

Ulawulo Lomthetho/Ngokomthetho
Puso ya Molao
Oppegesag van die Reg



January 2019

**SUBMISSION TO THE
DEPARTMENT OF JUSTICE
AND CORRECTIONAL SERVICES
ON THE
PREVENTION AND COMBATING OF
HATE CRIMES AND HATE SPEECH BILL, 2018**

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1. Executive summary

The Prevention and Combating of Hate Crimes and Hate Speech Bill, now in its second version, is a far cry away from the tyrannical disaster that the first version of the Bill was. It did away with the notion that ordinary “insults” that seek to “ridicule” or bring people into “contempt” could be considered hate speech and thus sanctionable by imprisonment for up to a decade; and it did away with the protected grounds of “belief” and “occupation”. The new Bill is far more faithful to the constitutional definition of hate speech, and, as such, no longer poses an existential threat to democracy and freedom in South Africa, as did its predecessor.

The Bill is, however, still not perfect.

The Free Market Foundation, which has been involved in every step of the public participation process since the first version of the Bill was announced, remains concerned about the following three factors:

- The hate speech provisions in the Bill, as in 2016, remain unnecessary, as existing anti-hate speech law and doctrine is sufficient.
- The Bill’s definition of hate speech does not align fully with the constitutional definition of hate speech, which it must; and,
- The Bill’s definition of hate speech is unnecessarily complicated and stated in unashamed legalese, making it difficult for those to who it applies, to understand it.

Ideally, the Free Market Foundation recommends the Bill be changed to reflect its original roots: an anti-hate crimes bill. In other words, the hate speech provisions throughout the Bill should be removed on the understanding that South Africa’s other anti-hate speech measures have been successful. Introducing new law for its own sake should never be on the parliamentary agenda.

Short of this ideal, however, the Free Market Foundation recommends that the Bill’s labyrinthian definition of hate speech be replaced with the words used to define hate speech in section 16(2)(c) of the Constitution, so as to bring this aspect of the Bill into full constitutional accord, and to simplify the language so that ordinary South Africans can understand and adhere to it.

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2. Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)¹ is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project² is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

3. Introduction

The original iteration of the Prevention and Combating of Hate Crimes and Hate Speech Bill (the Hate Speech Bill), the subject of widespread public disapproval, was published in 2016 and included provisions that would have seen the end of freedom of expression in South Africa. The public engagement on this bill, and government heeding the concerns of civil society, is a welcome incident of public participation in good faith, for which government must be commended.

The Hate Speech Bill, originally intended to be a hate crimes bill, initially criminalised petty insults that ridiculed or brought people into contempt based on their occupations or beliefs. This would have meant that insults directed at the President, or directed at bad or ill-considered opinions, could land one in jail for up to three years for a first offence, and up to ten years for consequent offences.

The Bill had irredeemable qualities that posed an existential threat to the continued existence of democracy, by abolishing freedom of expression, entirely, in South Africa. FMF Rule of Law Project chairperson, former judge Rex van Schalkwyk, said the Bill would "outlaw, with criminal penalties, the richly deserved ridicule of a variety of politicians and other such individuals. Zapiro, and others like him, will, regrettably, be silenced or imprisoned." The Bill contained no defences or exemptions.

This conception of hate speech did not align with the definition of hate speech found in section 16(2)(c) of the Constitution; that is, *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm*. The Bill's hate crime provisions were also problematic, as they overlapped with the prohibition of hate speech to such an extent that any conviction of hate speech would have automatically meant guilt of hate crime as well.

¹ www.freemarketfoundation.com.

² www.ruleoflaw.org.za.

The FMF therefore welcomes the changes to the Hate Speech Bill.

The new Bill is a marked improvement. Hate speech is now defined as publication, propagation, advocacy or communication, in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm or promote or propagate hatred, based on various grounds.

This definition, despite its labyrinthine character, accords closely with that of the Constitution, albeit imperfectly. There are only four protected grounds in the Constitution – race, ethnicity, gender, and religion – whereas the current Bill includes fifteen protected grounds, including age, culture, and language.

The FMF recommends in the strongest terms that the definition of hate speech in the Constitution be used in the Bill without substantive modification.

The new Bill also makes generous provision for exemptions from the prohibition against hate speech. These include artistic expression; scientific and academic inquiry; religious expression; and, crucially, commentary and reporting that is fair and accurate. This is appropriate and necessary.

While the current Bill is much better than its predecessor, its hate speech provisions are still an unnecessary intervention. Existing South African law regulates hate speech adequately and should be preferred to the introduction of a new law.

The Promotion of Equality and Prevention of Unfair Discrimination Act already prohibits hate speech, and the Films and Publications Act empowers the Films and Publications Board to refuse classification to publications which contain hate speech. Most notably, the doctrine of *crimen injuria* has been used in our law to prosecute cases of hate speech, most notably the case of Penny Sparrow and more recently that of Vicki Momberg. *Crimen injuria* is superior to the proposed Bill because it does not merely require someone's dignity to have been violated, but also requires that the reasonable person, in the same circumstances, would also have felt degraded. This means that the courts will not allow petty disputes where one person merely offended another, for instance, with a joke, to end up with someone spending three years in prison.

While the Bill no longer poses an existential threat to freedom and democracy in South Africa, it would be ideal for the Bill to return to its original purpose – hate crimes – and for hate speech to be regulated by already-existing law. If government does not wish for the Bill to concern itself only with hate crimes, the FMF cannot recommend highly enough that the legalistic definition of hate speech in the Bill be replaced with a reproduction of the definition found in section 16(2)(c) of the Constitution.

4. Free expression and its limitation in the Constitution

The importance of freedom of expression to the battle of ideas and to personal autonomy was discussed at length in the FMF's submission on the first edition of the Bill, and will not be revisited

here.³ Instead, the constitutional position regarding hate speech and limiting expression will be discussed.

Section 16 is part of chapter 2 of the Constitution, otherwise known as the Bill of Rights. The Bill of Rights codifies the protections for rights, liberties, and obligations which the people of South Africa may exercise unhindered by other persons or government.

Section 7 is the first provision in the Bill of Rights, and provides as follows:

- “7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

This section highlights the importance of the Bill of Rights, elevating it to “a cornerstone of democracy in South Africa”. Section 2, crucial for purposes of this submission, binds the State with the provisions of the Bill. Finally, section 3 subordinates any right in the Bill to the application of internal limitations as well as general limitations, as found in section 36.

Section 16 does two things. Firstly, in section 16(1), it guarantees the right to freedom of expression:

- “16. (1) Everyone has the right to freedom of expression, which includes —
- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.”

This section is the actual ‘right’ which the Constitution protects. Implicit in this provision is also a prohibition against the State using its power to suppress individuals from making use of the freedoms recognised in this section.

Of importance here and throughout, is section 16(1)(b), the “freedom to receive or impart information or ideas”.

The protection for this right, like that of any other right, is not absolute, as is stated in section 7(3).

Secondly, in section 16(2), the Constitution limits the preceding right to freedom of expression:

³ Van Staden M. “Submission to the Department of Justice and Constitutional Development on the Prevention and Combating of Hate Crimes and Hate Speech Bill.” (2017). Free Market Foundation.
<http://www.freemarketfoundation.com/publications-view/submission-hate-speech-bill>.

“(2) The right in subsection (1) does not extend to —

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) **advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.**” (my emphasis)

This is a *numerus clausus* – a closed list – which means that the right in section 16(1) above can only be limited in terms of what section 16(2) actually provides, and nothing more. Only those three subsections can cause the State to legitimately limit freedom of expression.

Of importance within the context of this submission, then, is clearly section 16(2)(c), which prohibits the advocacy of hatred based on four listed grounds, being race, ethnicity, gender, and religion. But this advocacy is only prohibited if it constitutes incitement to cause harm. This is the constitutional definition of hate speech.

4.1 Section 16(2) – limitation of freedom of expression

Every right in the Constitution, as well as foreign bills of rights, contains internal limitations. These internal limitations serve the purpose of limiting a right more specifically than it might otherwise be limited under a general limitation provision, in order to provide for particular contexts where the right must be limited.

Internal limitations can take two forms: Those limitations evident from the text itself, and those limitations expressly provided for. In the first case, the protection of the right is circumscribed by the way that right’s protection is described. For instance, if the protection of the right to privacy *only* said people’s *homes* may not be searched without a warrant, then it would be easier (all things being equal) to justify government searching a *vehicle* without a warrant. In other words, the right’s protection is not infinitely open-ended. In the second case, a provision in the right provides for a limitation.

Section 16(2) is the internal limitation provision of the right to freedom of expression in South Africa.

For the context of this submission, section 16(2)(c) is the applicable provision to bear in mind, as it constitutes the Constitution’s definition of hate speech. As quoted above, it provides that expression which advocates hatred based on race, ethnicity, gender, or religion, and which constitutes incitement to cause harm, are not protected.

This limitation outlines five requirements for when hate speech (i.e. unprotected speech) would be present:

- **Advocacy** of
- **Hatred** that is based on
- **Race, ethnicity, gender, or religion**, which amounts to

- **Incitement** to cause
- **Harm.**

For some expression to fall outside of the Constitution's protection of speech as far as hate speech is concerned, then, one must satisfy *each* of the above five requirements. (It must be emphasised that every one of them must be satisfied – merely satisfying one or even four of the five requirements will still amount to constitutionally-protected speech.)

Advocacy implies that there must be a public dimension to the expression and that some cause, policy, or action must be recommended. This cause, policy, or action must be nothing more or less than *hatred*.

According to the oft-cited Canadian Supreme Court case of *R v Keegstra*, hatred means “emotion of an intense and extreme nature that is clearly associated with vilification and detestation”.⁴ In other words, the hatred must be intentional and subjective to the individual advocating it. It is not possible to negligently or accidentally have an “emotion of an intense and extreme nature”, especially not if that emotion is a desire to vilify or detest. Intention also presupposes consciousness. There is no such thing as a subconscious intention.

This advocacy of hatred must relate to no ground or grounds other than *race, ethnicity, gender, or religion*. Advocacy of hatred based on any other group characteristic cannot be limited in terms of this section, but might be limitable in terms of section 36. If this advocacy of hatred is accompanied by an incitement to imminent violence, however, it will fall foul of section 16(2)(b), and it does not matter on what ground such advocacy is based.

The advocacy must amount to *incitement* – a call to action. In other words, mere advocacy of hatred is *still* protected expression. But when there is a call to action – an incitement to cause harm – it becomes hate speech, and is no longer protected. ‘Incitement’ is a specific criminal law concept. In South African law, incitement is defined in the Riotous Assemblies Act⁵ and means “incites, instigates, commands, or procures any other person to commit any offence, whether at common law or against a statute or statutory regulation”.⁶

Building upon ‘hatred’, as defined above, the incitement itself must also be intentional, and cannot happen negligently or accidentally.⁷

Finally, the advocacy which constitutes incitement must be to cause *harm*. Botha and Govindjee,⁸ in arguing for the introduction of hate speech regulations in South Africa, built upon the constitutional hate speech provision and argued that cases of “wilful incitement to cause severe harm” must be prosecuted by the State. They defined harm as the advocacy of physical violence. However, because

4 *R v Keegstra* [1990] 3 SCR 697.

5 Riotous Assemblies Act (17 of 1956).

6 Section 18(2)(b).

7 Snyman CR. *Criminal Law*. (2014, 6th edition). Durban: LexisNexis. 290.

8 Botha J and Govindjee A. “Regulating cases of ‘extreme hate speech’ in South Africa: A suggested framework for a legislated criminal sanction.” (2014). 27 *South African Journal of Criminal Justice*.

section 16(2)(b) already outlaws incitement of imminent violence, it is to be presumed that section 16(2)(c)'s provision has wider application. In this respect, the criteria relating to the doctrine of *crimen injuria* is apt to note, as it is the clearest common law doctrine which relates to non-physical harm which potentially carries penal repercussions.

Crimen injuria is the unlawful and intentional serious violation of the dignity or privacy of another.⁹ To determine whether someone's dignity has been seriously violated, both a subjective and an objective test are utilised.¹⁰ In the subjective sense, there must be an awareness of the offending behaviour, and degradation or humiliation must have followed from it.¹¹ In the objective sense, the reasonable person in the same circumstances must also have felt degraded or humiliated.¹²

Therefore, in summation, a person must have the intention to advocate hatred based on race, ethnicity, gender, or religion, which constitutes incitement to cause physical harm or seriously violate dignity, based on those grounds.

4.2 Section 36 – general limitation of rights

Overview

Not only does the Constitution contain internal limitations found within each granted right, but there is also the general limitation provision in section 36(1), which empowers the State to limit any right in the Bill of Rights if the limitation adheres to the criteria set out in that section. Section 36 provides as follows:

“36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

While the courts may take into account factors other than those listed in section 36(1)(a)-(e), it has been customary for the courts to limit themselves to these five factors which appear in the text.

⁹ *S v Sharp* 2002 1 SACR 360 (Ck).

¹⁰ Snyman (footnote 7 above) 463.

¹¹ *R v Van Tonder* 1932 TPD 90.

¹² Snyman (footnote 7 above) 464.

The relationship between section 16(2)(c) and section 36

As has been noted, section 16(2) is an internal (specific, particular) limitation, and section 36 is a general limitation.

One of the rules of statutory and constitutional interpretation is that the specific must take precedence over the general. Professor Lourens du Plessis describes the principle of “adjudicative subsidiarity”, especially as it related from the case of *SANDF Union v Minister of Defence*,¹³ as “a subordinate, less encompassing and more specific legal norm is relied on to adjudicate certain cases in preference to a superordinate, more encompassing and general constitutional norm”.¹⁴

This is similar to the doctrine of *lex specialis*, which means, essentially, that law governing or applying to a specific matter will overrule law governing or applying to a general matter. Stefan Ulrich Pieper, as discussed by Du Plessis in the same book quoted above, spoke of “logical subsidiarity”, which:

“... is a methodological criterion designating one of two competing legal norms for application in a given situation, and preferring, as a rule of thumb, the specific to the general norm. The latter ought to be applied only when the former is not applicable. Elsewhere, Pieper refers to this criterion as ‘the *lex specialis* rule’.”¹⁵

In fact, if the various provisions of the Constitution are taken as laws in and of themselves, as they should be, this is a case of *lex specialis* in the Constitution itself.

Section 36 is a general provision whose blanket falls over the entirety of the Bill of Rights, and section 16(2) is a specific provision whose blanket falls only over section 16. It is a specific/particular limitation of freedom of expression, whereas section 36 is merely a tool that can be used to potentially invoke a limitation of a right if a process is followed. It does not limit rights itself, but allows government to limit them if it satisfies certain requirements. The distinction between the general and the specific here should be clear.

The fact that section 16(2) already contains an internal limitation of the right to freedom of expression must lead any reasonable court to assign less weight to section 36 in any case regarding whether someone’s expression has been limited, and if so, whether it is justifiable. Indeed, if one engages in some kind of expression that is not limited by anything contained in section 16(2), and then section 36 is used (without any extraordinary ado) to limit that expression, then section 16(2) is effectively rendered redundant, and its inclusion in the Constitution is, as a result, useless.

Why have a provision like section 16(2) if section 36 will always trump it? There would be no point in saying government may prohibit only the closed list of advocacy for war, incitement to imminent

¹³ *SANDF Union v Minister of Defence & Others* 2007 (5) SA 400 (CC).

¹⁴ Du Plessis LM. “Interpretation” in Woolman S & Bishop M. *Constitutional Law of South Africa*. (2013, 2nd edition). Cape Town: Juta. 32.114.

¹⁵ Du Plessis (footnote 14 above) 32.144.

violence, and hate speech, if government can prohibit practically any expression by invoking section 36.

Given that a specific limitation already exists, it goes a long way to signifying that the Constitution and its drafters have already foreseen the necessary limitations to freedom of expression and provided for them. That does not mean section 36 does not apply, but should, and arguably can, only be applied in very rare circumstances and subject to far stricter scrutiny by the courts.

It is not denied that section 36 is applicable. Indeed, like section 16(2), section 36 cannot be considered redundant. Every word in the Constitution must be given effect. I cannot emphasise this enough: Section 36 applies. But the manner in which section 36 applies must, of necessity, change, if section 16(2) is to be given the respect it deserves. In other words, when government attempts to justify a limitation of freedom of expression beyond the confines of section 16(2), it should satisfy a far higher standard of proof and reason than it ordinarily would need to when undertaking the section 36 procedure.

The section 36 analysis

Laws which limit rights must be “reasonable and justifiable in an open and democratic society”.

The FMF was instrumental in having this portion of section 36 added to the Constitution, and thus we write with confidence when we say that the ‘open society’ is a concept developed by Karl Popper in his work *The Open Society and Its Enemies*. The ‘open society’, according to Dr Alan Haworth, “is a society characterised by institutions which make it possible to exercise the same virtues in the pragmatic pursuit of solutions to social and political problems”. These ‘virtues’ which must be possible to exercise are “creativity and imagination in the formulation of theories and hypotheses, as well as in devising experiments with which to test them; critical rationality in the assessment of theories and other claims; the toleration required to recognise that other peoples’ theories could be rivals to your own”.¹⁶

Therefore, for a limitation to be justifiable in an open society, the limitation must *still* allow individuals to exercise these aforementioned virtues in their daily lives. In other words, they must have the freedom to express themselves and manifest their own ‘experiments’ to arrive at certain conclusions.

The Constitution’s provision could have stopped at “open and democratic society”, but it goes further, and says “an open and democratic society based on human dignity, equality and freedom”. These values of dignity, equality, and freedom also appear in section 1 of the Constitution, meaning these are founding values for South Africa, and not simply filler text.

These values also complement one another, in that no individual’s dignity is truly being respected if he has no substantive freedom.

¹⁶ Haworth A. “‘The Open Society’ Revisited”. (2002). *Philosophy Now*.
https://philosophynow.org/issues/38/The_Open_Society_Revisited.

Furthermore, the factors listed in section 36(1)(a)-(e) further narrow the scope of the limitation of rights, and allow the courts to take other, unlisted factors into account, to decide whether or not the limitation is justifiable in an open and democratic society which is committed to the values of human dignity, equality, and freedom.

As we are dealing with freedom of expression in this submission, we will briefly discuss this right in relation to each of the factors listed in section 36(1)(a)-(e).

(a) The nature of the right.

The right to freedom of expression, by its very nature, is meant to protect speech which might be offensive to other persons. This stands to reason, for why would the freedom to discuss the weather, the taste of certain food sorts, or sports, require constitutional protection? For the most part, these are inoffensive topics for discussion, meaning nobody will take action to hinder this expression.

On the other hand, political and economic expression by a person or group of persons is more often than not offensive to another person or group of persons. It is because this other group of persons – which is often the State – may try to coerce the former into silence that such a thing as the ‘right to freedom of expression’ exists.

As I have written elsewhere:

“Of what relevance is the right to freedom of expression, for example, if an individual is in any case not allowed to say the most demeaning or offensive thing conceivable to another? If a particular statement is not offensive to anyone, then there need not be a constitutional protection for it, as no individual will challenge it in court. However, the constitutional protection exists *because* others might be offended or affronted by certain statements which they would desire to be censored. Indeed, the very nature of freedom of expression is supposed to protect the most unpopular perspectives, otherwise rendering this constitutional protection useless.”¹⁷

In the case of *SABC v NDPP*, the Constitutional Court further emphasised the nature of this right:

“This Court has frequently emphasised that freedom of expression lies at the heart of 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 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.”¹⁸

¹⁷ Van Staden M. *South African Law and Social Engineering*. (2016). LL.B dissertation. University of Pretoria.

¹⁸ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC).

(b) The importance of the purpose of the limitation.

Hate speech is a deeply emotional and divisive aspect in any society, especially if it has the potential to lead to physical violence and civil strife. In this case, the purpose of the limitation cannot be questioned on its importance and noble intention.

(c) The nature and extent of the limitation.

The extent of the limitation has an undeniable effect on its justifiability. If freedom of expression is banned *in toto* then the limitation will never be justified. If freedom of expression is allowed absolutely, then it will also not be justified, in light of section 16(2) of the Constitution. The more severe the nature and extent of the limitation, the greater the chances of it being unjustifiable, and vice versa.

(d) The relation between the limitation and its purpose.¹⁹

This is simply the requirement of rationality restated in constitutional terms. Rationality is one of the two legs of reasonableness. Reasonableness, in this context, means that a reasonable person will come to the conclusion that the limitation will achieve its purpose.

As we already know, a limitation must be “reasonable and justifiable” to persist, in terms of the Constitution.

For the limitation to be justifiable, thus, it must be rational, meaning the limitation must be objectively capable of achieving the purpose. In other words, evidence must support the notion that the limitation will effectively combat the problem identified.

(e) Less restrictive means to achieve the purpose.

This is the second leg of reasonableness, and is a constitutional restatement of the requirement of proportionality. In *S v Manamela*²⁰ the Constitutional Court described proportionality as the notion that one ought not to use a sledgehammer to crack a nut.

If less restrictive means are available to the government to achieve the purpose, then it must exhaust those means before resorting to harsh action, such as the Hate Speech Bill.

As we will discuss below, existing law is sufficient in the combating of hate speech, and, furthermore, no public order or public moral crisis is happening, as a report on South African race relations shows.²¹

¹⁹ We rely in large part on the following book for the following two sections.

Hoexter C. *Administrative Law in South Africa*. (2012, 2nd edition). Cape Town: Juta. 340.

²⁰ *S v Manamela* 2000 (3) SA 1 (CC).

²¹ “Race Relations in South Africa: Reasons for Hope 2018 – Holding the Line”. (2018). Institute of Race Relations. <https://irr.org.za/reports/occasional-reports/files/reasons-for-hope-2018-2014-holding-the-line.pdf>.

5. Other measures combating hate speech

In addition to the Constitution in section 16(2) which does not provide protection for hate speech, two further Acts of Parliament regulate hate speech, in addition to the common law doctrine of *crimen injuria*.

The Equality Act, in the aptly-titled section 10 (“Prohibition of hate speech”), provides:

“10. (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to —

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”

While much more verbose, this section is closely aligned with what the Constitution provides in section 16(2)(c). To the extent that the Equality Act itself does not align perfectly with the constitutional definition of hate speech, rectification is required as well.

Section 16(4) of the Films and Publications Act²² empowers the Films and Publications Board to refuse classification to publications which contain “advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm”, which is a constitutionally-sound provision. But for the fact that the “identifiable group characteristic” definition in the Act – like the Equality Act – is wider than the what is constitutionally permitted, this provision is adequate. However, as with the Equality Act, the FMF reserves its objections for existent law for a more appropriate time.

Crimen injuria is defined as “the unlawful, intentional and serious violation of the dignity or privacy of another”.²³ In order for an individual to be guilty of *crimen injuria*, they must unlawfully and intentionally fringe on the dignity or privacy of another, in a serious fashion. This infringement can take place in terms of conduct or communication.²⁴

Both a subjective and an objective test are utilised to determine whether infringement, in fact, took place.²⁵ In the subjective sense, there must be an awareness of the offending behaviour, and

²² Films and Publications Act (65 of 1996).

²³ *S v Sharp* (footnote 9 above).

²⁴ *Snyman* (footnote 7 above) 461.

²⁵ *Snyman* (footnote 7 above) 463.

degradation or humiliation must have followed from it.²⁶ In the objective sense, the reasonable person in the same circumstances must also have felt degraded or humiliated.²⁷ This latter aspect is crucial, as it ensures individuals who may be hypersensitive do not place an unbearable burden on the courts.

Crimen injuria also requires the infringement to be serious, which is determined by the courts on a case by case basis having regard to all relevant factors. The objective test outlined above will have a large influence on the courts' determination of whether an infringement was serious.

This existing part of our law is superior to the proposed law, firstly, because it has already been fleshed out as a developed doctrine in our criminal law. Years of precedence and previous judgments – including ones for racist speech – are available which the judiciary can rely on in settling hate speech issues. Secondly, *crimen injuria* does not require an exhaustive list of possible ways of communication, which the Bill provides for. Instead, regardless of the mode of communication, the court simply determines whether there was, in fact, a serious violation of dignity. Lastly, the combination of a subjective and objective test is apt in hate speech cases, because it affords the psychological and emotional harm the aggrieved party may have suffered recognition and relevance, but also ensures that petty or vexatious disputes – which could number in the hundreds of thousands per month, on the Bill's current language – are kept well away from the criminal justice system.

No cogent argument has been made for why these other legislative and doctrinal measures against hate speech are inadequate. It has been stated, usually correctly, that these measures are civil, and not criminal, in nature. But it is often left unstated why, exactly, this is a problem.

It appears to come down to a symbolic consideration: For South Africa to truly show *how* against hate speech it is, there must be criminal sanctions, not merely civil sanctions. But this is not how hate speech will be *effectively* combatted. The root of hate speech, in essence, is ignorance, which is often the root of all types of hate. The cure to ignorance is education, and imprisonment is likely to breed further resentment and ignorance rather than educate. Civil consequences do educate.

The consequences for hate speech in South Africa are severe, even without any mention of law or action by the State. More often than not, when someone, of high or low social status, engages in hate speech, they will lose their job, they will be ostracised by their communities, and, in some circumstances, even their families are forced out of business. Then come the added penalties of possible civil lawsuits under such legislation as the Equality Act, and, in extreme circumstances, criminal sanction under the doctrine of *crimen injuria*. When one's community abandons one because of untoward conduct such as hate speech, a valuable lesson is usually learnt, and there is great opportunity for reorientation and reintroduction into polite society.

²⁶ *R v Van Tonder* 1932 TPD 90

²⁷ Snyman (footnote 7 above) 464.

6. The Bill's definition of hate speech

The Bill has a convoluted definition of hate speech, and is as follows:

“Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm, or promote or propagate hatred, based on one or more of the following grounds – age, albinism, birth, colour, culture, disability, ethnic or social origin, gender or gender identity, HIV status, language, nationality, migrant or refugee status, race, religion, sex, which includes intersex, or sexual orientation – is guilty of an offence of hate speech.”

Contrast this with the Constitution's definition of hate speech:

“[Any person who engages in] advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm [is guilty of an offence of hate speech].”

The difference is striking and concerning.

Section 36 provides for the limitation of rights, and nothing more. It does not allow government to redefine the rights and concepts as they are defined in the Bill of Rights, which is the key problem here.

Imagine Parliament enacts a Death Penalty Act to reintroduce the death penalty after it was abolished by the Constitutional Court in 1995. In the preamble of the Act, Parliament says that it “recognises the right to life as contained in the Constitution”, but, in the definition section of the Act, defines “life” as “the ability of dogs and cats to roam freely without being threatened by eagles”. In this absurd example, government takes a concept from the Constitution — and thus all the constitutional safeguards and remedies associated with it — and changes its meaning so as to break it free from constitutional bounds. This is, clearly, obviously, and irrefutably unconstitutional. The right to life must be understood within its constitutional context and within the constitutional logic.

Another, less absurd example, is that of administrative action.

By the end of the Apartheid era, the term “administrative action” was understood legally to be a very wide concept. “Even prerogative powers,” writes Professor Cora Hoexter, “which were traditionally thought not to be justiciable owing to their highly political character, became reviewable toward the end of the apartheid era.”

Thus, when the Constitution was enacted in 1996, administrative action was understood as embracing a wide range of government conduct. In 2000, government enacted the Promotion of Administrative Justice Act (PAJA), which inserted a narrow definition of administrative action, thus freeing much of the government conduct that fell under the umbrella of the constitutional definition, from the control envisaged in section 33 of the Constitution.

Hoexter continues:

“In short, there is no need for ‘administrative action’ to have quite so broad a definition as it was given at common law. [...] The PAJA, however, goes too far in this regard. Its definition of administrative action is both complicated and narrow, thus creating an unfortunate disparity between the constitutional and statutory concepts of administrative action.”²⁸

Here a concept with a particular constitutional meaning and understanding was defined out of the bounds — and thus the safeguards and remedies — created by the Constitution.

In the case of the Hate Speech Bill, hate speech is being defined differently from how the Constitution understands it. One of the meanings ascribed to *fraus legis* (defrauding the law) is that one, usually government, goes about doing something indirectly which they cannot legally do directly, and that is unfortunately what is happening in this case.

The Hate Speech Bill proposes to add more than the four grounds of hate speech allowed by the Constitution, and it removes the necessary constitutional requirement of incitement to cause harm, replacing it with the vague notion of “communication [...] that could reasonably be construed to demonstrate a clear intention to be harmful”.

This, we submit, is unconstitutional and certainly against the spirit of constitutionalism.

The Constitution’s definition of hate speech cannot be departed from under the guise of section 36, because that is not what section 36 is tasked with doing. This provision is not a method of avoiding or defrauding the Constitution by using clever sophistry and wording to get around its provisions (in this case, section 16(2)(c)). If government wishes to limit the rights in the Bill of Rights, it must interpret and define those rights as meaning exactly what they mean in the Constitution using the values, logic, and norms in the Constitution.

The definition is also unnecessarily complex and labyrinthian. “Unnecessary” because the Constitution’s convenient and apt definition is already available. The Rule of Law, a constitutional imperative according to section 1(c) of the Constitution, dictates that the language of law must be accessible and understandable to those it applies to. There is no good reason to abandon the constitutional definition and replacing it with an alternative, legalistic definition that is only understandable to lawyers.

To be clear: The Bill’s definition of hate speech is unconstitutional because –

- It abandons the necessity of hate speech including an *incitement to cause harm*, and
- It has 15 protected grounds of hate speech, whereas the Constitution allows only four.

And additionally, it is unsound because it is unnecessarily formalistic.

The Bill’s definition of hate speech is far superior to that of the first version of the Bill, but it is still constitutionally improper. We therefore recommend that the Bill uses the constitutional language in its definition of the offence of hate speech.

²⁸ Hoexter (footnote 19 above) 173-174.

7. Recommendations

The FMF recommends the following, in order of preference:

- The hate speech aspects of the Bill be abandoned, in light of the fact that existing law has proven sufficient to combat the scourge of hate speech. South Africa is already over-legislated, and introducing unnecessary additional laws is ill-considered.
- If the hate speech provisions are not abandoned; the definition of hate speech, as elaborated in section 4(1) of the Hate Speech Bill, be replaced with the following:

“4. (1) Any person who intentionally advocates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to promote or propagate hatred and to incite the causing of harm, based on one or more of the following grounds:

- (a) Race or colour;
- (b) Ethnic or social origin;
- (c) Gender or sex; or
- (d) Religion

is guilty of an offence of hate speech.”

(Subsections (b) and (c) as contained in the Bill to be abandoned.)

8. Conclusion

Hate speech on whatever ground – not only those listed in the Constitution – is morally repugnant and must be condemned by all sectors of society. But South Africa must not legislate for legislating’s sake. It sets a fallacious precedent that government intervention can solve any social ill by throwing a law at it, and this, in turn, leads to a government that costs the taxpayer more money, costs the citizen more freedom, and ends up failing to solve the problem anyway.

Existing law – especially the common law doctrine of *crimen injuria* – which can be refined where necessary, must be preferred to the introduction of new law. But if the Bill is to be introduced, its definition of hate speech must confine itself to exactly that set out in section 16(2)(c) of the Constitution.

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