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

SYNOPSIS

Contents

Introduction

The Portfolio Committee on Justice and Correctional Services (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] 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. 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.

---

[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 to the Department of Justice and Constitutional Development regarding the draft Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016, 31 January 2017
[5] Section 4(1), Bill
[6] IRR submission, 2017, p2
[7] Section 4(1)(b) and (c), Bill; Section 6(3), Bill

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 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 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 be 'hacked and killed like Jews' and 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.

[8] Section 4(2), Bill
[9] Section 16(1), Constitution of the Republic of South Africa, 1996
[10] Section 4(2)(a) and (b), Bill

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 the hate-speech provisions lies in the offensive racial comments made in 2016 by Penny Sparrow (who insultingly compared black beach-goers to monkeys) and a small number of other white South Africans. This prompted the (then) Department of Justice and Constitutional Development to claim that urgent intervention was needed to help curb what the (then) deputy minister of justice and constitutional development, John Jeffery, described as 'the plethora of racial incidents happening on social media'.[12]

However, two recent opinion surveys commissioned by the IRR – the first conducted in September 2015 and the second carried in September 2016 – showed relatively little public concern about racism or popular demand for strong action against it. These two surveys (together with a third which had been conducted in 2001) had canvassed the views of comprehensive and carefully balanced samples of South Africans. These samples had been drawn from all provinces and socio-economic groups, and were fully representative in terms of race, age, employment status, and other relevant factors.

In the 2016 survey, despite the furore around Ms Sparrow and other racial utterances on social media, a mere 3.2% of South Africans – and 2.4% of black respondents – identified racism as a serious unresolved problem. Subsequent opinion polls conducted by professional polling companies for the IRR have revealed much the same perspective among ordinary South Africans over many years.

In the IRR's most recent poll, conducted in September 2021, the proportion of people who identified racism as a key problem for the government to address stood at a mere 1.6% and at 1.1% among black respondents. Far greater public concern has long been evident as regards joblessness, crime, service delivery failures, corruption, poor education, and inadequate housing.[13]

---

[11] Section 6(3), Bill

[12] *The Citizen* 17 August 2016

[13] IRR, Centre for Risk Analysis, 'The latest polling data', Presentation by John Endres and Gabriel Crouse, 30 September 2021; IRR, @Liberty, *Critical Race Theory and Race-based Policy; a threat to Liberal Democracy*, 17 May 2021

Overall, the IRR has commissioned eight opinion polls touching on racial issues, the first of which was conducted in 2001 and the remainder in every year between 2015 and 2021. The results of these field surveys have repeatedly confirmed that race relations are generally sound. There is thus no looming racial crisis in the country that could justify the Bill.

The outcomes of these field surveys cast doubt on the need for a new prohibition of hate speech. In addition, 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 too raises questions as to why new provisions should now be needed.

The Constitution and other existing laws

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.[14] The Constitution also guarantees freedom of speech, 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'.[15]

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'.[16]

The Promotion of Equality and Prevention of Unfair Discrimination Act (Pepuda) of 2000 already includes a general prohibition of hate speech. This 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'.[17] (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.)[18]

Also relevant is the common law of defamation, which can be invoked in both the civil and the criminal courts. 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 concern. Since 1994, the Constitutional Court has ruled that the crucial test is whether publication is 'reasonable' in all the circumstances.[19]

---

[14] Section 9, Constitution

[15] Section 16(1), Constitution

[16] Section 16(2), Constitution

[17] Section 10, Promotion of Equality and Prevention of Unfair Discrimination Act (Pepuda) of 2000

[18] *Qwelane* v *SA Human Rights Commission and another* [2021] ZACC 22

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

Civil defamation rules already 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 its capacity (in the words of legal expert Dario Milo) to 'adapt itself to modern circumstances and technology'.[20]

South Africa also has common law rules making defamation a criminal offence in certain instances. Here, the prosecution must prove all elements of the offence, including the 'unlawfulness' of the communication. The degree of proof required, in keeping with general principles of criminal justice, is proof beyond a reasonable doubt.[21]

Also relevant is the common law of *crimen injuria*, which prohibits the unlawful, intentional, and serious violation of the dignity of another. The victim must be aware of the offending behaviour and must feel degraded or humiliated by it. In addition, the conduct in question must be serious enough as to offend the feelings of a reasonable person.[22]

Major penalties have already been imposed under these rules on those responsible for demeaning racial speech. Section 10 of Pepuda has already been used, for example, to impose a R150 000 fine on Ms Sparrow. It has also been used to obtain damages of R100 000 from Wayne Swanepoel for using the 'k' word during an argument,[23] and to require the payment of R150 000 from Adam Catzavelos for using the same word in applauding the absence of black people from a Greek beach.[24]

Crimen injuria rules have also been used to convict:[25]

- Ms Sparrow, who was sentenced to a fine of R5 000 or 12 months' imprisonment, plus a further two years in jail suspended for five years;
- Ms Momberg, who was sentenced to three years' imprisonment, only one of one was suspended;[26]
- Mr Catzavelos, who was sentenced to a fine of R50 000 and two years' imprisonment, both of which were suspended for five years;[27] and
- Bruce Allen, who was sentenced to six months' of house arrest and ordered to pay R8 000 to the woman he insulted by using the 'k' word.[28]

---

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

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

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

[23] *Legalbrief* 15 September 2016

[24] News24.com 28 February 2020

[25] *Legalbrief* 27 June 2016

[26] News24.com, 27 December 2019

[27] News24.com 28 February 2020

[28] Legalbrief 27 June 2016

As this brief review shows, South Africa already has various laws under which racial utterances are unlawful 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

What section 16 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'.[29] Speech is thus protected unless it:

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

To count as hate speech, the communication must advocate or encourage 'hatred'. Hatred, according to the Canadian Supreme Court in *R* v *Keegstra*, means 'emotion of an intense and extreme nature that is clearly associated with vilification and detestation'.[30] The hatred expressed must be intentional, as it is not possible to have 'an emotion of an intense and extreme nature' on a negligent, accidental, or subconscious basis.

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

The advocacy must 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.

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, similar to what the common law of *crimen injuria* requires. There is thus 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 provides

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

[29] Section 16(2), Constitution

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

and criminally punish speech which has 'a clear intention to be harmful or incite harm, or to promote or propagate hatred'.[31] This wording is far wider than that contained in Section 16(2)(c) of the Constitution.

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. These include whether 'less restrictive means' could have been used to achieve the purpose of the limitation.[32]

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:[33]

> '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 *Qwelane* decision. (Jon Qwelane, a journalist, had written a newspaper article in 2008 in which he strongly criticised same-sex marriage and urged that it be ended before 'some idiot' – not necessarily a homosexual – decided to 'marry' an animal. The HRC took him before an equality court, which found the article constituted hate speech under Section 10 of Pepuda. But Qwelane contested the validity of the hate speech definition in Section 10 and the Supreme Court of Appeal (SCA) in time upheld his challenge, prompting a further appeal to the Constitutional Court.)

The unanimous ruling of the apex court was handed down by Judge Steven Majiedt, who described *Islamic Unity* as 'the lodestar for the interpretation and application of Section 16'.[34] Judge Majiedt nevertheless then largely abandoned the *Islamic Unity* approach and veered off on a different tack.

---

[31] Section 4(1), Bill

[32] Section 36, 1996 Constitution]

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

[34] *Qwelane* v *SA Human Rights Commission and another*, [2021] ZACC 22 ('Qwelane CC'), para 76

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 analysis is flawed and unconvincing for three key reasons.

First, Judge Majiedt, as earlier noted, failed to follow what he himself described as the 'lodestar' precedent on hate speech: the Constitutional Court's ruling in the *Islamic Unity* case in 2002. This judgment makes it clear (in the SCA's words) that 'all expression is protected, save anything that falls within Section 16(2)' of the Constitution.[35]

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

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

- the contradiction between his initial assessment – that Section 10 'on a plain reading, is broader than Section 16(2) in various respects' – and his subsequent finding that speech that is 'harmful or incite[s] harm' nevertheless 'aligns' with the 'advocacy of hatred' in section 16(2)'; [37]
- his further assumption that words that 'promote or propagate hatred' likewise 'accord' with the 'advocacy of hatred' in section 16(2), despite the obvious differences in these concepts;[38] and
- his failure even to acknowledge that section 16(2) requires not only the 'advocacy of hatred', on a closed list of four grounds, but also 'incitement to cause harm'.

Third, Judge Majiedt was dealing with civil law liability under Pepuda, a statute which (as he noted) aims 'not to punish the wrongdoer, but [rather] to provide remedies for victims of hate speech'.[39] By contrast, the Bill makes hate speech a crime that can be punished by prison terms of up to three years on a first offence and up to five years on any subsequent one.[40]

In creating criminal liability, the Bill exposes people to the same chilling effects as criminal defamation rules in various African states. The key risk with criminal defamation, notes legal expert Dario Milo of Webber Wentzel, is that it can be enforced by governments in the same way as other crimes. Writes Mr Milo: 'Criminal defamation is a crime in the same way that

[35] *Qwelane* v *SA Human Rights Commission and another* [2019] ZASCA 167, para 51
[36] Ibid,
[37] Qwelane CC, paras 77 and 135
[38] Ibid, para 135
[39] Ibid, para 194
[40] Section 6, Bill

stealing a car is. A charge gets laid against you, the police investigate the charge, and you may be arrested.' [41]

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 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'.[42]

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 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 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 'justification criteria' in Section 36

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'.[43]

When these criteria are applied to the Bill, it does not meet the requirements for a valid limitation. First, the right which it limits is the right to free expression. This is a particularly important right, which the Constitutional Court has previously described as 'the lifeblood of an open and democratic society'.[44]

Second, the 'nature and extent' of Bill's provision are problematic, for the definition of hate speech is too wide while the penalties laid down are too severe. This is sure 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 in the

[41] Dario Milo, The timely demise of criminal defamation law', http://blogs.webberwentzel.com/2015/10/the-timely-demise-of-criminal-defamation-law
[42] Milo, ibid
[43] Section 36(1), Constitution
[44] *Dikoko* v *Mokhatla* 2006(6) SA 235 (CC), at para 92

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.

Third, 'less restrictive' means to achieve the purpose of curtailing hate speech are readily available. Hate speech is already prohibited under Pepuda (though Section 10 still needs to be brought into line with Section 16(2)(c) of the Constitution), as well as the common law rules on defamation and *crimen injuria*, as earlier described. Hence, there is no need for the Bill at all – and certainly not for a measure that strays so far from what Section 16 of the Constitution permits.

Hate speech laws in Australia, Canada and Kenya

Mr Jeffery earlier suggested that the initial draft bill was modelled on hate speech rules in Australia, Canada, and Kenya. However, analysis of the relevant rules in these countries shows that the Bill, even in its current amended form, is in fact very different from these laws.

In ***Australia***, the Racial Discrimination Act of 1975 makes it unlawful publicly to insult, humiliate, offend, or intimidate people or groups on the basis of their 'race, colour, or national or ethnic origin'. The list of prohibited grounds is short, while liability is civil rather than criminal. In addition, to ensure proper protection for freedom of expression, the Act sets out various circumstances in which the prohibition does not apply.[45]

Hence, if the communication is part of an artistic work, it is not unlawful. Also excepted are academic and scientific works, and debates or comments on matters of public interest. A third exception permits fair and accurate reporting and commenting by the media on any matter of public interest. Offensive and racially-based material is thus permitted in these spheres, provided the person communicating it has acted 'reasonably and in good faith'.[46]

In ***Canada***, the Criminal Code of 1985 (in Section 318) makes the public dissemination of 'hate propaganda' a criminal offence punishable by imprisonment for up to five years. But it defines 'hate propaganda' narrowly as any communication that 'advocates or promotes genocide' against 'an identifiable group' distinguished by race, ethnicity, gender, religion, and a limited number of other characteristics.[47]

The Criminal Code (in Section 319) also prohibits the 'public incitement' or 'wilful promotion' of hatred against such groups, but only where this is 'likely to lead to breach of the peace' or public violence. Various free speech defences are also available. In addition, prosecution under either section requires the consent of the Attorney-General, who is a cabinet minister. This ensures political accountability in the use of the law.[48]

---

[45] 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

[46] Ibid

[47] Section 318, Criminal Code of Canada, 1985

[48] Section 319, Criminal Code of Canada

The Canadian Human Rights Act of 1977 used to include a broad prohibition of hate speech in Section 13, but this provision was repealed in 2013. This came about after the Canadian Islamic Congress had used the provision to lay three complaints (in three separate forums) against MacLean's magazine for publishing articles warning against a growing threat from Islam to the West. The articles were based on Mark Steyn's best-selling book *America Alone*.

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. The matter stirred up so much public controversy about the wide reach and uneven enforcement of Section 13 that the provision was subsequently repealed.[49]

In ***Kenya***, against the background of the 2007/08 ethnic conflict which cost some 1 300 lives, the 2010 Constitution's guarantee of freedom of expression does not extend to 'propaganda for war, incitement to violence, hate speech, or advocacy of hatred that constitutions ethnic incitement, vilification of others, or incitement to cause harm'.[50]

In addition, Section 62 of the National Cohesion and Integration (NCI) Act of 2008 makes it a criminal 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'. To help prevent such words being spread by the media, Section 62 of the NCI Act also makes it an offence for 'a newspaper, radio station or media enterprise to publish such utterances'. [51]

These NCI provisions are significantly narrower than those found in the Bill, especially as the prohibited grounds under the NCI are confined to 'ethnicity or race'. Kenya's hate speech laws have nevertheless been criticised for going well beyond what binding international treaties allow.[52] They have also been unevenly applied: a university student was recently jailed for two years for criticising the president and saying a particular ethnic group should be deported, whereas politicians have repeatedly escaped any such punishment for more inflammatory speech aimed at various ethnic groups.[53]

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' which is

[49] Wikipedia, Voice Voix, *America Alone*

[50] Milly Lwanga, 'Freedom of expression and harmful speech: the Kenyan situation', 2 September 2012; Article 33(2), Constitution]

[51] Lwanga, ibid

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

[53] Nanjira Sambuli, 'Defining the Hate Speech Crime', Umati, http://ihub.co.ke/blogs/26327; Njeri Kimani, Kenya: Hate speech as a political tool risks inciting more violence', *Daily Maverick*, 15 June 2016

based the victim's race or other 'characteristics'. 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 included in the hate crimes provisions, but not in the hate speech ones, are 'political affiliation or conviction' and 'occupation or trade'.[54]

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. [55]

In addition, if Section 51 of the Criminal Law Amendment Act of 1997 does *not* apply – in other words, if the trial court is *not* bound by minimum sentencing rules for serious offences such as murder and rape – then the commission of the hate crime must be regarded as 'an aggravating circumstance' in deciding on sentence. However, this obligation will apply solely where the victim's property has been lost or damaged, or the victim has suffered 'physical or other injury' or has lost 'money,…income, or support'.[56] This wording is distinctly odd, for it suggests that racial hatred may no longer count as an aggravating factor for murder, rape, and other particularly serious crimes once the Bill has been enacted into law.

Why these hate crime provisions are needed at all remains unexplained. The courts already have an obligation to take account of 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'. 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.[57]

---

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

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

[56] Section 6(2)(a)(b), Bill

[57] 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

Requiring the prosecution to prove the commission of hate crimes will also pose various problems. All elements of the new crimes, including the racial (or other) 'prejudice, bias or intolerance' that 'motivated' the perpetrators, will then have to be proved beyond a reasonable doubt. But this standard of proof might in practice be difficult to meet, especially if the accused were to claim a different motivation. This might prevent harsher penalties from being handed down where the necessary motive cannot adequately be shown. By contrast, under current law, the existence of aggravating factors relevant to sentence need be proved only on the lower standard of a balance of probabilities.

Requiring the prosecution to prove the relevant motive beyond a reasonable doubt could also make trials longer and more complicated. This would put even more of a burden on the already struggling criminal justice system.

Victim impact statements

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'.[58]

Victim impact statements may thus 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'.[59]

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 also 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.

Ramifications of the Bill

Since the defences included in Section 4(2) do not go far enough, the Bill will expose many people to arrest, prosecution and punishment simply for engaging in comment or debate on issues vital to democracy and prosperity. This is contrary to hate speech rules in other countries and cannot meet the justification criteria in Section 36 of the Constitution.

[58] Section 5(1), Bill
[59] Section 5(2), Bill

There is also a great likelihood that double standards will apply in the enforcement of both the hate speech and the hate crime provisions in the Bill. Yet 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.[60]

As regards hate speech, double standards in the treatment of white and black South Africans are already evident. Penny Sparrow has been severely fined under Pepuda and convicted of *crimen injuria*. Significant penalties have also been imposed on several other white South Africans for using the 'k' word or otherwise insulting black people. However, no such penalties have thus far been imposed on black South Africans for inciting violence against whites.

Velaphi Khumalo, who in January 2016 called for whites to be 'hacked and killed like Jews', was in time obliged to pay R30 000 in damages (spread over 30 months) to a charity of the ANC's choice, while his utterances were also referred to the National Prosecuting Authority for possible prosecution for *crimen injuria*.[61] Mr Malema was exonerated by the HRC for his implicit suggestion that whites should be 'slaughtered' at some time in the future.[62]

Major Mohlala was dismissed by the South African National Defence Force for urging further violence against an elderly white man who had already been attacked, but was not otherwise punished.[63] Little action has been taken against a University of Pretoria student, Luvuyo Menziwa, who called for 'a bazooka or AK47' so that he could kill white people, or against Benny Morota, a Unisa law lecturer, who also threatened violence against whites.[64] In addition, The HRC has also failed to act against President Jacob Zuma, who publicly sang the 'Kill the Boer' song in January 2012 and called on his cabinet to 'shoot them [whites] with the machine gun'.[65]

As for the Bill's hate crime provisions, there is also a real risk that these too will not be applied even-handedly. Some commentators see farm attacks as motivated by racial hatred, especially given the degree of gratuitous violence that sometimes accompanies these incidents. (In January 2017, for instance, Hannes Kidson and his wife Ester, both 69 years old, were killed on their Gauteng farm. Ester, who was in a wheelchair, had her throat cut. Hannes was found in his work-shed, also with his throat slit.)[66] However, the government has long resisted any such interpretation of farm murders, saying that robbery is the primary

[60] Section 1(c), Constitution
[61] SA Human Rights Commission v Khumalo, Equality Court, Gauteng Local Division, Johannesburg, 5 October 2018, para 121
[62] 'Malema's white slaughter remarks: The SAHRC's finding, politicweb.co.za, 8 March 2019, paras 18-20
[63] J Geldenhuys and M Kelly-Louw, 'Hate Speech and Racist Slurs in the South African Context: Where to Start?' www.scielo.org.za, p13
[64] Ibid, p12
[65] News24.com 5 November, 16 June 2016, *Legalbrief* 31 August 2016
[66] *The Citizen* 16 January 2017

motive for farm attacks and that farms are a particularly tempting target in the midst of rural poverty.[67]

How willing then will the National Prosecuting Authority to prosecute the alleged perpetrators of farm attacks for the new hate crimes of racially motivated robbery, assault, and/or murder? Yet if the hate crimes provisions are used primarily against white perpetrators and rarely against black ones, this will add to racial tensions, foster racial polarisation, and make it more difficult to uphold the Constitution's founding value of non-racialism.

The way forward

No need for additional hate speech provisions

Mr Jeffery claimed in 2016 that the Bill was urgently required to counter a 'plethora' of racial incidents on social media.[68] But eight comprehensive opinion polls on racial issues, commissioned by the IRR over many years, show that very few South Africans, including black respondents, identify racism as a serious unresolved problem.[69] 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.'[70]

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.'[71]

Criminalising hate speech is particularly objectionable

---

[67] Anthea Jeffery, *Chasing the Rainbow: South Africa's Move from Mandela to Zuma*, IRR, Johannesburg, 2010, pp289-290

[68] *The Citizen* 17 August 2016

[69] IRR, @Liberty; CRT and Race-based Policy: a threat to liberal democracy, 17 May 2021

[70] *Business Day* 15 January 2016

[71] 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

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 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.[72]

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.'[73]

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'.[74]

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, relevant legislation and/or codes of conduct for the print and electronic media, and also under Pepuda (though its definition of hate speech must still be rectified, as outlined below).

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)[75] – this should be narrowly drafted to ensure its compliance with Section 16(2)(c). Useful lessons can also be obtained from other countries – and particularly from experience in Kenya and the proposals put forward by online monitoring group Umati to overcome the problems experienced there.

---

[72] Dario Milo, 'The case against criminal defamation', Mail & Guardian, 23 September 2015

[73] Ibid

[74] Ibid

[75] *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, 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.[76]

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'.[77]

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'.[78]

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.

Existing protections for artistic expression, academic and scientific works, religious proselytising, and fair and accurate reporting in the public interest should, of course, be

[76] Nanjira Sambuli, *Defining the Hate Speech Crime*, Umati, http://ihub.co.ke/blogs/26327
[77] Article 4 (a)(b), International Convention on the Elimination of All Forms of Racial Discrimination
[78] Article 20, International Covenant on Civil and Political Rights of 1966

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 by seeking to build on the racial goodwill already so strongly evident across the country, as IRR opinion polls have repeatedly and consistently shown. It should 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**