on a first conviction to a fine (no maximum amount is specified) or to imprisonment for up to three years, or to both these penalties. Any subsequent conviction is punishable by a fine (again with no specified maximum) and/or a prison term of up to five years.[11] The maximum prison term for subsequent offences has been halved from the ten years which previously applied, which is again a significant improvement. These penalties nevertheless remain extraordinarily severe, especially for offences which are so broadly defined.

The stated rationale for these provisions

The stated rationale for these provisions lies primarily in the offensive comments made in January 2016 by a former KwaZulu-Natal estate agent, Penny Sparrow. In a Facebook post, Ms Sparrow commented on the large number of black people evident on the province’s beaches on New Year’s Day. She lamented ‘the monkeys that are allowed to be released’ on to the beaches, saying to ‘allow them loose is to invite huge dirt and troubles and discomfort to others’. In future, she added, she would ‘address the blacks of South Africa as monkeys’ because she saw ‘cute little wild monkeys do the same: pick, drop and litter’.[12]

The post was intended solely for Ms Sparrow’s Facebook friends, but a screenshot of it was taken and distributed on social media, where it soon went viral. Most white South Africans

[10] Section 4(2)(a) and (b), Bill

[11] Section 6(3), Bill

[12] *The New Age* 5 Jan 2016

strongly condemned Sparrow's insulting and inflammatory comments. Many black people expressed great hurt and anger at what she had said.[13]

Other allegedly racist comments by whites soon followed. Among other things, economist Chris Hart (in a series of comments on the failing economy) tweeted about a growing sense of victimhood, 'entitlement' and 'hatred towards minorities'. He was quickly suspended by Standard Bank, his employer, for the 'racist undertones' of this statement. Gareth Cliff, one of the judges in a television talent contest, was dismissed (but later reinstated) for saying that those calling for the criminal prosecution of Ms Sparrow did not understand the meaning of free speech. Another TV presenter, Andrew Barnes, was taken off the air for highlighting the way in which Angie Motshekga, minister of basic education, had mispronounced the word 'epitome'.[14]

With anger over these comments growing, some black South Africans used Twitter to retaliate. Velaphi Khumalo, an employee of the Gauteng provincial administration, called for whites to be 'hacked and killed like Jews' and for their children to be 'used as garden fertiliser'. He too was suspended by his employer. Other tweets called for whites to be 'poisoned and killed', urged 'the total destruction of white people', and called for a civil war in which 'all white people would be killed'. The FW de Klerk Foundation referred 45 messages of this kind to the South African Human Rights Commission (HRC), asking it to investigate the 'extreme violence' which they incited against white South Africans. This evoked further anger, with the ruling African National Congress (ANC) saying that Mr de Klerk had 'insulted black people' and the Pan-Africanist Congress of Azania (PAC) warning that the former state president could be seen 'as inciting war by taking sides'.[15]

The then president, Jacob Zuma, initially responded with words of moderation, saying 'people have tended to exaggerate the issue of racism' and that the comments of 'less than five people' should not be seen as representative of the country as a whole. But the ANC soon seized on the fact that Ms Sparrow happened to be an (inactive) member of the Democratic Alliance (DA) and asked the HRC to investigate the official opposition as 'a breeding ground' for racists. The ruling party also laid charges of *crimen injuria* against Sparrow and other whites, while launching civil suits in the equality courts to compel them to pay damages for hate speech.[16]

Various other hate speech cases have since come to public attention. In 2016, for example, Benny Morota, an advocate and law lecturer at the University of South Africa (Unisa), posted

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[13] *Business Day* 6 January, *Sunday Independent* 19 January 2016

[14] James Myburgh, A descent into racial madness, Politicsweb.co.za, 14 January 2016; *The Star* 7, 8 January 2016

[15] *News24.com*, 6, 8 January, *The New Age* 18 January 2016

[16] *The Citizen* 13 January, *News24.com*, 5 January, *The Times* 6 January 2016; Statement issued by the Office of the ANC Chief Whip, 5 January 2016; Statements by Zizi Kodwa, ANC national spokesman, 5, 21 January 2016; *Sunday Times* 10 January 2016

on Facebook: 'I hate white people and [they] must go back wherever they come from or alternatively to hell'. In response to a question whether he was serious, Morota replied: 'I don't entertain white cockroach like yourself…F*ck you pink white murderer…Enjoy the blood wealth of our people, your time to pay with your white skin is emmenent (sic).'[17]

Also in 2016, EFF leader Julius Malema made a speech to his followers in which he said: 'They found peaceful Africans here. They killed them. They slaughtered them like animals. We are not calling for the slaughtering of white people – at least for now. What we are calling for is the peaceful occupation of the land and we don't owe anyone an apology for that'. [18]

In 2018 Adam Catzavelos made a video while he was on holiday in Greece, in which he said: 'Not a f***en [k-word] in sight. Heaven on earth.' [19] He was immediately dismissed from the family business of which he owned a major share. [20]

Also in 2018, after two elderly white men were severely assaulted and one died, a photo of one of the victims was posted on social media, prompting an officer in the South African National Defence Force (SANDF), Major Mageti Vincent Mohlala, to comment that the attacker 'should have poked out the victim's eyes and tongue so that the last people he would ever see were the killers and he could go to his grave with the nightmare'.[21]

According to the ANC, this relatively small number of hate speech cases requires the introduction of legislation to 'criminalise any act that perpetuates racism or glorifies apartheid', as the organisation put it back in August 2016. The then deputy minister of justice and constitutional development, John Jeffery, thus announced that the government planned to include hate speech provisions in new legislation it had long been busy developing to criminalise other forms of discrimination. This addition was necessary, he said, because of 'the plethora of racial incidents happening on social media', including the Penny Sparrow incident. Added Mr Jeffery: 'People seem to think they can just say, "I'm sorry" and "I'm not a racist, I've got black friends" and get away with it.' However, this was not enough.The government had therefore resolved to 'look into criminalising hate speech', knowing that 'other countries had also done that' and South Africa would not be unique in pursuing this path.[22]

[17] J Geldenhuys and M Kelly-Louw, 'Hate Speech and Racist Slurs in the South African Context: Where to Start?', www.scielo.org.za, p12

[18] Timeslive.co.za 14 March 2019

[19] Geldenhuys and Kelly-Louw, op cit, p12

[20] Ibid, pp12-13

[21] Ibid, p13

[22] *The Citizen* 17 August 2016

However, South Africa already has hate speech legislation on the Statute Book, while the common law has long penalised speech which is defamatory or an affront to dignity. This raises important questions as to why new provisions should be needed at all.

The Constitution and other laws

The Constitution

The 1996 Constitution guarantees equality before the law, and bars unfair discrimination by either the state or private persons on racial and 16 other listed grounds.[23] The Constitution also guarantees freedom of speech in trenchant terms, saying: 'Everyone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or import information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research'.[24]

As an exception to this general principle, the Constitution does not protect speech which amounts to (a) 'propaganda for war, (b) incitement of imminent violence, or (c) advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm'.[25] The meaning of Section 16(2) is further analysed in due course.

The Pepuda prohibition

When the Constitution came into force in February 1997, it required the enactment within three years of legislation giving effect to the prohibition of unfair racial discrimination in Section 9 of the new text. To this end, the Promotion of Equality and Prevention of Unfair Discrimination Act (Pepuda) was adopted in 2000 and largely brought into effect in June 2003.

Pepuda includes a broad prohibition of hate speech, which states: 'No one may publish…or communicate words based on [race or other] prohibited grounds…that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; or (c) promote or propagate hatred'.[26] (The Constitutional Court has recently ruled, in the *Qwelane* case, that the 'hurtful' test is too vague and broad – but has otherwise upheld the constitutionality of this provision, as further described in due course.) [27]

To ensure the proper interpretation and enforcement of Pepuda, high courts and magistrates courts across the country have been designated as equality courts and trained in how to apply the statute. These equality courts are civil, rather than criminal, ones and cannot order imprisonment. In dealing with hate speech, however, they may order the payment of damages for any 'impairment of dignity' or any 'emotional and psychological suffering'. They may

[23] Section 9, Constitution

[24] Section 16(1), Constitution

[25] Section 16(2), Constitution

[26] Section 10, Pepuda

[27] *Qwelane* v *SA Human Rights Commission and another* [2021] SACC 22

also require 'an unconditional apology' and make any 'appropriate order of a deterrent nature'. An equality court may also direct that a hate speech matter be referred to the relevant provincial director of public prosecutions 'for the possible institution of criminal proceedings in terms of the common law or relevant legislation'.[28]

Enforcement of Pepuda's hate speech rules

In 2016 the ANC brought equality court proceedings against Penny Sparrow, who was ordered to pay R150 000 as compensation for her offensive speech. In 2019 equality court proceedings were also brought against Adam Catzavelos, who undertook (under a settlement agreement reached with the HRC) to pay R150 000 in compensation and perform community service.[29]

The HRC also launched investigations into Chris Hart (for tweeting that apartheid's victims showed an increasing 'sense of entitlement and hatred towards minorities'); Mabel Jansen (a judge who was compelled to resign after the publication of several private emails in which she lamented how often black children were raped by relatives or friends and suggested this might point to a rape culture among black people; and Justin van Vuuren, who, like Ms Sparrow, had criticised black holiday makers on Durban beaches on his Facebook page.[30]

By contrast, the HRC declined for many months to institute proceedings against Velapi Khumalo. It also failed to act in this way Julius Malema, whom it instead exonerated following its own investigation. It further overlooked Mogeti Mohlala, who was in time dismissed by the SANDF following a complaint by AfriForum, a civil society organisation.[31] The *Khumalo* and *Malema* cases are, however, particularly instructive and merit further analysis.

When the *Khumalo* case came before the equality court in Johannesburg in 2018, Judge Roland Sutherland found that Mr Khumalo's calls for the killing of whites amounted to hate speech. He ordered him to apologise, and referred the matter to the National Prosecuting Authority to investigate whether *crimen injuria* charges should be brought. However, since Mr Khumalo had already agreed (in settling an earlier hate speech complaint brought against him by the ANC in the Roodepoort Equality Court) to pay R30 000 to a charity of the ANC's choice, no further order for the payment of compensation was made.[32]

In considering the social context in which Mr Khumalo had acted, Judge Sutherland rejected any suggestion that different racial groups should be treated differently in the adjudication of hate speech. According to the court, it would not be possible to overcome the rift between the

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[28] Section 21, Equality Act

[29] News24.com 28 February 2020

[30] https://www.bbc.com/news/world-africa-36246081; Geldenhuys and Kelly-Louw, op cit, pp14, 35

[31] Geldenhuys and Kelly-Louw, ibid, p13

[32] South African Human Rights Commission v Khumalo 2019 1 SA 289 (GJ), para 121

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.[33]

However, this did not mean that social context should be ignored. On the contrary, historical context, personal social circumstances (Mr Khumalo had grown up in poverty under apartheid) and other surrounding circumstances (his perception that whites were rallying to support Ms Sparrow) were factors that 'aggravated or mitigated the likelihood of incitement to cause harm'. This made them relevant in deciding on remedies for hate speech.[34]

In adjudicating on *Malema'*s case in 2019, the HRC took a different approach. Mr Malema, it said, had 'not [in fact] called for the slaughter of White people', even though 'White colonial settlers had killed peaceful Black Africans as if they were animals'. Instead, he had 'called for the peaceful occupation of the land'.[35]

Mr Malema had been 'critical of White people historically', which was why he had also 'called for the occupation of White people's land currently'. This might be 'offensive and upsetting for many White people', some of whom might think it was 'racially biased'. However, the HRC went on, 'it was clear that White colonial settlers did occupy Black land, by both violent and non-violent means'. It was also evident that 'currently White people, albeit a political minority, have significant economic power'. [36]

Viewed in its context, Mr Malema's statements did 'not amount to hate speech', the HRC concluded. 'The historical context in which the statement is made is one of unjust land dispossession by white colonists and the apartheid government', while the first reference to 'slaughter' made in the statement is 'an opinion on the actions of colonialists'. In addition, the 'social context' for the statement is one of 'continued landlessness, poverty and inequality, giving rise to anger and frustration by the black majority'. As regards its 'factual context', the statement deals not with 'perpetrating harm against white people, but the highly emotive and contested issue of land reform'. In addition, 'Malema explicitly states he is not calling for the slaughter of white people'. [37]

Overall, the claim of hate speech hinged on the words 'at least for now' – and whether these showed a clear intent to incite harm 'at some indeterminate date in the future'. However, 'such incitement was not "imminent", or foreseen at the time when the utterances were made'. When assessed in its proper context, Mr Malema's statement 'dealt with the subject

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[33] Ibid, paras 100-102

[34] Ibid, para 102

[35] HRC, letter to complainant, 8 March 2019, Ref: KZ/1617/0259/HO, pp3-4; businesstech.co.za 14 March 2019

[36] Ibid

[37] Ibid, p4

matter of land dispossession and redistribution, and was not aimed at inciting harm to white people'. Hence, his words 'did not amount to hate speech'. [38] (The issue of what many people see as selective enforcement of hate speech rules is further examined in the *Ramifications* section, below.)

The common law of defamation

Also relevant is the common law of defamation, which can be invoked in both the civil and the criminal courts.

Civil defamation rules

In the civil sphere, the relevant rules protect people's reputations by allowing them to sue for damages for the publication of material that lowers their standing in the eyes of others. Traditional defences at common law are truth and fair comment on matters of public interest. Strict liability used to apply, which meant a defamatory intention did not need to be shown before the onus shifted to the publisher to establish a defence. Since 1994, however, the Constitutional Court has rejected strict liability for defamation and ruled that the crucial test is whether publication was 'reasonable' in all the circumstances.[39]

In adjudicating on defamation, the Constitutional Court has been careful to protect the free speech vital to South Africa's democracy. In 2011, for example, the court dismissed a defamation claim brought against *The Citizen* by Robert McBride, a former Umkhonto we Sizwe cadre who in 1986 had helped set off a bomb in Durban which had killed three civilians. Mr McBride brought the suit because the newspaper had repeatedly described him as a 'murderer', who was unfit for appointment to a senior police post. The High Court upheld his claim, but the Constitutional Court took a different view. In a majority ruling, the court stressed that *The Citizen* had 'expressed an honestly held opinion on a matter of public interest on facts that were true'. This made its comment 'fair' in law, even if it was 'extreme, unjust, unbalanced, exaggerated, and prejudiced'.[40]

Notwithstanding the Constitutional Court's robust approach, the mere threat of defamation claims can help promote self-censorship. This may explain why Jacob Zuma in 2006, the year before the ANC's electoral conference at Polokwane, brought libel actions totalling R63m against cartoonist Jonathan Shapiro (Zapiro) and various newspapers. Though few of these claims seemed likely to proceed to trial – and though Mr Zuma was unlikely to win the many millions in damages he sought – all newspapers would have been anxious to avoid such liability. All thus had an interest in toning down criticisms of Mr Zuma in a period critical to his future career.[41]

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[38] Ibid

[39] *Khumalo and others* v *Holomisa*, 2002 (8) BCLR 771 (CC)

[40] Anthea Jeffery, *The Rainbow Index*, 2010-2011, IRR, 2012, pp16-17

[41] Anthea Jeffery, *Chasing the Rainbow: South Africa's Move from Mandela to Zuma*, IRR, Johannesburg, 2010, p119

Civil defamation rules thus provide a potent weapon against racial invective damaging to reputation. The common law has also evolved to deal with cases of defamation on Facebook or communicated via the Internet. This shows (in the words of legal expert Dario Milo, a partner in law firm Webber Wentzel) that it has already successfully 'adapted itself to modern circumstances and technology'.[42]

Criminal defamation

South Africa also has common law rules making defamation a criminal offence in certain instances. The constitutionality of these provisions was challenged but nevertheless upheld by the Supreme Court of Appeal (SCA) in 2008 in *Hoho* v *The State*. Here, a researcher employed by the Eastern Cape provincial legislature published several leaflets in the early 2000s in which he accused the provincial premier and various national ministers of corruption, embezzlement, fraud, and other crimes. He was charged with criminal defamation. The Bisho High Court convicted him on 22 charges and sentenced him to three years' imprisonment, suspended for five years, and three years' correctional supervision. Hoho appealed against the judgment, arguing that South Africa's criminal defamation rules were unconstitutional. But the SCA dismissed his appeal and found the law of criminal defamation consistent with the Constitution.[43]

In explaining its decision, the SCA stressed that, in a criminal defamation trial, the prosecution must prove all the elements of the offence. The state must thus prove that the communication is unlawful, which requires it to prove that none of the standard justifications of truth, fair comment, and reasonableness applies. It must also prove that publication is 'intentional', which requires 'proof that the accused knew he was acting unlawfully'. In addition, the standard of proof demanded is proof beyond a reasonable doubt. These requirements provide important safeguards against any abuse of the law, said the court. Hence, the crime of defamation is not inconsistent with the Constitution but is instead 'reasonably required to protect people's reputations'.[44] (The adequacy of the SCA's reasoning is further examined in the section on *Ramifications*, below.)

Crimen injuria

Also important is the common law of *crimen injuria*, under which Penny Sparrow was also convicted and punished. *Crimen injuria* is the unlawful, intentional, and serious violation of the dignity of another. For successful prosecution, the victim must be aware of the offending behaviour and must feel degraded or humiliated by it. In addition, the behaviour in question must be serious enough as to offend the feelings of a reasonable person.[45]

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[42] Dario Milo, The timely demise of criminal defamation law', http://blogs.webberwentzel.com/2015/10/the-timely-demise-of-criminal-defamation-law

[43] *Hoho* v *The State* (493/05) 2008 ZASCA 98 17 September 2008

[44] Ibid, paras 26, 36

[45] Snyman, Kallie, *Criminal Law*, 6th edition, LexisNexis South Africa, 2014, p463; Burchell, Jonathan, *Principles of Criminal Law*, Cape Town, Juta & Co. Ltd, 2013, 4ed, p632

Some legal writers have suggested that the insult in issue must be directed at an individual, rather than a group, before liability can arise. However, this overstates the key judgment on the matter, which was handed down by the Transvaal Provincial Division in 1975. Here, the court was primarily concerned with whether the dignity of the victim had been affected by an insult against the Afrikaans language. Within this context, the judge commented: 'There may, of course, be cases in which an insult to a person's language, or race, or religious persuasion, or national group may, in the circumstances, constitute also an impairment of his *dignitas*.'[46]

That the insult was directed at a 'national group' is presumably nevertheless the basis on which Ms Sparrow was convicted of *crimen injuria* in September last year. The judgment of the Scottsburgh Magistrate's Court has seemingly not been reported, but press coverage indicates that she pleaded guilty to the charge and was ordered to make a public apology. Magistrate Vincent Hlatshwayo also sentenced her to a fine of R5 000 or 12 months' imprisonment, plus an additional two years' imprisonment. However, this further prison term was suspended for five years on condition that she was not again convicted of *crimen injuria* in this period.[47]

Ms Sparrow broke down and cried in court as she read out her 'heartfelt' apology for her 'thoughtless behaviour'. This had 'hurt the feelings of her fellow South Africans' and 'impaired the dignity of African people', she acknowledged.[48] The ANC in KwaZulu-Natal criticised the sentence handed down as insufficient, saying: 'A prison sentence without the option of a fine would have afforded her an opportunity, in isolation, to deeply reflect and repent from her disgraceful conduct.'[49]

Vicki Momberg, who had been highly upset by a smash-and-grab robbery from her car and had used the 'k' word 48 times against the black policeman trying to help her, was convicted on four counts of *crimen injuria*. Despite questions as to her mental state, she was sentenced in March 2018 to an unprecedented three years' imprisonment, of which only one was suspended. She was released in December 2019 under a general remission of sentence for some 14 600 prisoners which was announced by President Cyril Ramaphosa on the Day of Reconciliation (16th December). [50]

Adam Catzavelos was likewise found guilty of *crimen injuria* in December 2019. He pleaded guilty and apologised for what he told the court had been 'horrendous and disgusting'

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[46] *State* v *Tanteli* 1975 2 SA 772 (T), at p775

[47] *The Citizen*, *The New Age*, *The Times* 13 September 2016

[48] *The New Age* 13 September 2016

[49] Mdumiseni Ntuli, Penny Sparrow judgment not proportional to harm she caused, Politicsweb.co.za, 13 September 2016

[50] News24.com, 27 December 2019

behaviour on his part. He was sentenced to a fine of R50 000 and two years' imprisonment, both of which were suspended for five years. [51]

As this brief review shows, South Africa already has many laws under which racial utterances are prohibited and can effectively be punished. The hate speech provisions in the Bill are thus unnecessary. They are also prima facie in conflict with the Constitution.

Unconstitutionality of the hate speech provisions in the Bill

What section 16 of the Constitution says

As earlier noted, the Constitution generally guarantees free speech, including freedom of the media. However, it does not protect 'the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.[52] This exception to the general right is carefully phrased, which means that speech is protected unless it:

- advocates hatred,
- does so on one of the four grounds expressly listed, and also
- 'constitutes incitement to cause harm'.

Advocating hatred

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'.[53] The hatred expressed must be intentional, for it is not possible to have 'an emotion of an intense and extreme nature' on a negligent, accidental, or subconscious basis.

Four listed grounds

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

Incitement to cause harm

The advocacy must amount to incitement to cause harm. The mere advocacy of hatred is thus still protected expression, and it is only when this is accompanied by a call to action – an incitement to cause harm – that it loses its constitutional protection. Incitement has a specific legal meaning. It must also be intentional, as it cannot happen negligently, accidentally, or subconsciously.

[51] News24.com 28 February 2020

[52] Section 16(2)(c), Constitution. 'Propaganda for war' and 'incitement to imminent violence' are also excluded from constitutional protection under the rest of Section 16(2).

[53] *R* v *Keegstra*, [1990] 3 SCR 697 (Canada)

Harm need not necessarily be confined to physical harm and may include harm to people's dignity. However, it must involve a serious violation of dignity, as the common law of *crimen injuria* likewise requires. There is an objective element in this test, for it must be shown that the reasonable person would identify the violation of dignity as serious.

What the Bill says

The hate speech provisions in the Bill are much better than before but still go well beyond these limits. To begin with, the Bill's list of 15 prohibited grounds extends far beyond the four grounds listed in Section 16(2) of the Constitution. In addition, 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'.[54] This wording is far wider than that contained in Section 16(2)(c) of the Constitution. This clause, as earlier noted, withholds constitutional protection solely from speech which amounts to the 'advocacy of hatred that is based on race, ethnicity, gender or religion, *and* that constitutes incitement to cause harm'.[55]

Any statute limiting free speech in circumstances going beyond Section 16(2) is invalid unless it complies with 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' and in the light of all relevant factors – including whether 'less restrictive means' could have been used to achieve the purpose of the limitation. [56]

Key Constitutional Court judgments

The Constitutional Court has already provided important guidance on the interpretation and significance of Section 16(2). In *Islamic Unity Convention* v *Independent Broadcasting Authority and others*, the court said:[57]

> 'What is not protected by the Constitution is expression or speech that amounts to "advocacy of hatred" that is based on one or other of the listed grounds: namely race, ethnicity, gender or religion, and which amounts to "incitement to cause harm"…. Any regulation of expression that falls within the categories enumerated in s 16(2) would not be a limitation on the right in s 16. [However,] where the state extends the scope of regulation beyond expression envisaged in s 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in s 36(1) of the Constitution.'

This passage was cited and endorsed by the Constitutional Court in its recent

[54] Section 4(1), Bill

[55] Section 16(2)(c), Constitution

[56] Section 36, 1996 Constitution

[57] *Islamic Unity Convention* v *Independent Broadcasting Authority and others*, 2002 (4) SA 294 (CC), at paras 33-34

Qwelane decision. Here, the unanimous ruling handed down by Judge Steven Majiedt described the judgment in *Islamic Unity* as 'the lodestar for the interpretation and application of Section 16'.[58] Judge Majiedt nevertheless then largely abandoned the *Islamic Unity* approach and veered off on a different tack.

Proponents of the Bill will nevertheless no doubt argue that the Constitutional Court in the *Qwelane* case expressly approved the definition of hate speech that has now been inserted into the Bill. On this basis, they will say, the definition of hate speech in the Bill must be accepted as constitutional too.

However, this overlooks the fact that the *Qwelane* case dealt with the validity of a hate speech definition in the context of Pepuda, which is a *civil* statute. By contrast, the Bill seeks to turn hate speech into a criminal offence. Those convicted under the Bill will thus be vulnerable not only to major fines but also to arrest, trial, and lengthy prison terms.

The differing standards of proof needed for criminal conviction and civil liability further underscore the distinction between the two. In civil proceedings, the standard of proof is a balance of probabilities, which is relatively easy to fulfil. In criminal prosecutions, by contrast, all the elements of an offence must be proved beyond a reasonable doubt.

In the criminal context, thus, it is particularly vital that the definition of hate crime used to arrest, prosecute and put people behind bars for up to three to five years should be entirely in keeping with what the Constitution requires. The *Qwelane* ruling – handed down in a civil law context and with many weaknesses in its reasoning – cannot suffice to confirm the constitutionality of the hate speech definition in the Bill.

The weaknesses in the Qwelane judgment

Abandoning the Islamic Unity test

According to *Islamic Unity*, as earlier noted, legislation which restricts free speech is contrary to Section 16(1) of the Constitution, unless it falls within the ambit of Section 16(2). However, if the statute extends beyond what Section 16(2) allows, then it is unconstitutional unless it satisfies the 'justification' criteria in Section 36.

Since Section 10 of Pepuda clearly extends beyond what Section 16(2) allows – as Judge Majiedt in fact acknowledged early on in his judgment [59] – the key task for the court in *Qwelane*, following the 'lodestar' of *Islamic Unity*, was to assess whether Section 10 could be justified under Section 36. However, Judge Majiedt declined to follow the precedent laid down in *Islamic Unity*. Astonishingly, his first concern was instead to examine whether Section 10 infringes the right to free speech in Section 16(1). This allowed him to introduce various considerations extraneous to the *Islamic Unity* approach that he should have applied.

[58] Qwelane CC, para 76

[59] Ibid, para 77

Introducing new tests for hate speech

In making his Section 16(1) analysis, Judge Majiedt began by stressing that 'the expression of unpopular or even offensive beliefs does not constitute hate speech', as a healthy democracy 'requires a degree of tolerance towards expression or speech that shocks or offends'. Hate speech must therefore go beyond 'mere offensive expression'. In keeping with Canadian law, it requires an 'extreme detestation and vilification which risks provoking discriminatory activities against [a] group'.[60]

Having laid down this test, however, Judge Majiedt then went on to say that even 'facially innocuous words have to be understood based on the different structural positions occupied by white people in relation to black people in contemporary South Africa'. This, coupled with the Constitution's commitment to 'substantive' equality, makes it necessary to 'curtail speech which is part and parcel of the system of subordination of vulnerable and marginalised groups'.[61]

In this way, Judge Majiedt moved from an accurate conception of hate speech as 'extreme detestation and vilification' likely to provoke discriminatory activities to a far broader test. On this new basis, 'facially innocuous words' may be 'curtailed' if they are 'part and parcel' of a 'system of subordination' affecting vulnerable groups. This test is fundamentally at odds with Section 16(2)(c) of the Constitution, under which speech is protected unless it amounts to 'advocacy of hatred that is based on [the listed grounds] and that constitutes incitement to cause harm'.[62]

The intention required

Section 10 of Pepuda defines hate speech as that which can 'reasonably be construed to demonstrate a clear intention' to be 'hurtful', to be 'harmful', or to 'promote hatred', among other things. Based on this wording, Judge Majiedt began by recognising that intention on the part of the hate speech perpetrator is indeed required, rather than 'mere inferences and assumptions…made by the targeted group'. The presence of the requisite intent depends, however, on an objective test. It follows that 'an intention shall be deemed if a reasonable reader would so construe the words'.[63]

Having made this accurate analysis, Judge Majiedt then again veered off on a different path. Without giving reasons, he simply declared that there is in fact no need to ascertain 'the subjective intention of the speaker', whether by using the well-established test of the 'reasonable person' or in any other way.[64]

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[60] Qwelane CC, paras 79, 81

[61] Ibid, paras 83, 86

[62] Section 16(2), Constitution

[63] Qwelane CC, para 96

[64] Ibid, paras 97, 99

In this, Judge Majiedt seemed to follow the *Whatcott* judgment in Canada, where the court commented that 'intentional discrimination' is rare, whereas 'systemic discrimination' is (supposedly) widespread. Hence, if anti-discrimination cases are to succeed, intention has to be discounted and replaced by a focus on effects. As the Canadian court put it: 'The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination'. In this situation, a focus on 'a subjective intent requirement', rather than a focus 'solely on effects', would 'defeat' the efficacy of anti-discrimination law.[65]

Even if this is an accurate summary of anti-discrimination rules in Canada, it certainly cannot apply to the adjudication of hate speech in South Africa. Here, Section 10 of Pepuda requires 'a clear intention' to be hurtful, harmful or promote hatred, which is to be established using the objective test of the reasonable person. That intentional discrimination has become rare in Canada (as it has in South Africa as well) is a positive development that should be applauded, not used to dispense with a key Pepuda requirement.

The 'hurtful', 'harmful' and 'promoting hatred' criteria

Judge Majiedt (correctly) concluded that what is 'hurtful' cannot easily be distinguished from what is 'harmful'. In addition, the concept of 'hurtfulness' is too vague to comply with the rule of law, and risks 'infringing freedom of expression' by 'barring speech that [merely] offends, disturbs, and shocks'. Its inclusion in section 10(1) 'results in the section suffering from vagueness and it is thus unconstitutional'.[66]

By contrast, Judge Majiedt glossed over the validity of the remaining clauses of Section 10. These, he says, must be read 'conjunctively', so that every element in the definition must be shown to exist before liability can arise.[67] On this basis, hate speech is that which shows a clear intention not only to 'be harmful or to incite harm' but also to 'promote or propagate hatred'.[68]

However, Judge Majiedt avoided any properly reasoned analysis of whether this wording extends beyond the ambit Section 16(2)(c) of the Constitution. Instead, he simply assumed that the remainder of Section 10 complies with the Constitution, saying: 'Section 10(1)(c) of the Equality Act prohibits words that "promote or propagate hatred", and this may be interpreted to accord with the prohibition of the "advocacy of hatred" in section 16(2)'. Similarly, he said, the classification in section 10 of hate speech as 'speech that is "harmful or

[65] *Saskatchewan (Human Rights Commission) v Whatcott* 2012 SCC 11; [2013] 1 SCR 467 (*Whatcott)*, para 126

[66] Qwelane CC, paras 106,152,147,104,140-144, 156

[67] Ibid, paras 104, 105

[68] See sections 10(1)(b), 10(1)(c), Pepuda

incite[s] harm" may be read to align with the prohibition against the "advocacy of hatred" in section 16(2).' [69]

However, this shallow and unconvincing assessment ignores the fact that the wording of Section 10 is substantially different from that in Section 16(2)(c). In addition, the Constitution speaks of the 'advocacy' of hatred, which is different from its 'promotion' or 'propagation'. This advocacy of hatred must also 'constitute incitement to cause harm', a requirement that Section 10 does not begin to match and which Judge Majiedt simply ignores.

Early on in his judgment, moreover, Judge Majiedt had recognised that Section 10 is substantially different from Section 16(2)(c), saying: 'I accept that, on a plain reading of Section 10 of the Equality Act, juxtaposed with Section 16(2)(c) of the Constitution, the former is broader than the latter in various respects.' He makes no attempt to explain his subsequent about-face in concluding that Section 10 in fact 'accords' with Section 16(2)(c).[70]

In this way, Judge Majiedt avoids the need for a full 'justification' analysis of Section 10. Insofar as he embarks on such an analysis at all, he confines this to the 'hurtful' criterion in Section 10(a) – and to the inclusion of sexual orientation as a prohibited ground of hate speech under Pepuda, even though Section 16(2)(c) speaks only of 'race, ethnicity, gender or religion'.

On the issue of 'hurtful' speech, Judge Majiedt quickly concluded that this term is 'disproportionate' and leads to 'an unjustifiable limitation on freedom of speech', which is thus unconstitutional. On sexual orientation, by contrast, he decided that this is 'entirely proportional' to the purpose in issue – and that 'less restrictive means' of achieving this purpose are 'inconceivable'.[71] No explanation is provided for this second point, even though a narrower provision echoing the wording of Section 16(2)(c) would doubtless also achieve the objective.

Judge Majiedt made no attempt to apply a justification analysis to the rest of Section 10. In this, he again ignored the precedent set in *Islamic Unity*, under which his key task was to assess whether Section 10 met all the requirements of Section 36. The 'less restrictive means' test would have been difficult to satisfy, however, as Section 10 – like the relevant clause in *Islamic Unity* – could easily have been more 'appropriately tailored and more narrowly focussed'.[72]

[69] Qwelane CC, para 135

[70] Ibid, para 77 cf para 135

[71] Ibid, para 145

[72] See Qwelane v SA Human Rights Commission and another [2019] ZASCA 167, para 50

The SCA, in its earlier *Qwelane* ruling, accurately summed up the jurisprudence of the Constitutional Court on hate speech when it said:[73]

> 'The effect [of *Islamic Unity*] is that all expression is protected save anything that falls within section 16(2)(c). Moseneke summarised this in *Laugh it Off* in saying that 'unless an expressive act is excluded by s16(2) it is protected expression'. Legislation may be passed that limits otherwise protected freedom of expression, but it must then be justified in terms of s36 of the Constitution. This does not mean that s16(2)(c) is irrelevant to the justification analysis. *It provides a baseline against which to measure the extent of any limitation so that the greater the intrusion into freedom of expression and the further the departure from that baseline the stricter the scrutiny that is required*.'

Judge Majiedt, despite having recognised *Islamic Unity* as his 'lodestar' on hate speech, failed to follow the approach that the judgment requires (as pithily summarized by the SCA in *Qwelane*). Nor did he provide any reasons for departing from *Islamic Unity* and other Constitutional Court judgments.

Is the Bill's definition constitutional?

As earlier noted, proponents of the Bill are sure to argue that the definition of hate speech in the Bill must be constitutional because it mirrors the definition of hate speech approved by Judge Majiedt in *Qwelane*. But, for all the reasons earlier outlined, Judge Majiedt's ruling is too flawed – and too contrary to South Africa's established jurisprudence on hate speech issues – to be accepted as definitive.

In addition, Judge Majiedt was dealing with civil law liability under Pepuda, a statute which (as he took pains to note) aims 'not to punish the wrongdoer, but [rather] to provide remedies for victims of hate speech'.[74] By contrast, the Bill makes hate speech a crime which 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, moreover, the Bill exposes people to same chilling effects that criminal defamation laws have had in Zimbabwe and other African states. The key risk with criminal defamation law in these countries, as legal expert Dario Milo of Webber Wentzel reminds us, is that it can be enforced by the government 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.' [75]

Much the same point was made by Zimbabwe's Constitutional Court in 2014 when it struck down the criminal defamation rules often used to punish merited criticism of former

[73] Qwelane v SAHRC and others [2019] ZASCA 167 para 51, emphasis supplied by the IRR

[74] Qwelane, CC, para 194

[75] Milo, The timely demise of criminal defamation law', op cit

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'.[76]

The *Qwelane* ruling – handed down in a civil law context and with many weaknesses in its reasoning – thus cannot suffice to confirm the constitutionality of the hate speech definition in the criminal context that applies to the Bill. Instead, the validity of the definition must rest on whether it complies with the 'justification' analysis required for all limitations of guaranteed rights by Section 36 of the Constitution.

The Section 36 'justification' criteria

Section 36(1) of the Constitution says that guaranteed rights may be limited only if 'the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. In making this determination, all relevant factors must be taken into account. These include (a) the nature of the right, (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.[77]

The nature of the right

In assessing whether the limitation of a guaranteed right is justified under Section 36(1), one of the key considerations (as the Constitutional Court emphasised in *State* v *Makwanyane*) is 'the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality'.[78]

One of the rights limited by the Bill is, of course, the right to freedom of expression, which the Constitutional Court has previously described as 'the lifeblood of an open and democratic society'.[79] The importance of the right to free expression has been emphasised on many other occasions by both the Constitutional Court and the High Court. As these courts have stressed:

- 'Under the new constitutional dispensation in this country, expressive activity is prima facie protected, no matter how repulsive, degrading, offensive, or unacceptable society, or the majority of society, might consider it to be.'[80]

- 'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society, and its

[76] Milo, ibid

[77] Section 36(1), Constitution

[78] *State* v *Makwanyane*, 1995 (3) SA 391 (CC) at para 149

[79] *Dikoko* v *Mokhatla* 2006 (6) SA 235 (CC), at para 92

[80] *Phillips and another* v *Director Public Prosecutions*, 2002 (5) SA 549 (W) at p554

facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.'[81]

- 'Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity,…it could actually be contended with much force that the public interest in the open market place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought control, however respectably dressed.'[82]

- 'The corollary of freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.'[83]

The importance of the purpose of the limitation

There is a clear societal interest in prohibiting 'propaganda for war, incitement of imminent violence', and the 'advocacy of hatred' that is based on a listed ground *and* that 'constitutes incitement to cause harm', as set out in Section 16(2) of the Constitution. However, there is little societal interest in criminally punishing speech that falls outside these parameters, as the Bill will clearly do.

The nature and extent of the limitation

Various issues must be taken into account in assessing the extent to which the Bill limits the important right to freedom of expression:

<u>An overly broad definition</u>

Under the current Bill, the definition of hate speech is less extensive than before. However, the definition is still broad enough to have a profoundly chilling effect on speech in many spheres. This is particularly so for speech that falls outside the exceptions now contained in Section 4(2) of the Bill, as outlined above and in the *Ramifications* section below. The Bill's list of 15 grounds on which speech may be punished as hate speech is also too extensive, particularly as Section 16(2) lists only four such grounds.

<u>Draconian penalties</u>

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[81] *South African National Defence Union* v *Minister of Defence and another*, 1999 (4) SA 469 (CC), at para 7

[82] *State* v *Mamabolo*, 2001 (3) SA 409 (CC) at para 37

[83] *South African National Defence Union* v *Minister of Defence and another*, 1999 (4) SA 469 (CC) at para 8

The penalties set out in the Bill – with their emphasis on lengthy prison terms lasting as long five years for any repeat offence – are unnecessarily draconian. This is especially so when more suitable penalties are readily available in the form of apologies, community service, and appropriate fines. Penalties of the latter kind would be more in keeping with the principles of restorative justice.

Possible criminal liability for many people

The current version of the Bill no longer criminalises the fair and accurate reporting of hate speech by journalists, civil society organisations, and other commentators, which is an important improvement. However, the Bill will still punish speech falling outside the ambit of Section 4(2) – and the chilling effect on valuable speech could be considerable (see *Ramifications*, below). For people wanting to raise issues outside the scope of Section 4(2), the risk of arrest, trial, and conviction for speech that ought to be constitutionally protected will be significant. This could discourage frank discussion and informed debate about issues vital to the strength of South Africa's democracy and the upward mobility of all its people.

'Less restrictive means of achieving the purpose'

Hate speech is already prohibited under Section 10 of Pepuda, though this provision still needs to be brought into line with Section 16(2)(c), as further outlined in due course. It is also already restricted under common law rules on defamation and *crimen injuria*, as earlier described. 'Less restrictive' means to combat hate speech are thus readily available.

If hate speech is nevertheless to be made a crime – even though many other policy reforms are clearly far more pressing – then legislation in various other countries provides a model of the more tailored and 'less restrictive means' that could be used to achieve this.

Lessons from other hate speech laws

Australia

In Australia, the Racial Discrimination Act of 1975, a federal statute, was amended in 1995 to make it unlawful publicly to insult, humiliate, offend or intimidate another person or group on racial grounds. The act must be 'reasonably likely' to insult or intimidate, and must have been done because of the 'race, colour, or national or ethnic origin' of the target individual or group. The Australian statute thus requires an objective test. Wide latitude is also generally permitted in deciding what is 'reasonable' because of the importance of free speech in a democracy. The statute also avoids the long list of prohibited grounds contained in the Bill. In addition, liability is civil, rather than criminal, as Australia regards criminal punishment as a risk to free speech and disproportionate to the harm caused by hate speech.[84]

Australia's component states have legislation similar to the federal statute, but these are not uniform. In 1989 New South Wales amended its anti-discrimination legislation by making it a criminal offence to incite hatred, serious contempt, or severe ridicule towards a person or

[84] Australian Human Rights Commission, *Racial Vilification law in Australia*, Race Discrimination Unit, 2002; Brooke Murphy, 'Nova Peris' case highlights shortcomings of Australian hate speech laws', 7 June 2016

group on racial grounds. However, the criminal prohibition applies only where such incitement threatens physical harm or urges others to threaten such harm. Prosecution requires the consent of the Attorney General, and the offence is generally punishable by a maximum fine of AU$10 000 or six months' imprisonment. No prosecution under this law has yet been brought. [85]

Canada

In Canada, the Criminal Code of Canada of 1985 (in Section 318) prohibits 'hate propaganda' and makes this a criminal offence punishable by imprisonment for up to five years. However, it defines 'hate propaganda' narrowly as any communication that 'advocates or promotes genocide'. Genocide, in turn, is defined as either the 'killing' of members of 'an identifiable group', or acts 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction'. An identifiable group means 'any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability'.[86]

Also relevant is section 319 of the Criminal Code, which prohibits the public incitement of hatred or the willful promotion of hatred against an identifiable group. In both instances, however, the incitement or promotion of hatred must be 'likely to lead to a breach of the peace'. Various free speech defences are also available. Hence, an accused is not guilty if the statements are true, or if they are relevant to any subject of public interest and he or she reasonably believed them to be true. Expressing in good faith an opinion on a religious subject is not punishable. Nor are literary devices such as sarcasm and irony.[87] In addition, no prosecutions (under either Section 318 or 319) may proceed without the approval of the attorney general, who is a cabinet minister. This makes for an important element of political accountability.[88]

The Canadian Human Rights Act of 1977 is a federal statute which prohibits discrimination on the basis of race, colour, sex, sexual orientation, and national or ethnic origin, among other things. Section 13 of the statute also prohibited hate speech in broad terms, making it discriminatory to communicate by phone or Internet any material 'that is likely to expose a person or persons to hatred or contempt'. However, this provision was repealed in 2013, after growing objections to its wide reach and lack of free speech defences.[89]

Criticism of Section 13 came to a head after the Canadian Islamic Congress filed complaints of hate speech against Maclean's magazine in December 2007. The nub of the complaints was that MacLean's had published a series of articles by author Mark Steyn, which warned

[85] Ibid; Murphy, 'Nova Peris' case'

[86] Wikipedia; Sections 318, Criminal Code of Canada of 1985

[87] Section 319, Criminal Code of Canada of 1985

[88] Wikipedia

[89] Wikipedia

against a growing threat to the West from Islam and so insulted Muslims. The main target was Mr Steyn's article, 'The Future Belongs to Islam', an excerpt from his best-selling book *America Alone*. This book warned that the United States would find it difficult to retain its secular democracy if Muslims in European countries used their increasing demographic preponderance to win political control of these nations.[90]

The Ontario Human Rights Commission found it lacked jurisdiction to deal with the complaint lodged with it, but the British Columbia Human Rights Tribunal heard the case in June 2008. Handing down its ruling in October 2008, the tribunal stated that the article 'contained historical, religious, and factual inaccuracies, relied on common Muslim stereotypes, and tried to "rally public opinion by exaggeration and causing the reader to fear Muslims"'. Having criticised the article in these ways, the tribunal ultimately concluded that it was not likely to expose Muslims to hatred or contempt. This meant that the complaint had to be dismissed.[91]

The Canadian Human Rights Tribunal dismissed the federal complaint in June 2008 without referring the matter to a tribunal. The federal commission said Mr Steyn's article was 'polemical, colourful and emphatic and was obviously designed to excite discussion and even offend certain readers, Muslim and non-Muslim alike'. However, 'the views expressed in it were not of an extreme nature', as required by Canadian law.[92]

Though all three complaints were ultimately dismissed, Maclean's incurred some $2m in legal costs in defending itself. Mr Steyn commented that a lesser-known writer without a media conglomerate to support him would probably have been convicted. He added: '[The case] has made me understand just how easily and incrementally free societies, often for the most fluffy reasons, slip into a kind of soft, beguiling totalitarianism.'[93]

Kenya

The current Constitution of Kenya was promulgated in 2010, in the aftermath of the ethnic conflict which broke out in December 2007 following disputed presidential elections. This upsurge in violence cost the lives of some 1 300 people, displaced more than 600 000, and resulted in major destruction of property.[94] Against this background, the Constitution limits the guaranteed right to free expression by saying this does not extend to 'propaganda for war, incitement to violence, hate speech, or advocacy of hatred that constitutes ethnic incitement, vilification of others, or incitement to cause harm'.[95]

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[90] Wikipedia; Voice Voix, America Alone

[91] Wikipedia, British Columbia Human Rights Tribunal

[92] Wikipedia, Canadian Human Rights Commission

[93] Wikipedia

[94] Milly Lwanga, 'Freedom of expression and harmful speech: the Kenyan situation', 2 September 2012

[95] Article 33(2), Constitution; Lwanga, ibid

Relevant too is Kenya's National Cohesion and Integration (NCI) Act of 2008. This statute establishes the National Cohesion and Integration (NCI) Commission. It also seeks to promote tolerance and outlaw discrimination on ethnic grounds. Section 13 of the Act prohibits 'threatening, abusive, or insulting words or behaviour' which are 'intended to stir up ethnic hatred' or are likely to do so in all the circumstances. Ethnic hatred is defined as hatred against a group identified by 'colour, race, nationality, or ethnic or national origins'. Acts in breach of Section 13 are punishable on conviction by a fine of up to one million shillings and/or imprisonment for up to three years.[96]

The NCI Act, in Section 62, also makes it an offence to 'utter words intended to incite feelings of contempt, hatred, hostility, violence, or discrimination against any person, group, or community on the basis of ethnicity or race'. The penalty here is a fine of up to one million shillings and/or a prison term of up to five years.[97] To help prevent such words being spread by the media, Section 62 of the NCI Act makes it an offence for 'a newspaper, radio station or media enterprise to publish such utterances'. This offence is likewise punishable by a fine of up to one million shillings, but no prison term may be imposed.[98]

Kenya's laws have been criticised for ambiguity and double standards in their enforcement.[99] In 2015, for instance, Umati, a group that monitors online hate speech, noted that no politicians had yet been convicted under Section 62 of the NCI Act, despite significant evidence of their having made utterances 'intended to incite feelings of contempt or hatred' against coastal Arabs, the Luo, and the Maasai people, respectively. Most of these cases had simply been quashed after apologies had been made to the NCI Commission. By contrast, a university student, Allan Wadiwas, had been convicted of hate speech over a Facebook post critiquing President Uhuru Kenyatta and saying a particular ethnic group should be deported from Kenya. Mr Wadiwas had also been sentenced to two years in prison.[100]

Umati warns that the hate speech provisions in the NCI Act are broad enough to 'stifle potentially fruitful political discourse'. It suggests that that the focus should instead be placed on 'dangerous' speech with 'a high potential to catalyse violence'. Speech would count as 'dangerous' if it:[101]

- targets ethnic groups, rather than individuals;
- compares this group to vermin, insects, or animals;
- suggests that this group poses such a serious threat that others should arm themselves or attack first; and

[96] Section 13(1)(2), National Cohesion and Integration Act; Lwanga, ibid

[97] Section 62(1), NCI Act

[98] Section 62(2), NCI Act; Lwanga, ibid

[99] Article 19, 'Commentary on the Regulation of "Hate Speech" in Kenya', June 2010, at p17

[100] Nanjira Sambuli, *Defining the Hate Speech Crime*, Umati, http://ihub.co.ke/blogs/26327

[101] Ibid

- contains any other call to violent action, whether by looting, burning, beating, forcefully evicting, or killing members of the group.

Such a revised definition, Umati suggests, would help distinguish political speech, which needs to be protected, from utterances which truly amount to hate speech. A clear definition would also make it easier for ordinary people to understand 'the kind of speech that has a high potential to cause harm' to ethnic groups. This in turn would help to 'counter ambiguity and facilitate harmony'.[102]

Overview

Despite the positive changes to the wording of the Bill, it still differs significantly from hate speech laws in Australia, Canada, and Kenya. Australia's hate speech rules generally involve civil, rather than criminal, liability, while criminal liability requires threats of physical harm. Canada has repealed its criminal hate speech rules at the federal level, and now allows criminal liability primarily for communications aimed at inciting genocide or the destruction of identified groups. It also bars the incitement or promotion of hatred against such groups only where this is 'likely to lead to a breach of the peace' and includes a number of free speech defences. Kenya's emphasis, against a background of ethnic conflict, is on utterances that are 'intended to stir up ethnic hatred' or to 'incite feelings of contempt, hatred or hostility' based on 'ethnicity or race'.

The Bill goes far beyond the legitimate parameters for the prohibition of hate speech, as set out in Section 16(2) of the Constitution. It also fails the justification tests set out in Section 36 – especially as less restrictive means of curtailing hate speech are already contained in our law or could easily be crafted.

In summary, thus, the hate speech provisions in the Bill are inconsistent with the Constitution and cannot lawfully be endorsed by Parliament.

The 'hate crimes' provisions 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', based on the victim's race or other 'characteristics'.[103] A list of 17 characteristics is then set out in the Bill, many of which are the same as the 15 listed grounds in the hate speech clauses.

Listed characteristics thus again include age, disability and ethnic or social origin, along with HIV status, nationality, race, and religion. Also listed are gender or gender identity, sex (including intersex) and sexual orientation. The two additional characteristics that are

[102] Ibid

[103] Section 3, Bill

included in the hate crimes provisions, but not in the hate speech ones, are 'political affiliation or conviction' and 'occupation or trade'.[104]

Any person 'who commits a hate crime' is guilty of an offence and liable on conviction to the penalties set out in the Bill. Such penalties include any fine, prison term, or period of correctional supervision which the trial court considers appropriate and is authorised (within the limits of its jurisdiction) to hand down. A caution, reprimand, or suspended sentence may also be imposed. [105]

Where Section 51 of the Criminal Law Amendment Act of 1997 does *not* apply – in other words, where the trial court is *not* already bound to impose the minimum sentences laid down for particularly serious offences such as murder and rape – then the commission of the hate crime must be regarded as 'an aggravating circumstance' in deciding on sentence. However, this consequence will follow only where victims have:[106]

a) suffered 'physical or other injury';
b) lost 'income or support'; or
c) had their property damaged, destroyed, or lost.

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

Why the Bill's hate crime provisions are needed at all remains unexplained. The courts already have an obligation to consider all the circumstances surrounding the commission of a crime in deciding on an appropriate sentence. They also have the capacity to treat a racial motive for murder, rape, robbery, and other crimes as an aggravating factor that justifies an increased punishment. Hence, as Mr Jeffery told a meeting of the Hate Crimes Working Group in February 2015: 'Our courts are handing down appropriate sentences and where prejudice, hatred or bias is established, this is often found to be an aggravating factor, used to impose a harsher sentence.'[107]

Mr Jeffery also said 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.[108] This was illustrated, the deputy minister added, by the sentence handed down in the Duduzile Zozo case.

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[104] Section 3, Bill; Section 4(1), Bill

[105] Sections 6(1), (2), Bill; see also Sections 276 and 297 of the Criminal Procure Act of 1977

[106] Section 6(2), Bill

[107] Hon John Jeffery MP (ANC), Address by the Deputy Minister of Justice and Constitutional Development at the Annual General Meeting of the Hate Crimes Working Group, Scalabrini Centre, Cape Town, 11 February 2015, p4

[108] Ibid

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 he wanted to make a difference to all vulnerable groups "in his own small way". He said a harsh sentence…would serve as a warning to those who threatened the vulnerable… He [thus] sentenced [the perpetrator] to an effective 30 years in prison…and told [him] to reconsider his attitude towards gay people while he served his sentence. "Lead your life and let gays and lesbians be," he stressed.'[109]

Since hate motivations already count as aggravating factors warranting harsher punishments, there is no need for new legislation seeking to provide for this. In particular, there is little logic in introducing a Bill which *bars* the courts from regarding a hate motive as an aggravating factor in particularly serious cases, such as murder and rape, where minimum sentencing rules apply.

In addition, the Bill's definition of a hate crime makes the accused's motivation for the crime a key element of the offence. Hence, like other elements, it must be proved beyond a reasonable doubt to secure a conviction. Requiring this standard of proof for the motive of the accused will add to the complexity of criminal trials and could make it more difficult to secure convictions at all.

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 has 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. The video showed him being pushed down into a coffin. It also featured one of the perpetrators saying in Afrikaans 'Get in, I want to throw some petrol.'[110]

If the Bill had already been in force, the prosecution would have to prove not only the well-established elements of assault with intent to do grievous bodily harm, but also that the accused had been 'motivated by prejudice or intolerance' towards Mr Mlotshwa, based on his race or colour. 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 the high number of farm murders in the country?

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[109] Ibid

[110] *The Citizen* 16, 17 November 2016

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 current law, by contrast, the existence of aggravating (or mitigating) factors relevant to sentence need only be proved on the lower standard of a balance of probabilities.

Perversely, the hate crime provisions in the Bill could make it more difficult to convict and punish many perpetrators at all. If racial motivation is a key element of a 'hate crime' murder – but the motivation element cannot be proved beyond a reasonable doubt – then the state will have failed to prove its case and the accused would generally be entitled to an acquittal.

To circumvent this outcome, the Bill (in its Schedule of amendments to existing legislation) seeks to insert a new provision into the Criminal Procedure Act of 1977, which states: 'If the evidence on a charge for a hate crime…does not prove the commission of the offence so charged but proves the commission of the underlying offence on which the hate crime is based, the accused may be found guilty of the underlying offence so proved'.[111]

This provision makes it clear that the accused on, say, a hate crime murder charge can still be convicted of murder if all the elements of that crime, other than the prejudiced motivation, have been proved beyond a reasonable doubt. This prevents the murderer from walking free – while the prosecutor will doubtless then seek to fall back on the existing law, which requires proof of aggravating factors only on a balance of probabilities. But why then introduce the hate crime provisions in the Bill at all?

Victim impact statement

The Bill also makes provision for 'victim impact statements', which prosecutors are generally expected to provide to trial judges where either hate speech or other hate crimes are in issue.

According to the Bill, a 'victim impact statement is a sworn statement or affirmation by the victim or someone authorised by the victim to make such a statement,…which contains the physical, psychological, social, economic or other consequences of the offence for the victim and his or her family or associate'.[112]

Victim impact statements may be based on hearsay or other inadmissible evidence, but must nevertheless be admitted as evidence, says the Bill, 'unless the court, on good cause shown, decides otherwise'.[113]

[111] New Section 270A, Criminal Procedure Act of 1977, as set out in Schedule, Bill

[112] Section 5(1), Bill

[113] Section 5(2), Bill

This clause is presumably intended to help prosecutors prove the victim's injury, loss, or damage to property, which must be shown before conviction of a hate crime may be considered an aggravating circumstance under Section 6(2) of the Bill. In practice, such statements may thus help 'prove' the commission of hate speech crimes in instances where the Section 4(2) exceptions do not apply, as described in the *Ramifications* section below. The admission of these statements may accordingly encourage harsh sentences for speech that should not merit any punishment at all in an open democracy.

Directives to prosecutors

The Bill empowers the National Director of Public Prosecutions to issue directives to all prosecutors dealing with hate crimes and hate speech cases. These directives, says the Bill, will set out the circumstances in which a hate crime or hate speech charge may be withdrawn or a prosecution stopped. They will also guide prosecutors on 'the leading of relevant evidence indicating the presence of prejudice or intolerance towards the victim', so as to help secure convictions.[114]

Prevention of hate crimes and hate speech

According to the Bill, 'the State, the South African Human Rights Commission and the Commission for Gender Equality' have a particular duty to 'promote awareness of the prohibition against hate crimes and hate speech'.[115]

Various cabinet ministers, as designated by the president, must also 'conduct education and information campaigns' to inform the public about these crimes. In addition, these ministers must ensure that all relevant public officials are 'educated and informed' about the prohibition of these offences, while those officials responsible for preventing or combating them must be given appropriate training, including 'social context' training. People who want to lodge complaints about these crimes must also be 'provided with assistance and advice'.[116]

According to the Bill, judges and magistrates must also be trained in the correct adjudication of these cases. To this end, the South African Judicial Education Institute must 'develop and implement training courses, including social context training courses' for the judicial officers who will preside over these criminal prosecutions.[117] These provisions suggest, as further explored in the *Ramifications* section, that presiding officers are to be schooled into jettisoning the key principle of equality before the law. They will also be encouraged to find those from allegedly 'oppressor' groups guilty of hate speech, even as they minimise or disregard any hate speech emanating from allegedly 'marginalised' or 'subordinated' groups. The more this approach is adopted, however, the more it will conflict with the rule of law – the supremacy of which all judicial officers are obliged to uphold.

[114] Section 7(a), Bill

[115] Section 9(1), Bill

[116] Section 9(2), Bill

[117] Section 9(3), Bill

Reporting on implementation

The South African Police Service (SAPS) and National Prosecuting Authority (NPA) are already buckling under heavy caseloads which both lack the skills and resources to manage. Under the Bill, both must nevertheless devote considerable time and effort to 'collecting and collating' both 'quantitative and qualitative' data on hate crimes and hate speech. They must then use this for 'effective monitoring' and the ongoing 'analysis of trends and interventions'. This information must be made available to Parliament, the HRC, the Commission for Gender Equality, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities'. [118]

Ramifications of the Bill

Hate crimes provisions

As earlier described, the hate crimes provisions in the Bill will not allow a racist or otherwise prejudiced motive to be taken into account as an aggravating factor in the most serious cases, such as murder and rape, where minimum sentencing rules apply. The new hate crime rules will also require that a prejudiced motive be proved beyond a reasonable doubt, if a hate crime conviction is to be secured.

If motive cannot be established on this test, conviction on the underlying offence will still be possible under the proposed clause to be inserted into the Criminal Procedure Act of 1977. However, it remains unclear what benefit the hate crime provisions will bring – especially when a racist or similar motive is already viewed as an aggravating factor in determining sentence for all crimes, including murder and rape.

Hate speech provisions

So long as the definition of hate speech remains the same and the defences available are not broadened, the Bill will curtail and punish speech on many issues vital to both democracy and prosperity. This will contradict what the Constitutional Court ruled in *State* v *Mamabolo* in 2001. Here, the court highlighted 'the public interest in the open market place of ideas', and said 'we should be particularly astute to outlaw any form of thought control, however respectably dressed.' [119]

The Paul Rossi example

The dangers are best illustrated by an example drawn from the United States (US), but prescient as to what is likely to happen here. The example is that of Paul Rossi, a maths teacher at a Manhattan high school who felt compelled despite the risks (he no longer has his

[118] Section 8, Bill

[119] *State* v *Mamabolo*, 2001 (3) SA 409 (CC) at para 37

job) to question the uniform 'anti-racist' views the school expected both staff and students to endorse. [120]

Worse still, said Rossi, staff were also expected to treat students differently according to their race. In keeping with the precepts of critical race theory (CRT), 'the morally compromised status of "oppressor" was assigned to one group of students based on their immutable characteristics, [while] dependency, resentment and moral superiority were cultivated in students considered "oppressed"'.[121]

At a mandatory, whites-only student and faculty Zoom meeting at the school (racially segregated sessions had become commonplace), Rossi questioned whether people should define themselves in terms of their racial identity at all. He also questioned whether attributes such as 'objectivity' and 'individualism', which used to be seen as strengths, should be dismissed as 'characteristics of white supremacy'. [122]

His questions, he said, encouraged others to speak up and generated a more meaningful discussion. But when his words were shared outside the meeting (in breach of the school norm of confidentiality), he was told by the head of the school that his queries had 'caused "harm" to students, given that these topics were "life and death matters, about people's flesh and blood and bone"'. He was also told he had created '"dissonance for vulnerable and unformed thinkers" and "neurological disturbance in students' beings and systems"'.[123]

CRT-type thinking, in terms of which all whites are seen as oppressors and all blacks as their victims, is seeping into many South African schools too. Imagine then the difficulty a teacher here might face if the Bill's hate speech provisions were enacted into law and she wanted to question damaging CRT dogma in the way that Rossi felt compelled to do.

A teacher who asked questions of this kind in a school meeting would not have the benefit of the defences introduced by the Bill. She would not be engaged in creative activity, nor in academic research or scientific inquiry, nor in 'fair and accurate reporting in the public interest'. Nor could she be said to be 'interpreting' or 'espousing' any religious belief. Could she then be convicted of hate speech under the present Bill? This would depend on whether she had 'intentionally' communicated words 'in a manner that could reasonably be construed to demonstrate a clear intention' to be 'harmful' to people on the basis of their race.

The Rossi example suggests this test might easily be met. If she tried to argue that she intended no harm and caused none too, this could be brushed aside on the basis that she had

[120] 'I refuse to stand by while my students are indoctrinated', bariweiss.substack.com, 13 April 2021

[121] Ibid

[122] Ibid

[123] Ibid

blundered into ‘life and death matters’, thereby creating ‘dissonance’ and ‘neurological disturbance in students’ beings and systems’.

Despite the important improvements that have been made to the Bill, its current wording could still have a disturbingly chilling effect in many situations – and particularly as CRT’s exaggerations and distortions take increasing hold in universities, schools, civil society organisations, and the private sector.

What if the boot were on the other foot?
The Rossi example also suggests a rather different scenario, in which the boot might be on the other foot. What if the Bill had been made law in South Africa and CRT thinking in the country’s schools had resulted in the white high school pupils at a particular school being told they were ‘oppressors’ who were responsible for the marginalisation of black South Africans and could redeem themselves only by paying reparations for much of their adult lives.

What if those white pupils laid a charge of hate speech under the Bill against a teacher who expressed this view. Would that teacher not have caused them ‘harm’, by creating ‘dissonance for vulnerable and unformed thinkers’ and ‘neurological disturbance in students’ beings and systems’?

The teacher in question would also not be able to rely on the current defences in the Bill. For he too would not have been engaged in creative activity, academic research, scientific inquiry, or ‘fair and accurate reporting in the public interest’. Nor could he be said to be ‘interpreting’ or ‘espousing’ any religious belief. He could thus also be jailed for up to three years for an initial hate speech crime under the Bill, and for a maximum of five years for any repeat offences.

The further risk, however – based on how hate speech cases have already been dealt with in South Africa – is that interpretation and enforcement of the rules will be highly selective, with conviction depending largely on the racial identity of the speaker. Yet differential treatment of this kind would clearly infringe the rule of law and contradict the founding provisions of the Constitution.

The importance of equality before the law
Equality before the law is one of the principal elements in the rule of law, the ‘supremacy’ of which is guaranteed by Section 1 of the Constitution as a ‘founding value’ of the new order.[124] To date, however, neither the HRC nor the courts have been sufficiently rigorous in ensuring compliance with this principle in the hate speech context.

The hate speech cases earlier outlined underscore this point. Penny Sparrow was fined R150 000 under Pepuda, a sum which was crippling to her in her straitened financial

[124] Section 1(c), Constitution

circumstances and was imposed without regard for its affordability or likely impact on her.[125] In separate proceedings before a magistrate's court, she was also convicted of *crimen injuria*, for which she was ordered to pay a R5 000 fine or serve a 12-month prison sentence. An additional two-year prison sentence, suspended for five years, was imposed on her as well.[126]

Vicki Momberg, who was frightened by the smash-and-grab robbery she had experienced and seemed mentally disturbed in her constant repetition of the 'k' word some 48 times, was denied bail pending trial on charges of crimen injuria, even though she posed no obvious threat to society. She was remanded in custody for many weeks, before being found guilty on four counts of *crimen injuria*. Despite doubts as to her mental capacity at the time of the incident, she was sentenced to prison for three years, only one of which was suspended. She was released in December 2019, as part of a general remission of sentence benefiting some 14 600 prisoners [127]– many of whom had probably been convicted of more far serious crimes.

Adam Catzavelos was punished in much the same way as Sparrow. He was instructed to pay R150 000 in damages by an equality court (under a settlement agreement with the HRC) and was later also convicted of *crimen injuria*. For this, he was sentenced to a fine of R50 000 and to imprisonment for two years, though both punishments were suspended for five years. [128]

By contrast, the HRC dragged its heels in acting against Velaphi Khumalo for saying that 'white people in South Africa deserve to be hacked and killed like Jews' and their children used as 'garden fertiliser'. In time, however, the commission brought proceedings against him in the Johannesburg Equality Court, where it emerged that the ANC had previously laid a complaint against him (over the same utterances) with the Roodepoort Equality Court. [129]

However, there were many oddities in the Roodepoort proceedings, where a settlement agreement reached between Mr Khumalo and the ANC had seemingly been rubber-stamped by the court behind closed doors. Under this agreement, Mr Khumalo undertook to apologise and to pay R30 000 over 30 months to a charity of the ANC's choice. Though this was far more lenient than the sentences imposed on Ms Sparrow, Ms Momberg, or Mr Catzavelos, the Johannesburg Equality Court declined to order Mr Khumalo to pay more as it had no information on his financial circumstances. It did, however, require that he pay the costs of the HRC. It also instructed the National Prosecuting Authority to consider bringing *crimen injuria* charges against him. [130]

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[125] *SAHRC v Khumalo*, para 111]

[126] *The Citizen*, *The New Age*, *The Times* 13 September 2016; Geldenhuys and Kelly-Louw, p28

[127] Geldenhuys and Kelly-Louw, p28; News24.com, 27 December 2019

[128] News24.com 28 February 2020

[129] SAHRC v Khumalo, paras 3, 6, 12-25

[130] HRC v Khumalo, paras 20-24, 111-112

Moreover, when it came to the HRC's investigation of Mr Malema – for saying he was 'not calling for the slaughtering of White people, at least for now' – the commission was easily satisfied that his words did not amount to hate speech at all. As earlier noted, the HRC put great emphasis on the overall 'context' in which Mr Malema had spoken. In its view, the 'historical context' was 'one of unjust land dispossession' by whites, while the 'social context' was one of 'continued landlessness, poverty, and inequality'. The 'factual context' was essentially the same, for 'the subject' of Mr Malema's statement was not 'perpetrating harm against white people but the highly emotive and contested issue of land reform'. [131]

The FW de Klerk Foundation, whose complaint against Mr Malema had prompted the HRC's investigation, said the commission had 'brushed aside the truly chilling implication that Malema might call for the slaughter of white people at some later stage'. It had also disregarded 'his highly prejudicial view of history' and his false claim that whites had 'slaughtered…peaceful Africans…like animals', even though this was clearly intended to sweep up racial hatred.[132]

Lawson Naidoo of the Council for the Advancement of the South African Constitution (Casac) was critical too. The commission, he said, had disregarded the extent of Mr Malema's political influence and his likely impact on his supporters. The HRC had also failed to acknowledge that the land occupations he was urging were illegal and thus unlikely to be 'peaceful', as he ostensibly sought. In addition, the HRC 'appeared to have elevated the identity of the offender and target group above other contextual considerations'. [133]

Overall, both the HRC in Mr Malema's case and the Constitutional Court in *Qwelane* have come close to saying that liability for hate speech depends primarily on the racial identity of the speaker. The HRC, in dealing with Mr Malema, seemed to suggest that only vulnerable groups should be able to express anger and frustration through 'robust speech'.[134] In *Qwelane*, moreover, Judge Majiedt spoke of 'curtailing speech which is part and parcel of the system of subordination of vulnerable and marginalised groups in South Africa'. [135][

By contrast, the Equality Court in Johannesburg, in the *Velaphi Khumalo* case, got it right in rejecting any suggestion that the different racial groups should be treated differently in the adjudication of hate speech.

According to Judge Roland Sutherland, it will not be possible to overcome the rift between the different races if the black group is 'licensed to be condemnatory because its members

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131 'Malema's white slaughter remarks: The SAHRC's finding, Politicsweb.co.za 8 March 2019, para 16

132 timeslive.co.za 14 March 2019

133 News24.com, 9 April 2019

134 Malema's white slaughter remarks, op cit, para 16.2

135 Qwelane CC, para 86

were the victims of oppression', while whites are 'disciplined to remain silent'.[136]This does not mean that context should be ignored. On the contrary, said Judge Sutherland, historical context, personal social circumstances (Mr Khumalo had grown up in poverty under apartheid) and other pertinent issues are aggravating or mitigating factors relevant in deciding on suitable remedies for hate speech.[137]

As these cases indicate, the hate speech provisions in the Bill are likely to be used primarily against white South Africans, to help focus public attention on white racism and strengthen outrage against it. This, of course, will help lend credence to ANC assertions that white racism is the key reason for persistent poverty and inequality, rather than more salient factors such as slow growth, bad schooling, and pervasive unemployment. At the same time, calls by black South Africans for whites to be attacked and killed are unlikely to evoke either prosecution or punishment under the Bill. This differential treatment could add to racial polarisation and raise the risk of racial confrontation.

In addition, much of the racial invective emanating from the ruling party and the EFF is rooted in the ideology of the national democratic revolution (NDR), to which the ANC and its communist allies have long been committed.

This racial invective is intended to stigmatise whites, deny their contribution to the development of the country, and make it easier for the government to embark on a major programme of expropriation and nationalisation aimed at their assets. Yet this will cripple the economy, rather than provide effective redress for past injustice. The ideologues appear careless of the economic suffering this will cause, for they seem to believe that it is only after the free-market economy has been destroyed that a socialist and then communist system will be able to rise, phoenix-like, from the ashes.

The Bill will aid in this destructive process by focusing yet more public attention on the racist utterances or actions of a tiny minority of whites. In doing so, it will help these ideologues to build perceptions that such abhorrent conduct is representative of whites in general.

The Bill is thus likely to be deeply damaging. It is also unconstitutional and unnecessary – and should be withdrawn as part of a very different approach. The best way to reduce racial awareness and racial hostility is for the ANC unambiguously to embrace the Constitution's founding value of non-racialism. The ruling party should abandon its own racial invective, jettison policies that depend on racial classification and racial preferencing – and set about promoting the growth, investment, and employment most needed to increase social cohesion and help the poor and disadvantaged get ahead.

The way forward

[136] SAHRC v Khumalo, para 102

[137] Ibid, para 102

No need for new hate speech provisions

As earlier noted, Mr Jeffery, claimed in 2016 that the Bill was urgently required to counter a 'plethora' of racial incidents on social media.[138] But a comprehensive survey of public opinion on racial issues (commissioned by the IRR and carried out in September 2016) showed that only 3.2% of South Africans – and 2.4% of blacks – identified racism as a serious unresolved problem.[139] Subsequent opinion polls conducted by professional polling companies for the IRR have repeatedly revealed much the same perspective among ordinary South Africans, as earlier outlined.[140] There is thus no looming racial crisis in the country that could justify the Bill.

In addition, the best 'remedy for hateful or "wrong" speech is more speech', as Mia Swart, professor of international law at the University of Johannesburg, has pointed out. Writing in *Business Day* in January 2016, soon after the Penny Sparrow post, Professor Swart stated: 'Freedom of speech means nothing if it does not include the freedom to engage in unpopular, controversial, and even offensive speech. Freedom of speech would not be necessary if it covered and protected only correct and innocuous speech… The debates [on the Penny Sparrow issue] show that South Africans are sufficiently vocal to remedy speech with speech.'[141]

Denise Meyerson, in a paper on the risks in suppressing racial speech, has also warned against any further prohibitions on hate speech, saying: 'To drive an evil view underground can actually increase its strength, whereas to debate it out in the open is more likely to bring home its abhorrent nature…. To the extent that racial animosities continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more serious kind of discharge.'[142]

Criminalising hate speech is particularly objectionable

Turning hate speech into a crime is particularly objectionable – and especially so when the potential for the abuse of criminal defamation rules is already well known and has been particularly evident in many African states.

As far back as 2010, the African Commission of Human and Peoples' Rights responded to this pattern of abuse by resolving that criminal defamation laws should be repealed across the continent. Explaining its resolution, the commission said: 'Criminal defamation laws constitute a serious interference with freedom of expression and impede the role of the media

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[138] *The Citizen* 17 August 2016

[139] IRR, Race Relations in South Africa, Reasons for Hope 2017, p3

[140] https://irr.org.za/reports/atLiberty/liberty-critical-race-theory-race-based-policy-a-threat-to-liberal-democracy

[141] Business Day 15 January 2016

[142] D Meyerson, '"No Platform for Racists", What Should the View of Those on the Left Be?' (1990) 6 *South African Journal of Human Rights* 394, at 397

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. [143]

In September 2015, some months before the Penny Sparrow post, the then minister in the presidency, Jeff Radebe, speaking in his capacity as 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.'[144]

Mr Radebe also stressed that 'a growing democracy needs to be nourished by the principles of free speech and the free circulation of ideas and information. Criminal defamation detracts from these freedoms'.[145]

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 – are to be enacted into law.

Yet 'the shackles of criminal sanction' (to cite Mr Radebe's words once again) are unnecessary when effective civil remedies against hate speech already exist under the common law of defamation, and relevant legislation and/or codes of conduct for the print and electronic media.

Further remedies are also available under Pepuda, though its definition of hate speech must still be rectified. This should be done by changing it to echo the words of Section 16(2)(c) of the Constitution as closely as possible, as the SCA in *Qwelane* proposed. [146]

A possible bar on dangerous incitement to violence against groups

If new legislation barring incitement to violence against racial or ethnic groups has become necessary – now that the Constitutional Court in October 2019 has struck down key clauses in the Intimidation Act of 1982[147]– any such statute should be narrowly drafted to ensure its compliance with Section 16(2)(c). Useful lessons in this regard can be obtained from other countries – and particularly from Kenya and the proposals put forward by online monitoring group Umati to overcome the problems experienced there.

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[143] Dario Milo, The case against criminal defamation, http://mg.co.za/articles/2015-09-23-the-case-against-criminal-defamation

[144] Ibid

[145] Ibid

[146] Qwelane v SAHRC and minister of justice [2019] ZASCA 167

[147] *Moyo and another* v *Minister of Police and others*, *Sonti and another v Minister of Police and others*, CCT/174/18, CCT 178/18, 29 October 2019]

In keeping with Umati's suggestions, as earlier outlined,a new anti-incitement law in South Africa should focus on prohibiting 'dangerous' speech with 'a high potential to catalyse violence'. Speech would count as 'dangerous' in this way if it targeted ethnic groups, compared them to vermin, animals, or insects, urged people to arm themselves against them, and/or contained any call to violent action: whether by looting, burning, beating, forcefully evicting, and/or killing group members. [148]

A narrow prohibition of this kind would be fully in keeping with Section 16(2), as well as the guaranteed right to expression in Section 16(1). It would also comply with South Africa's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which requires the prohibition of 'any incitement to violence' or 'acts of violence against any race or group of another colour or ethnic origin'.[149]

It would also be consistent with the International Covenant on Civil and Political Rights of 1966 (ICCPR). This convention requires the prohibition of 'any propaganda for war'. It also states that 'any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[150]

The Bill itself should be scrapped in its entirety

The hate speech provisions in the Bill are clearly unconstitutional. This is a fatal defect, which means they cannot lawfully be adopted by Parliament. They will also undermine the rigorous debate that is vital to South Africa's democracy. If unevenly applied, they are likely to add to racial polarisation and racial hostility, rather than reducing these ills. In addition, insofar as the country needs hate speech provisions, the key requirement is to narrow those already contained in Pepuda – not enact new provisions that are equally in breach of the Constitution.

As for the hate crimes provisions in the Bill, these are poorly worded and confusing. They are also unnecessary, as the courts already have the capacity to take racial motivation into account as an aggravating factor in deciding sentence.

The Bill is both unconstitutional and unnecessary and should be abandoned rather than pursued. The government should instead focus on bringing the hate speech provisions in Pepuda into line with the Constitution. Section 10 of that Act should be recast so that it falls squarely within the parameters permitted by Section 16(2). 'Free speech' defences modelled on those in Australian law should also be included to protect all members of the public wanting to engage in comment and debate on matters of general interest.

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[148] Nanjira Sambuli, *Defining the Hate Speech Crime*, Umati, http://ihub.co.ke/blogs/26327

[149] Article 4 (a)(b), International Convention on the Elimination of All Forms of Racial Discrimination

[150] Article 20, International Covenant on Civil and Political Rights of 1966

Existing protections for artistic expression, academic and scientific works, religious proselytising, and fair and accurate reporting in the public interest should, of course, be retained. Liability should remain civil, rather than criminal. Enforcement should be even-handed, and penalties should focus on public apologies, community service, and the payment of damages in appropriate instances.

The government should also embrace a fundamentally different approach. Instead of fuelling polarisation, it should seek to build on the racial goodwill already so strongly evident across the country – as IRR opinion polls have repeatedly and consistently shown. It should also abandon its ideological commitment to a national democratic revolution aimed at ushering in a socialist and then communist future, which is a key reason for its over-emphasis on white racism as the most pressing problem confronting the country.

The ANC alliance should stop pretending that the reprehensible racial utterances and conduct of the few are representative of the many, when clearly this is not so. It should also abandon its own racial rhetoric, commit itself unambiguously to the constitutional 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.

South African Institute of Race Relations NPC **1st October 2021**