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13 February 2019

Mr Vhonani Ramaano
Committee Secretary
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Dear Mr Ramaano

COMMENTS ON THE 2018 PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL

The draft of the Combating of Hate Crimes and Hate Speech Bill, announced by the Minister of Justice Michael Masutha on 24 October 2016, had been opened for commentary and public consultation. The draft Bill was reportedly introduced to give effect, in terms of the Constitution, to regulate equal rights and outlaw discrimination by, *inter alia*, the creation of the offences of “hate crime” and “hate speech”.

The Dutch Reformed Church (DRC) aims to contribute to a society where dignity, equality, and freedom are recognized and respected as core values foundational to the Republic, by unequivocally condemning incidents of social injustice and all actions motivated thereby. The DRC has passed an assortment of official resolutions over the past decades, condemning all forms of prejudice and unfair discrimination.

We have submitted a commentary on the 2016 Prevention and Combating of Hate Crimes and Hate Speech Bill in which we criticized the over broadness in particular of the hate speech provisions of the Bill. (The commentary is attached.) The effort of the drafters of the revised 2018 Bill to address this aspect is appreciated. It is evident that comments were taken into account received from the public and private sector, the legal profession, and religious organisations. We would now like to comment in particular on section 4 of the revised Bill.

We contend that the revised Bill’s generalisation of hate speech as a criminal offence including constitutionally unprotected hate speech contemplated in section 16(2)(c) of the Constitution and expression which is comparably serious in effect, as well as discriminatory expression outside this ambit which is currently addressed under section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000 (the Equality Act), should be reconsidered in view of the following:

Section 16(2)(c) of the Constitution

Hate speech defined in terms of section 16(2)(c) of the Constitution is concerned with the advocacy of hatred that constitutes incitement to harm others related to specified grounds. Hate speech of this dangerous nature is excluded from constitutional protection, hence its prohibition does not have to be justified in terms of section 36 of the Constitution. In fact, section 16(2)(c) by implication calls for the criminalization of expression of this nature. We have argued, and we agree, that grounds should be added and that such addition will readily pass the justification standard in terms of section 36.

The hate speech prohibition of the Canadian Criminal Code provides an example of a narrowly defined criminal hate speech offence. Section 319(1) prohibits the incitement in public of hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, and 319(2) the willful promotion of hatred against an identifiable group. Chief Justice Dickson in *R v Keegstra* 1990(3)R.C.S. at 776-777 stated that the word “promotes” ... indicates more than simple encouragement or advancement. The hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group. The

act to be targeted is therefore the intentional fostering of hatred against particular members of our society, as opposed to any individual." He described "hatred" in this sense as "a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group-affiliation.")

Section 10 of the Equality Act

The Equality Act prohibits hate speech primarily in giving effect to the obligation in terms of section 9(4) of the Constitution which requires the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. The hate speech provision, section 10, provides for criminalised forms of hate speech to be referred to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation. This includes face-to-face racist insult that constitutes *crimen injuria*. In dealing with hate speech outside this ambit, the Act reflects the commitment to healing in the preamble of the Constitution. Its preamble states that "systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy" and commits to the facilitation of "the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom."

The Bill

Section 4 of the Bill covers the extreme hate speech contemplated in terms of section 16(2)(c) of the Constitution (with extended grounds) and comparably serious hate speech, as well as discriminatory expression addressed in terms of the hate speech provision, section 10, of the Equality Act. [The explicit exclusions in section 4(2) of the Bill seem to be largely in line with similar exclusions from the ambit of section 10 of the Equality Act. However, section 4(2)(a) of the Bill explicitly broadly excludes good faith engagement in any bona fide constitutionally protected form of expression. Section 10 (read together with the proviso in section 12) of the Equality Act can be, but often is not, interpreted in the same way. Unfortunately, in both instances, the formulation of the exceptions leaves room for different interpretations. This contributes to uncertainty, contradicts the purpose of the explicit inclusions, and should be addressed.]

Comment

The criminalisation of expression within the ambit of section 16(2)(c) of the Constitution and comparably serious expression as described above, falls within the mandate of the state to duly protect society against the threat posed by conduct of such extreme nature. In contrast, the criminalisation of expression that "could reasonably be construed to demonstrate a clear intention to - (i) be harmful1...", not requiring subjective intention, is problematic. Yet, the problem will not be properly addressed by the inclusion of such requirement. Subjective intention is not an essential element of unfair discrimination. Discriminatory expression outside the ambit of the advocacy and promotion of hatred described above, should rather be addressed separately, primarily aimed at the promotion of equality and the prevention of unfair discrimination as explicitly required in terms of section 9(4) of the Constitution. Within the framework of section 9(3) and (4) of the Constitution, the relevant challenge when dealing with expression of this nature is to "(h)eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." Healing requires changing the hearts and minds of ordinary South Africans, still filled with misconceptions, distrust, hostility, bitterness, racist, sexist, homophobic or xenophobic views. Healing will not be achieved by branding them as criminals. The eradication of unfair discrimination, hate speech and harassment requires the instilment of understanding, empathy, remorse and, ultimately, sincere transformation. The innovative remedies provided in terms of the Equality Act were designed to achieve these goals.

Civil society's stance on discriminatory expression warrants consideration in this discussion. We have experienced how the pressure generated by collective condemnation of hate speech has led to public condemnation, dismissals and resignations. Overbroad criminalisation will inevitably stifle society's self-regulating transformative potential and ability to heal itself by exposing and effectively condemning stereotypes and hurtful comment. Surely, there should be access to courts, not only for victims of the relevant hate speech, but also for alleged hate speakers who are wrongly or unfairly judged and treated by society. However, not primarily the courts, but rather civil organisations and associations, religious communities and churches, the Human Rights Commission and the Commission for Equality, parliament, media agents and, of course, dedicated individuals, should join in the healing of our troubled society. Ultimately the Equality Court should, in applicable matters, adjudicate outside the constrained realm of criminal law.

We therefore submit that the criminalisation of hate speech should be restricted to the extreme hate speech

contemplated in terms of section 16(2)(c) of the Constitution as well as the intentional and active promotion of hatred related to group characteristics as described above. The focus of hate speech regulation outside this ambit should be the healing of our society so that the South Africa envisaged by the Constitution, belonging to all who live in it, united in our diversity, will come into existence. In this regard we commit ourselves.

Kind Regards

A handwritten signature in black ink, appearing to read 'G. Claassen', with a stylized flourish at the end.

Gustav Claassen
GENERAL SECRETARY

Enclosure: Appendix 1

**COMMENTS ON THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH
BILL, 2016**

These comments were prepared at the request of the Dutch Reformed Church in response to an invitation that was issued by the Minister of Justice and Constitutional Development.

The concerns and submissions that are stated are motivated by a commitment to the ideal of a society that values human dignity in all its dimensions.

1. THE OFFENCE OF HATE CRIME

In *S v Cyril Salzwedel and Others*¹ Chief Justice Mahomed quoted the following dictum with approval:

To state that the appellant's racism was conditioned by a racist environment is to explain but not necessarily to mitigate. At different times in history, societies have sought to condition citizens to legitimise discrimination against women, to accept barbaric modes of punishing citizens and exacting brutal retribution, and to permit monstrous invasions of human dignity and freedom through the institution of slavery. But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past. . . I can find no fault with the finding of the Court a quo that the racial motive which influenced the appellant to commit a serious crime must in the circumstances of the case be considered as an aggravating factor.²

The judgment illustrates the determination of an appropriate sentence within the framework of the Constitution. As a matter of fact, it is an established principle that the public interest is an essential rationale for establishing offences in the first place, and for motivating the infliction and determining the nature of punishment. In *Brisley v Drotsky*³ Appeal Judge Cameron stated that

(i)n its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.⁴

We undeniably do live in a time that requires positive action to address incidents that provoke hatred in our society and jeopardise the efforts of the majority of South Africans who have contributed to and who are committed to the achievement of a united society based on respect for dignity and freedom and equality. This reality, however, does not necessarily require the creation of a substantive offence of hate crime. Naidoo and Karels⁵ point out certain controversies in this regard. Firstly it is an established principle of law in South African criminal law that a perpetrator's criminal liability is based on his criminal conduct and his guilty state of mind in the form of intention or negligence and not on his motive. Secondly, categorically imposing enhanced penalties on the perpetrator of a hate crime may prove to be irrational and therefore unfair.⁶ Crime as such threatens our society at large. If a bloodthirsty perpetrator full of hatred for all fellow human beings viciously attacks his victims, regardless of race, gender, sexual

1 *S v Salzwedel and Others* (273/98) [1999].

2 *S v Salzwedel and Others*: 14.

3 *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

4 *Brisley v Drotsky*: Judgment Cameron: par 4.

5 Naidoo & Karels 2016. Prosecuting "hate": An overview of problem areas relating to hate crimes and challenges to criminal litigation. *Journal for Juridical Science* 41(1): 65-82

6 Naidoo & Karels 2016: 67-68.

orientation or any of the other selected grounds, it may be difficult to justify why similar action related to a selected ground should necessarily constitute a more serious offence.

The well-developed approach to sentencing in South African criminal jurisprudence, in accordance with the constitutional obligation on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”⁷ and on courts to, in interpreting legislation and the common law, promote the spirit, purport and objects of the Bill of Rights⁸, adequately not only provides for, but requires the due consideration of the impact of hatred on the victim and on society on a case by case basis. The effort, time and cost that will be involved in the creation and introduction of a new offence should rather be spent on training and the empowerment of police, prosecutors and judges to exercise competently their legal duties in the efficient protection of our society against criminal acts emanating from hatred.

A final comment in this context concerns the proposed selection of grounds. The fact that discrimination is considered to be a more serious form of differential treatment, means that it is subjected to more stringent requirements in order to be constitutionally valid. It not only has to be rational, but also fair. The issue of concern is the violation of human dignity. Grounds are therefore identified related to their potential to violate human dignity. Surely the potential of a differentiation between engineers and doctors has little potential to violate the dignity of the members of these groups. On the other hand, any differentiation based on race is suspect and calls for justification. Section 9(3) of the Constitution accordingly provides a list of grounds on the basis that these grounds substantiate a presumption of unfairness. Analogous grounds have been recognised by the Constitutional Court after carefully considering the potential impact on human dignity. This cautious approach reasons against what seems to be a rather arbitrary, robust and confusing selection of grounds, in particular in the context of a categorical prohibition that creates a criminal offence that specifically provides for more severe punishment. To illustrate the point, the vulnerability of old people and children often make them the victims of the cruellest crimes, yet age is not included as a ground. Occupation or trade, on the other hand, is included, although it generally is not a fundamental or immutable characteristic that a person cannot change and that tends to identify people as members of a social group. It is not a listed discrimination ground under section 9 of the Constitution, neither has it been found to constitute an analogous ground.

2. THE OFFENCE OF HATE SPEECH 9

2.1 INTRODUCTION

The South African Constitution explicitly stipulates freedom, equality and human dignity as foundational values of our constitutional democracy. This entails that all constitutional rights are informed by all these values with the effect that the tensions that are intrinsic to these values manifest in constitutional rights. Of particular relevance in conceptualising the right to freedom of expression in the context of the Constitution, is the approach that dignity warrants human beings the autonomy to influence and be influenced by the exchange and promotion of ideas,

⁷ Section 7 of the Constitution.

⁸ Section 39(2) of the Constitution.

opinions and knowledge, and to act or refrain from action in accordance with their evaluation thereof, but also entitles them to be treated with respect for their inherent dignity as a human being. Section 10 of the Constitution reflects both these perspectives when it states that “(e)veryone has inherent dignity and the right to have their dignity respected and protected.” These different dimensions create an inherent tension within the right to freedom of expression.

The right to freedom of expression facilitates participation by individuals and society in the search for truth and in the building of the culture envisaged by the Constitution.¹⁰ It “promotes a culture in which citizens are regarded as being capable of forming their own opinions, and in which their right to make political choices and engage in public debate is thereby indirectly respected”.¹¹ The ambit of its operation is broad to the extent that the exclusion from the realm of public debate of any value, even those values expressed in the Constitution, will be illegitimate.¹²

Freedom of expression is also supportive of and infused by other constitutional rights and values. The Constitutional Court has held that

. . . freedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.¹³

Against this background it is apparent that restrictions should be carefully designed to maintain the integrity of the constitutional democracy, including the autonomy of members of society and religious and other associations to express or communicate their ideas and beliefs, and the right to be respected as dignified human beings. This requires a clear distinction between unprotected expression that should be eliminated, and protected expression that may under certain circumstances be regulated.¹⁴

9 This section of the commentary draws substantially from the following article by the author of this commentary: M.E. Marais 2015. Does the Constitution call for the criminalisation of hate speech? *Southern African Public Law (SAPL)* 30(2): 456-483.

10 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC): par 7.

11 Roux “Democracy” in Woolman & Bishop 2008: 10-48 – 10-53. *Khumalo and Others v Holomisa* 2002 (8) BCLR: par 24.

12 Meyerson D 1997. Rights limited: 80.

13 *South African National Defence Union v Minister of Defence and Another*: par 8.

14 In this regard, the Rabat Plan of action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence¹⁴ adopted in 2012, contains valuable conclusions and recommendations emanating from four regional expert workshops organised by the United Nations Office of the High Commissioner for Human Rights (OHCHR). It provides an expert interpretation of the International Covenant on Civil and Political Rights (ICCPR): <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 8-12-2016). It states that in terms of general principles, a clear distinction should be made between three types of

Section 16(2)(c) of the Constitution provides the constitutional framework to deal with “hate speech” that threatens the functioning of the democracy. Its exclusion of the expression within its ambit from constitutional protection gives the state leeway to, without further justification, use all its legitimate powers to protect society against the contemplated expression. When measures designed to address the expression contemplated by section 16(2)(c) are employed outside the ambit of expression that poses this threat, the measures themselves constitute a threat to the functioning of the democracy.

The constitutional framework to deal with “hate speech” in the sense of unfairly discriminatory expression outside the ambit of section 16(2)(c) is provided by section 9(3) and (4) of the Constitution. The *Promotion of Equality and Prevention of Unfair Discrimination Act 4 / 2000* aims to give effect to the obligation in section 9(4) to enact national legislation to prevent or prohibit unfair discrimination. In order to uphold all the relevant constitutional values, restrictions of expression of this nature should take account of the intrinsic tensions mentioned above and should be carefully designed to not inhibit rather than promote the healing of our convalescent society by the criminalisation of protected speech. Remedial transformative measures recognise that “truth is most likely to emerge from the clash of ideas” and that the exposure of stereotypes, and society’s rejection of unfairly discriminatory acts and utterances, have more potential for transformation and healing than sterilising societal debate and response through criminalisation.

2.2 SECTION 16(2)(c) OF THE CONSTITUTION

2.2.1 The scope of the provision

The constitutional right to freedom of expression in terms of section 16(1) of the Constitution categorically excludes (a) propaganda for war¹⁵, (b) incitement of imminent violence, and (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. These are extreme forms of expression that constitute a threat to the essential functioning of the constitutional democracy with all the values and rights that it represents, including freedom of expression.

The challenge to deal with the shocking and disillusioning reality of humanity’s capacity for cruelty, and of the vulnerability of democratic arrangements and universally recognised foundational human values, reached a peak in the aftermath of World War II. The idea that freedom of expression is essential for the maintenance of democracy, the protection of human dignity in the sense of autonomy, and the search for truth had to accommodate the reality that thousands of people had been killed on the basis of violent hate ideologies propelled by extreme hate speech.¹⁶

expression: expression that constitutes a criminal offence; expression that is not criminally punishable but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others. http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf (accessed 8-12-2016).

¹⁵ Sec 16(2)(a) of the Constitution.

¹⁶ *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) paras 7-8. See also *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) par 27.

Vulnerable groups had been marginalised by utterances of detestation. Moreover, unequal access to the marketplace of ideas had distorted truth and knowledge and had destroyed democratic processes, including freedom of expression.¹⁷ The international community was motivated to commit to internationally recognised, non-negotiable norms. What eventually emerged was the recognition within the conceptual valuation of freedom of expression as guarantor of democracy and dignity in the sense of autonomy, of a broader concept of human dignity that not only focused on individual autonomy, but was also inclusive of an inherent human dignity which requires self-esteem and respect for the esteem of others. This led to the acceptance of categorical restrictions of freedom of expression, but subject to the condition of necessity.¹⁸ Criminalisation in particular was reserved for extreme forms of expression.¹⁹ Section 16(2)(c) resembles article 20(2) of the ICCPR. It defines hate speech as “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”. Only expression of the most severe and deeply felt group-related contempt that constitutes incitement to harm and imperils democracy is contemplated. To an extent expression of this extreme nature is covered by existing common law and legislative offences. Incitement to commit any crime, including assault and public violence, is an independent offence under South African common law. What is not criminalised, is hate speech that incites the audience to harm the target group by means of discrimination, hostility and the infliction of psychological harm. Expression of this nature indeed calls for criminalisation. However, prohibitions should be extremely carefully drafted to not involve expression of opinions that challenge generally accepted norms and aim to influence the autonomous decisions that people make, even if the opinion or the expression thereof is hurtful or insulting, without intentionally advocating hatred that constitutes incitement to harm.

2.2.2 The selected grounds

Taking account of the above, the extension of the selection of grounds stipulated in section 16(2)(c) to include nationality and sexual orientation when prohibitions of extreme expression of the nature contemplated in section 16(2)(c) are formulated, can be substantiated. This submission is made in light of the following considerations:

The selection of grounds in section 16(2)(c) is related to contextual realities at the time of the formation of the Constitution. Race, gender, ethnicity and religion were the very lines on which the South African society was legally and systemically divided. In terms of the undemocratic apartheid ideology, race and ethnic separation constituted the fundamental basis for the determination of civil, social, economic and political power. Laws and practices explicitly discriminated against women, and there was a favoured and state-supported religion.

17 See the discussion of the concept ‘representative democracy’ by Roux “Democracy” in Woolman and Bishop: 2008: 10-08–10-11. See also *South African National Defence Union v Minister of Defence*: paras 7-8.

18 Article 19 of the ICCPR provides as follows: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals. Article 20 provides as follows: 1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

19 See the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence: fn 15 above.

Other contextual circumstances have now become as compelling and as threatening to the functioning of democracy. Migration and xenophobia, defined as the ‘attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity’, became worldwide phenomena. Since 2008, xenophobic attacks on foreigners have occurred regularly in South Africa. The attacks exposed extreme hatred in society, and the vulnerability of citizens targeted by those who feel and incite such hatred. Those targeted were victimised to the extent that they were deprived of their guaranteed constitutional rights, including their right to freedom of expression. Whether xenophobic acts of this nature are related to ethnicity, race, nationalism or, which is often the case, a combination of any of these characteristics, makes no difference to the unreasonable and unjustifiable threat to constitutional rights that such acts entail. Considering that the essential reason for the exclusion of expression under section 16(2)(c) is to maintain the democracy, to exclude nationality from the list of grounds that can substantiate hate speech of the nature contemplated by section 16(2)(c) makes no sense.

Discrimination on the ground of sexual orientation certainly existed in society at the time of the drafting of the Constitution. As a matter of fact, sexual orientation was listed as a discrimination ground in section 9(3) of the Constitution. However, it was not perceived as a primary facet of the struggle for the formation of a constitutional democracy in South Africa. Since then, the focus on the effects of hate speech on the ground of sexual orientation has increased. From the early 1990s, United Nations human rights mechanisms have repeatedly expressed concerns about violations of the rights of lesbian, gay, bisexual and transsexual people. In June 2011, the Human Rights Council adopted the first United Nations resolution on sexual orientation and gender identity, expressing ‘grave concern’ regarding violence and discrimination against individuals based on their sexual orientation and gender identity.²⁰ The resolution was presented by South Africa along with Brazil and 39 additional co-sponsors from all regions of the world. The adoption of the resolution paved the way for the first official United Nations report on the issue prepared by the Office of the High Commissioner for Human Rights.²¹ In September 2014, at its 27th session, the Human Rights Council adopted a new resolution, once again expressing grave concern at such human rights violations and requesting the High Commissioner to produce an update of the 2011 report with a view to sharing good practices and ways to overcome violence and discrimination in the application of existing international human rights law and standards, and to present it to the 29th session of the Human Rights Council.²² These considerations similarly substantiate a compelling need for the inclusion of sexual orientation as a hate speech ground in this context.

To the extent that theoretically protected expression will be infringed by this extended scope, the limitation will surely be justifiable in terms of section 36 of the Constitution. It should however be reiterated that even restrictions on activist speech should be cautiously viewed, keeping in mind that, in the words of Nadine Gordimer, “the regime of racism in South Africa was maintained not only by brutality - guns, violence, restrictive laws. It was upheld by

20 UN Resolution A/HRC/RES/17/19 ‘Human rights, sexual orientation and gender identity’ adopted on 14-07-2011 <http://arc-international.net/wp-content/uploads/2011/09/HRC-Res-17-19.pdf> (accessed 21-11-2016).

21 Report of the United Nations High Commissioner for Human Rights ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ http://www.ohchr.org/documents/issues/discrimination/a.hrc.19.41_english.pdf (accessed 21-11-2016).

22 UN Resolution A/HRC/RES/27/32 ‘Human rights, sexual orientation and gender identity’ adopted on 02/10/2014 <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx>

elaborately extensive silencing of freedom of expression”.

Further extensions of the selected grounds in the context of a prohibition of expression contemplated by section 16(2)(c) may become justifiable, but only when equally necessary for the maintenance of democracy.

2.3 SECTION 9 OF THE CONSTITUTION AND SECTION 10 OF THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 / 2000 (THE EQUALITY ACT)²³

The Equality Act is not primarily concerned with the prohibition of the extreme expression contemplated by section 16(2) of the Constitution, but with the promotion of equality and the prevention and prohibition of unfair discrimination as required by sections 7 and section 9(4) of the Constitution. It should therefore be interpreted within the framework of section 9 of the Constitution.

Subsections 9(3) and (4) require the state to enact national legislation to prevent or prohibit unfair discrimination. As stated in its preamble, the Equality Act approaches this requirement with a focus on “systemic inequalities and unfair discrimination (that still) remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.” It endeavours to “facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.” This approach aptly reflects the commitment to healing in the Preamble of the Constitution.

The hate speech prohibition in terms of section 10 of the Act acknowledges the hurt and harm that unfairly discriminatory expression may cause. It condemns the reinforcement of systemic discrimination by means of expression, particularly in the broad societal context. Its primary aim is the prohibition and prevention of unfair discrimination and the promotion of equality. Its ambit is purposely much broader than that of section 16(2)(c). It addresses unfairly discriminatory expression not by branding members of society as criminals because they still entertain racist, sexist, homophobic or xenophobic views, but rather through corrective remedies ultimately aimed at transformation.²⁴

Section 10(1) prohibits “hate speech” in the following terms:

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;

(accessed 21-11-2016).

²³ This discussion draws from the following article: M.E.Marais and J.L. Pretorius. 2015. A contextual analysis of the hate speech provisions of the Equality Act. *Potchefstroom Electronic Law Journal* 18(4): 901-942. <http://www.ajol.info/index.php/pelj/article/viewFile/128750/118306> (accessed 10-12-2016)

²⁴ See sec 21(2). Where appropriate an order made by an equality court under the Act has the effect of an order of the said court made in a civil action.

- (b) be harmful or to incite harm;
- (c) promote or propagate hatred

Prohibited grounds are defined as follows:²⁵

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground -
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).²⁶

Significantly, in accordance with section 16(1) of the Constitution, bona fide engagement in constitutionally protected expression is explicitly excluded from the prohibition in terms of a proviso that reads as follows:

Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section

From a particular perspective, the Act operates in a receptive societal environment. The South African society's overwhelming rejection of recent regrettable incidences of hate speech, in particular on social media, testifies to the growing maturity of the South-African democracy in general, and specifically in exercising the right to freedom of expression. Rather than responding to group insult by violent means, society employed free expression to reprimand the perpetrators and to facilitate societal penalties. In the process many ignorant and prejudiced members of society come to understand that fellow South-Africans have to deal with painful associations, and that the ideal of the society envisaged by the Constitution requires empathy and sensitivity from all well-meaning South Africans.

2.4 CRIMINALISATION

Criminalisation represents institutionalised state action with permanent legal effects that label transgressors. Its chilling effect constrains free expression, impacting, as indicated above, on the very essence of democracy. This is exactly why it should be reserved for unprotected expression under section 16(2) that threatens the functioning of our

²⁵ Sec 1.

²⁶ Comparable provisions of the *Canadian Human Rights Act* R.S.C., 1985, c. H-6 read as follows: "3(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. (2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex."

democracy, namely propaganda for war²⁷, incitement of imminent violence²⁸, and hate speech of the extreme nature contemplated by section 16(2)(c). Expression within the ambit of section 16(2)(c) falls in this category because it victimises target groups to the extent that they can no longer freely exercise their constitutional rights, including the right to freedom of expression.

On the other hand, unfairly discriminatory expression outside this ambit should be curtailed by transformative measures aimed at balancing various constitutional rights and values. The restrictive effect of the criminalisation of expression on all sincere debate around contentious issues will jeopardise rather promote the achievement of equality. Systemic prejudices and misperceptions and unfairly discriminatory convictions will not be changed if, for fear of prosecution, they are not voiced in conversation. The “chilling effect” of criminalisation could “cow courageous journalists” and consequently deprive citizens of their right to be informed. “The very existence of a crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal”. Criminal liability “stains every sphere” of the convicted person’s life. “He becomes a criminal, and must disclose that every time he applies for a job, a visa or even a bank account.” Clearly the same public disapproval that the criminal law casts on murderers, rapists and thieves, “precisely for its deterrent potency”, does not apply to injurious speech.²⁹

In line with this approach, the African Commission on Human and Peoples’ Rights adopted a resolution on repealing criminal defamation laws in Africa. It provides as follows: “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.” This is particularly so when less restrictive remedies are available in the form of civil defamation and the right of reply.³⁰

Ultimately a categorical branding of members of society as criminals because they still entertain racist, sexist, homophobic and xenophobic views will have the effect of sterilising the sincere commitment in the Preamble to the Constitution to “heal the divisions of the past” and frustrating the Equality Act’s objective to achieve this through the facilitation of the eradication of unfair discrimination, hate speech and harassment and the education of the public and raising of public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment.³¹

Against this background, it is submitted that the hate speech offence in terms of the Bill is overly broad to the extent that it categorically criminalises unconstitutional expression that should be dealt with by transformative means, as well as constitutionally valid expression. This poses a threat not only to the freedom of expression guarantee, but also to other values and rights that are involved, including the rights to equality and human dignity. .

27 Sec 16(2)(a) of the Constitution.

28 Sec 16(2)(b) of the Constitution.

29 Bhardwaj & Winks 2013. The dangers of criminalising defamation. Mail & Guardian, 1 November.

<http://mg.co.za/article/2013-10-31-the-dangers-of-criminalising-defamation> (accessed on 19 November 2016).

30 Bhardwaj & Winks 2013; ACHPR/Res169(XLVIII)2010: Resolution on Repealing Criminal Defamation Laws in Africa http://old.achpr.org/english/resolutions/Resolution169_en.htm (accessed on 19 November 2016).

2.5 THE BILL

2.5.1 THE PREAMBLE

The Bill states that it aims to give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance in accordance with international law obligations. In its preamble it states that South Africa has committed itself to uphold the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban. It proceeds by adding that it gives effect to requirement in terms of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which the Republic is a signatory State, to declare, among others, an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.

In particular the reference to the ICERD calls for comment.

THE ICERD³²

South Africa's commitment to the ICERD is indeed relevant, in particular in the context of the unprotected expression contemplated in section 16(2). It is, however, problematic that references to it in the Bill are selective to the extent that an out of context, incorrect impression of broadness is created. Article 4 should be more comprehensively quoted in order to inform a contextualised understanding of the required action.

Article 4 of the Convention provides as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare [as] an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organisations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such

³¹ Equality Act: Preamble and sec 2.

³² ICERD: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (accessed on 10-12-2016)

organisations or activities as an offence punishable by law; ...

The adoption of the ICERD in 1965 was inspired by a widespread fear of the revival of authoritarian ideologies as is apparent from the condemnation of propaganda and organisations in the introductory paragraph of article 4. Furthermore, the Committee of Ministers of the Council of Europe in its Recommendation R(97)20 comments that the obligation in article 4 is qualified, in that states parties should have 'due regard' to the principles embodied in the UDHR and the rights expressly set forth in article 5 of the ICERD. Articles 18 and 19 of the UDHR respectively protect freedom of thought, conscience and religion, and freedom of opinion and expression. Article 5 of the ICERD constitutes a commitment to guarantee, amongst other rights, civil rights, including the right to freedom of thought, conscience and religion and the right to freedom of opinion and expression.³³

THE ICCPR

It is significant that section 16(2) of the Constitution specifically and closely resembles article 20 of the ICCPR which was adopted shortly after the adoption of the ICERD. Evidently acknowledgement of the ICCPR in addition to the ICERD is required. In particular article 20 of the Convention explicitly obliges states parties to adopt the necessary legislative measures prohibiting the action referred to.

Article 19 of the *ICCPR* reads as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20 reads as follows:

1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The Convention introduces relevant and compelling perspectives. UN General Comment 34 stipulates that, when a

³³ For examples of relevant decisions of the the Committee on the Elimination of Racial Discrimination (CERD) see *Zentralrat Deutscher Sinti und Roma et al v Germany* 2008 038/2006 (CERD) http://www.bayefsky.com/pdf/germany_t5_cerd_38_2006.pdf (accessed 21-11-2016); *LK v The Netherlands* 1993 4/1991 (CERD) <http://www1.umn.edu/humanrts/country/decisions/CERD-DLR.htm> (accessed 21-11-2016). *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway* 2006 030/2003 (CERD) <http://www1.umn.edu/humanrts/country/decisions/30-2003.html> (accessed 21-11-2016).

state party invokes a legitimate ground for restriction of freedom of expression under article 19, it must demonstrate in a specific and individualised way the precise nature of the threat and the necessity of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. The least intrusive and restrictive measures should be applied in order to minimise the chilling effect on freedom of expression.³⁴

It further stipulates that article 20 may be considered as *lex specialis* with regard to article 19 only to the extent that it obliges states parties to adopt the necessary legislative measures prohibiting the action referred to, while article 19(3) merely entitles them to do so.³⁵

The Rabat Plan states that States “should ensure that, bearing in mind the interrelationship between articles 19 and 20 of the ICCPR, the domestic legal framework on incitement should be guided by express reference to article 20 of the ICCPR (‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’) and should consider including robust definitions of key terms like hatred, discrimination, violence, hostility, etc. It recommends that legislation can draw, inter alia, from the guidance and definitions provided in the Camden Principles on Freedom of Expression and Equality.³⁶

Accordingly, acknowledgment of international law obligations should not be selective, should include commitments to the guarantee of the right to freedom of expression, and should inform reservation of criminalisation for the extreme form of hate speech contemplated by article 20 of the ICCPR and section 16(2) of the Constitution.

2.5.2 SECTION 4 (1) OF THE BILL

The provisions in section 4(1)(b), 4(1)(a)(ii) and the broad selection of grounds extend the scope of the provision to cover expression outside the ambit of section 16(2)(c) of the Constitution. Without these provisions the prohibition would read as follows:

Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that advocates hatred towards any other person or group of persons; and which demonstrates a clear intention, having regard to all the circumstances, to incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; based on race, gender, religion or ethnic or social origin, is guilty of the offence of hate speech.

It was contended above that the inclusion of the grounds of sexual orientation and nationality is indeed required. Subject to a clear formulation that informs an interpretation that the communication is required to constitute incitement in the sense that the speaker should subjectively intend to incite the harm, and it should be objectively likely that such harm will result from the expression,³⁷ an offence in these terms will essentially fall within the conceptual ambit of section 16(2)(c). It is concerned with expression that victimises groups in our society to the extent that they, and those that support their cause, are no longer free to exercise their democratic rights, including

34 General Comment 34 on article 19 of the ICCPR 2011 paras 33-36.

<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

35 General Comment 34 paras 50-52.

36 ‘ARTICLE 19’ (2009) Camden Principles on freedom of expression and equality

<https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (accessed 21-11-2016).

37 Milo D, Penfold G and Stein A 2008. “Freedom of expression” in S Woolman and M Bishop (eds), Constitutional Law of South Africa: 42-72.

the right to freedom of expression. As contended above, existing offences that criminalise incitement to commit a crime, including assault and public violence, do not cover hate speech that incites the audience to harm the target group by means of discrimination, hostility and the infliction of psychological harm, and section 16(2)(c) by implication requires the legislator to protect our society against extreme expression of this nature by the most effective available means, which, in this context, is criminalisation.

In contrast, the provisions which will next be discussed, are problematic. They fall outside the scope of section 16(2)(c). To the extent that they involve constitutionally compliant expression, they need to be restricted. To the extent that they address expression that constitutes unfair discrimination, but not hate speech contemplated by section 16(2)(c) of the Constitution, they should rather be dealt with in terms of the Equality Act that was designed to give effect to the section 9 obligation to prevent unfair discrimination and promote equality. The focus of the Act is on changing attitudes and on transforming and, ultimately, healing our convalescing society. Criminalisation of unfair discrimination contemplated by the provisions and remedies of the Act, will not have these remedial effects.

Sections 4(1)(b) and 4(1)(a)(ii) extend the scope of the offence of hate speech to include intentional communication in a manner that is threatening, abusive or insulting towards any other person or group of persons, and which demonstrates a clear intention, having regard to all the circumstances, to ... bring into contempt or ridicule, any person or group of persons, based on the grounds that are listed.

Terms like threatening, abusive and insulting have synonyms like hostile, unmannerly and discourteous. Contempt *inter alia* means disapproval and ridicule has synonyms like laughter and mimicry. The implication is that a woman who in a hostile manner accuses her male colleagues of chauvinistic behavior, or threatens to expose their conduct, or a black man that states that apartheid has taught him that whites cannot be trusted, may be guilty of a criminal offence. A comedian who rudely mimics black or female leaders, or politicians or engineers for that matter, will face a jail sentence. A church that proclaims that its scriptures teach that only males are suitable to be church leaders, or that homo-sexuality is sinful, will need to go underground. All these remarks are *prima facie* constitutional and requires no categorical restrictions at all. These examples illustrate the unduly restrictive effect of the provision on all the stipulated forms of freedom of expression in section 16(1) of the Constitution to the extent that our democracy is threatened. It violates human dignity as autonomy. It threatens freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research and, inevitably, freedom of the press. In particular it smothers debate that provides opportunity to challenge discriminatory views in order to ultimately effectively promote equality and human dignity.

This is in contrast with the relevant aims and provisions of the Equality Act described above.

Finally, it is accepted that the exclusion of age as a ground for hate speech in the sense of unfair discrimination by means of expression is an oversight. On the other hand, the inclusion of occupation or trade is again problematic. The Constitutional Court has pointed out that the pejorative meaning of discrimination is related to the unequal treatment of people “based on attributes and characteristics attaching to them” and has cautioned against a narrow definition of the terms and attributes and characteristics. In *Harksen v Lane* the Court stated that

(w)hat the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who

have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features...³⁸

A prohibition of unfair discrimination in the form of hate speech which is not subject to a fairness analysis assumes unfairness when there is compliance with all the essential elements of the prohibition. It is not feasible to define circumstances in which a differentiation based on trade or occupation will categorically be unfair in the sense that it is unduly violative of human dignity and equality.

2.6 CONCLUDING REMARKS

The Draft Bill does not distinguish between extreme hate speech under section 16(2)(c) of the Constitution that indeed calls for criminalisation, and hate speech in the sense of unfairly discriminatory expression that requires transformative measures. The effect is that the design of the provisions of the Equality Act directed at achieving the promotion of equality and the prevention of unfair discrimination, where appropriate, by means calculatedly steering away from criminalisation, is not only wasted, freedom of expression as a guarantee of constitutional democracy is violated. The following oft-quoted dictum from the majority judgment in *President of the Republic of South Africa and Another v Hugo* equality approach articulates our challenge:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.³⁹

The comprehensiveness and approach of our nation's commitment to the achievement of this ideal society in the preamble of the Constitution is remarkable. As members of the South African family, we pledge commitment to one another's healing, to empathy, to the ideal of freedom and prosperity for all. We pledge to build a prosperous and fair society deserving of every South African's loyalty and esteem. From this basis we will confidently promote our values in the family of nations. The unnuanced categorical criminalisation of free expression that is contemplated by the Draft Bill jeopardises this commitment.

³⁸ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489.

³⁹ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

**COMMENTS ON THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH
BILL, 2016**

These comments were prepared at the request of the Dutch Reformed Church in response to an invitation that was issued by the Minister of Justice and Constitutional Development.

The concerns and submissions that are stated are motivated by a commitment to the ideal of a society that values human dignity in all its dimensions.

1. THE OFFENCE OF HATE CRIME

In *S v Cyril Salzwedel and Others*⁴⁰ Chief Justice Mahomed quoted the following dictum with approval:

To state that the appellant's racism was conditioned by a racist environment is to explain but not necessarily to mitigate. At different times in history, societies have sought to condition citizens to legitimise discrimination against women, to accept barbaric modes of punishing citizens and exacting brutal retribution, and to permit monstrous invasions of human dignity and freedom through the institution of slavery. But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past. . . I can find no fault with the finding of the Court a quo that the racial motive which influenced the appellant to commit a serious crime must in the circumstances of the case be considered as an aggravating factor.⁴¹

The judgment illustrates the determination of an appropriate sentence within the framework of the Constitution. As a matter of fact, it is an established principle that the public interest is an essential rationale for establishing offences in the first place, and for motivating the infliction and determining the nature of punishment. In *Brisley v Drotsky*⁴² Appeal Judge Cameron stated that

(i)n its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.⁴³

We undeniably do live in a time that requires positive action to address incidents that provoke hatred in our society and jeopardise the efforts of the majority of South Africans who have contributed to and who are committed to the achievement of a united society based on respect for dignity and freedom and equality. This reality, however, does not necessarily require the creation of a substantive offence of hate crime. Naidoo and Karels⁴⁴ point out certain controversies in this regard. Firstly it is an established principle of law in South African criminal law that a perpetrator's criminal liability is based on his criminal conduct and his guilty state of mind in the form of intention or negligence and not on his motive. Secondly, categorically imposing enhanced penalties on the perpetrator of a hate crime may prove to be irrational and therefore unfair.⁴⁵ Crime as such threatens our society at large. If a bloodthirsty perpetrator full of hatred for all fellow human beings viciously attacks his victims, regardless of race, gender, sexual

40 *S v Salzwedel and Others* (273/98) [1999].

41 *S v Salzwedel and Others*: 14.

42 *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

43 *Brisley v Drotsky*: Judgment Cameron: par 4.

44 Naidoo & Karels 2016. Prosecuting "hate": An overview of problem areas relating to hate crimes and challenges to criminal litigation. *Journal for Juridical Science* 41(1): 65-82

45 Naidoo & Karels 2016: 67-68.

orientation or any of the other selected grounds, it may be difficult to justify why similar action related to a selected ground should necessarily constitute a more serious offence.

The well-developed approach to sentencing in South African criminal jurisprudence, in accordance with the constitutional obligation on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”⁴⁶ and on courts to, in interpreting legislation and the common law, promote the spirit, purport and objects of the Bill of Rights⁴⁷, adequately not only provides for, but requires the due consideration of the impact of hatred on the victim and on society on a case by case basis. The effort, time and cost that will be involved in the creation and introduction of a new offence should rather be spent on training and the empowerment of police, prosecutors and judges to exercise competently their legal duties in the efficient protection of our society against criminal acts emanating from hatred.

A final comment in this context concerns the proposed selection of grounds. The fact that discrimination is considered to be a more serious form of differential treatment, means that it is subjected to more stringent requirements in order to be constitutionally valid. It not only has to be rational, but also fair. The issue of concern is the violation of human dignity. Grounds are therefore identified related to their potential to violate human dignity. Surely the potential of a differentiation between engineers and doctors has little potential to violate the dignity of the members of these groups. On the other hand, any differentiation based on race is suspect and calls for justification. Section 9(3) of the Constitution accordingly provides a list of grounds on the basis that these grounds substantiate a presumption of unfairness. Analogous grounds have been recognised by the Constitutional Court after carefully considering the potential impact on human dignity. This cautious approach reasons against what seems to be a rather arbitrary, robust and confusing selection of grounds, in particular in the context of a categorical prohibition that creates a criminal offence that specifically provides for more severe punishment. To illustrate the point, the vulnerability of old people and children often make them the victims of the cruellest crimes, yet age is not included as a ground. Occupation or trade, on the other hand, is included, although it generally is not a fundamental or immutable characteristic that a person cannot change and that tends to identify people as members of a social group. It is not a listed discrimination ground under section 9 of the Constitution, neither has it been found to constitute an analogous ground.

2. THE OFFENCE OF HATE SPEECH 48

2.1 INTRODUCTION

The South African Constitution explicitly stipulates freedom, equality and human dignity as foundational values of our constitutional democracy. This entails that all constitutional rights are informed by all these values with the effect that the tensions that are intrinsic to these values manifest in constitutional rights. Of particular relevance in conceptualising the right to freedom of expression in the context of the Constitution, is the approach that dignity warrants human beings the autonomy to influence and be influenced by the exchange and promotion of ideas,

⁴⁶ Section 7 of the Constitution.

⁴⁷ Section 39(2) of the Constitution.

opinions and knowledge, and to act or refrain from action in accordance with their evaluation thereof, but also entitles them to be treated with respect for their inherent dignity as a human being. Section 10 of the Constitution reflects both these perspectives when it states that “(e)veryone has inherent dignity and the right to have their dignity respected and protected.” These different dimensions create an inherent tension within the right to freedom of expression.

The right to freedom of expression facilitates participation by individuals and society in the search for truth and in the building of the culture envisaged by the Constitution.⁴⁹ It “promotes a culture in which citizens are regarded as being capable of forming their own opinions, and in which their right to make political choices and engage in public debate is thereby indirectly respected”.⁵⁰ The ambit of its operation is broad to the extent that the exclusion from the realm of public debate of any value, even those values expressed in the Constitution, will be illegitimate.⁵¹

Freedom of expression is also supportive of and infused by other constitutional rights and values. The Constitutional Court has held that

. . . freedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.⁵²

Against this background it is apparent that restrictions should be carefully designed to maintain the integrity of the constitutional democracy, including the autonomy of members of society and religious and other associations to express or communicate their ideas and beliefs, and the right to be respected as dignified human beings. This requires a clear distinction between unprotected expression that should be eliminated, and protected expression that may under certain circumstances be regulated.⁵³

48 This section of the commentary draws substantially from the following article by the author of this commentary: M.E. Marais 2015. Does the Constitution call for the criminalisation of hate speech? *Southern African Public Law (SAPL)* 30(2): 456-483.

49 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC): par 7.

50 Roux “Democracy” in Woolman & Bishop 2008: 10-48 – 10-53. *Khumalo and Others v Holomisa* 2002 (8) BCLR: par 24.

51 Meyerson D 1997. Rights limited: 80.

52 *South African National Defence Union v Minister of Defence and Another*: par 8.

53 In this regard, the Rabat Plan of action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence⁵³ adopted in 2012, contains valuable conclusions and recommendations emanating from four regional expert workshops organised by the United Nations Office of the High Commissioner for Human Rights (OHCHR). It provides an expert interpretation of the International Covenant on Civil and Political Rights (ICCPR): <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 8-12-2016). It states that in terms of general principles, a clear distinction should be made between three types of

Section 16(2)(c) of the Constitution provides the constitutional framework to deal with “hate speech” that threatens the functioning of the democracy. Its exclusion of the expression within its ambit from constitutional protection gives the state leeway to, without further justification, use all its legitimate powers to protect society against the contemplated expression. When measures designed to address the expression contemplated by section 16(2)(c) are employed outside the ambit of expression that poses this threat, the measures themselves constitute a threat to the functioning of the democracy.

The constitutional framework to deal with “hate speech” in the sense of unfairly discriminatory expression outside the ambit of section 16(2)(c) is provided by section 9(3) and (4) of the Constitution. The *Promotion of Equality and Prevention of Unfair Discrimination Act 4 / 2000* aims to give effect to the obligation in section 9(4) to enact national legislation to prevent or prohibit unfair discrimination. In order to uphold all the relevant constitutional values, restrictions of expression of this nature should take account of the intrinsic tensions mentioned above and should be carefully designed to not inhibit rather than promote the healing of our convalescent society by the criminalisation of protected speech. Remedial transformative measures recognise that “truth is most likely to emerge from the clash of ideas” and that the exposure of stereotypes, and society’s rejection of unfairly discriminatory acts and utterances, have more potential for transformation and healing than sterilising societal debate and response through criminalisation.

2.2 SECTION 16(2)(c) OF THE CONSTITUTION

2.2.1 The scope of the provision

The constitutional right to freedom of expression in terms of section 16(1) of the Constitution categorically excludes (a) propaganda for war⁵⁴, (b) incitement of imminent violence, and (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. These are extreme forms of expression that constitute a threat to the essential functioning of the constitutional democracy with all the values and rights that it represents, including freedom of expression.

The challenge to deal with the shocking and disillusioning reality of humanity’s capacity for cruelty, and of the vulnerability of democratic arrangements and universally recognised foundational human values, reached a peak in the aftermath of World War II. The idea that freedom of expression is essential for the maintenance of democracy, the protection of human dignity in the sense of autonomy, and the search for truth had to accommodate the reality that thousands of people had been killed on the basis of violent hate ideologies propelled by extreme hate speech.⁵⁵

expression: expression that constitutes a criminal offence; expression that is not criminally punishable but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others. http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf (accessed 8-12-2016).

⁵⁴ Sec 16(2)(a) of the Constitution.

⁵⁵ *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) paras 7-8. See also *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) par 27.

Vulnerable groups had been marginalised by utterances of detestation. Moreover, unequal access to the marketplace of ideas had distorted truth and knowledge and had destroyed democratic processes, including freedom of expression.⁵⁶ The international community was motivated to commit to internationally recognised, non-negotiable norms. What eventually emerged was the recognition within the conceptual valuation of freedom of expression as guarantor of democracy and dignity in the sense of autonomy, of a broader concept of human dignity that not only focused on individual autonomy, but was also inclusive of an inherent human dignity which requires self-esteem and respect for the esteem of others. This led to the acceptance of categorical restrictions of freedom of expression, but subject to the condition of necessity.⁵⁷ Criminalisation in particular was reserved for extreme forms of expression.⁵⁸ Section 16(2)(c) resembles article 20(2) of the ICCPR. It defines hate speech as “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”. Only expression of the most severe and deeply felt group-related contempt that constitutes incitement to harm and imperils democracy is contemplated. To an extent expression of this extreme nature is covered by existing common law and legislative offences. Incitement to commit any crime, including assault and public violence, is an independent offence under South African common law. What is not criminalised, is hate speech that incites the audience to harm the target group by means of discrimination, hostility and the infliction of psychological harm. Expression of this nature indeed calls for criminalisation. However, prohibitions should be extremely carefully drafted to not involve expression of opinions that challenge generally accepted norms and aim to influence the autonomous decisions that people make, even if the opinion or the expression thereof is hurtful or insulting, without intentionally advocating hatred that constitutes incitement to harm.

2.2.2 The selected grounds

Taking account of the above, the extension of the selection of grounds stipulated in section 16(2)(c) to include nationality and sexual orientation when prohibitions of extreme expression of the nature contemplated in section 16(2)(c) are formulated, can be substantiated. This submission is made in light of the following considerations:

The selection of grounds in section 16(2)(c) is related to contextual realities at the time of the formation of the Constitution. Race, gender, ethnicity and religion were the very lines on which the South African society was legally and systemically divided. In terms of the undemocratic apartheid ideology, race and ethnic separation constituted the fundamental basis for the determination of civil, social, economic and political power. Laws and practices explicitly discriminated against women, and there was a favoured and state-supported religion.

56 See the discussion of the concept ‘representative democracy’ by Roux “Democracy” in Woolman and Bishop: 2008: 10-08–10-11. See also *South African National Defence Union v Minister of Defence*: paras 7-8.

57 Article 19 of the ICCPR provides as follows: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals. Article 20 provides as follows: 1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

58 See the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence: fn 15 above.

Other contextual circumstances have now become as compelling and as threatening to the functioning of democracy. Migration and xenophobia, defined as the ‘attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity’, became worldwide phenomena. Since 2008, xenophobic attacks on foreigners have occurred regularly in South Africa. The attacks exposed extreme hatred in society, and the vulnerability of citizens targeted by those who feel and incite such hatred. Those targeted were victimised to the extent that they were deprived of their guaranteed constitutional rights, including their right to freedom of expression. Whether xenophobic acts of this nature are related to ethnicity, race, nationalism or, which is often the case, a combination of any of these characteristics, makes no difference to the unreasonable and unjustifiable threat to constitutional rights that such acts entail. Considering that the essential reason for the exclusion of expression under section 16(2)(c) is to maintain the democracy, to exclude nationality from the list of grounds that can substantiate hate speech of the nature contemplated by section 16(2)(c) makes no sense.

Discrimination on the ground of sexual orientation certainly existed in society at the time of the drafting of the Constitution. As a matter of fact, sexual orientation was listed as a discrimination ground in section 9(3) of the Constitution. However, it was not perceived as a primary facet of the struggle for the formation of a constitutional democracy in South Africa. Since then, the focus on the effects of hate speech on the ground of sexual orientation has increased. From the early 1990s, United Nations human rights mechanisms have repeatedly expressed concerns about violations of the rights of lesbian, gay, bisexual and transsexual people. In June 2011, the Human Rights Council adopted the first United Nations resolution on sexual orientation and gender identity, expressing ‘grave concern’ regarding violence and discrimination against individuals based on their sexual orientation and gender identity.⁵⁹ The resolution was presented by South Africa along with Brazil and 39 additional co-sponsors from all regions of the world. The adoption of the resolution paved the way for the first official United Nations report on the issue prepared by the Office of the High Commissioner for Human Rights.⁶⁰ In September 2014, at its 27th session, the Human Rights Council adopted a new resolution, once again expressing grave concern at such human rights violations and requesting the High Commissioner to produce an update of the 2011 report with a view to sharing good practices and ways to overcome violence and discrimination in the application of existing international human rights law and standards, and to present it to the 29th session of the Human Rights Council.⁶¹ These considerations similarly substantiate a compelling need for the inclusion of sexual orientation as a hate speech ground in this context.

To the extent that theoretically protected expression will be infringed by this extended scope, the limitation will surely be justifiable in terms of section 36 of the Constitution. It should however be reiterated that even restrictions on activist speech should be cautiously viewed, keeping in mind that, in the words of Nadine Gordimer, “the regime of racism in South Africa was maintained not only by brutality - guns, violence, restrictive laws. It was upheld by

59 UN Resolution A/HRC/RES/17/19 ‘Human rights, sexual orientation and gender identity’ adopted on 14-07-2011 <http://arc-international.net/wp-content/uploads/2011/09/HRC-Res-17-19.pdf> (accessed 21-11-2016).

60 Report of the United Nations High Commissioner for Human Rights ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ http://www.ohchr.org/documents/issues/discrimination/a.hrc.19.41_english.pdf (accessed 21-11-2016).

61 UN Resolution A/HRC/RES/27/32 ‘Human rights, sexual orientation and gender identity’ adopted on 02/10/2014 <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx>

elaborately extensive silencing of freedom of expression”.

Further extensions of the selected grounds in the context of a prohibition of expression contemplated by section 16(2)(c) may become justifiable, but only when equally necessary for the maintenance of democracy.

2.3 SECTION 9 OF THE CONSTITUTION AND SECTION 10 OF THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 / 2000 (THE EQUALITY ACT)⁶²

The Equality Act is not primarily concerned with the prohibition of the extreme expression contemplated by section 16(2) of the Constitution, but with the promotion of equality and the prevention and prohibition of unfair discrimination as required by sections 7 and section 9(4) of the Constitution. It should therefore be interpreted within the framework of section 9 of the Constitution.

Subsections 9(3) and (4) require the state to enact national legislation to prevent or prohibit unfair discrimination. As stated in its preamble, the Equality Act approaches this requirement with a focus on “systemic inequalities and unfair discrimination (that still) remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.” It endeavours to “facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.” This approach aptly reflects the commitment to healing in the Preamble of the Constitution.

The hate speech prohibition in terms of section 10 of the Act acknowledges the hurt and harm that unfairly discriminatory expression may cause. It condemns the reinforcement of systemic discrimination by means of expression, particularly in the broad societal context. Its primary aim is the prohibition and prevention of unfair discrimination and the promotion of equality. Its ambit is purposely much broader than that of section 16(2)(c). It addresses unfairly discriminatory expression not by branding members of society as criminals because they still entertain racist, sexist, homophobic or xenophobic views, but rather through corrective remedies ultimately aimed at transformation.⁶³

Section 10(1) prohibits “hate speech” in the following terms:

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;

(accessed 21-11-2016).

⁶² This discussion draws from the following article: M.E.Marais and J.L. Pretorius. 2015. A contextual analysis of the hate speech provisions of the Equality Act. *Potchefstroom Electronic Law Journal* 18(4): 901-942. <http://www.ajol.info/index.php/pelj/article/viewFile/128750/118306> (accessed 10-12-2016)

⁶³ See sec 21(2). Where appropriate an order made by an equality court under the Act has the effect of an order of the said court made in a civil action.

- (b) be harmful or to incite harm;
- (c) promote or propagate hatred

Prohibited grounds are defined as follows:⁶⁴

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground -
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).⁶⁵

Significantly, in accordance with section 16(1) of the Constitution, bona fide engagement in constitutionally protected expression is explicitly excluded from the prohibition in terms of a proviso that reads as follows:

Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section

From a particular perspective, the Act operates in a receptive societal environment. The South African society's overwhelming rejection of recent regrettable incidences of hate speech, in particular on social media, testifies to the growing maturity of the South-African democracy in general, and specifically in exercising the right to freedom of expression. Rather than responding to group insult by violent means, society employed free expression to reprimand the perpetrators and to facilitate societal penalties. In the process many ignorant and prejudiced members of society come to understand that fellow South-Africans have to deal with painful associations, and that the ideal of the society envisaged by the Constitution requires empathy and sensitivity from all well-meaning South Africans.

2.4 CRIMINALISATION

Criminalisation represents institutionalised state action with permanent legal effects that label transgressors. Its chilling effect constrains free expression, impacting, as indicated above, on the very essence of democracy. This is exactly why it should be reserved for unprotected expression under section 16(2) that threatens the functioning of our

⁶⁴ Sec 1.

⁶⁵ Comparable provisions of the *Canadian Human Rights Act* R.S.C., 1985, c. H-6 read as follows: "3(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. (2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex."

democracy, namely propaganda for war⁶⁶, incitement of imminent violence⁶⁷, and hate speech of the extreme nature contemplated by section 16(2)(c). Expression within the ambit of section 16(2)(c) falls in this category because it victimises target groups to the extent that they can no longer freely exercise their constitutional rights, including the right to freedom of expression.

On the other hand, unfairly discriminatory expression outside this ambit should be curtailed by transformative measures aimed at balancing various constitutional rights and values. The restrictive effect of the criminalisation of expression on all sincere debate around contentious issues will jeopardise rather promote the achievement of equality. Systemic prejudices and misperceptions and unfairly discriminatory convictions will not be changed if, for fear of prosecution, they are not voiced in conversation. The “chilling effect” of criminalisation could “cow courageous journalists” and consequently deprive citizens of their right to be informed. “The very existence of a crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal”. Criminal liability “stains every sphere” of the convicted person’s life. “He becomes a criminal, and must disclose that every time he applies for a job, a visa or even a bank account.” Clearly the same public disapproval that the criminal law casts on murderers, rapists and thieves, “precisely for its deterrent potency”, does not apply to injurious speech.⁶⁸

In line with this approach, the African Commission on Human and Peoples’ Rights adopted a resolution on repealing criminal defamation laws in Africa. It provides as follows: “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.” This is particularly so when less restrictive remedies are available in the form of civil defamation and the right of reply.⁶⁹

Ultimately a categorical branding of members of society as criminals because they still entertain racist, sexist, homophobic and xenophobic views will have the effect of sterilising the sincere commitment in the Preamble to the Constitution to “heal the divisions of the past” and frustrating the Equality Act’s objective to achieve this through the facilitation of the eradication of unfair discrimination, hate speech and harassment and the education of the public and raising of public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment.⁷⁰

Against this background, it is submitted that the hate speech offence in terms of the Bill is overly broad to the extent that it categorically criminalises unconstitutional expression that should be dealt with by transformative means, as well as constitutionally valid expression. This poses a threat not only to the freedom of expression guarantee, but also to other values and rights that are involved, including the rights to equality and human dignity. .

66 Sec 16(2)(a) of the Constitution.

67 Sec 16(2)(b) of the Constitution.

68 Bhardwaj & Winks 2013. The dangers of criminalising defamation. Mail & Guardian, 1 November.

<http://mg.co.za/article/2013-10-31-the-dangers-of-criminalising-defamation> (accessed on 19 November 2016).

69 Bhardwaj & Winks 2013; ACHPR/Res169(XLVIII)2010: Resolution on Repealing Criminal Defamation Laws in Africa http://old.achpr.org/english/resolutions/Resolution169_en.htm (accessed on 19 November 2016).

2.5 THE BILL

2.5.1 THE PREAMBLE

The Bill states that it aims to give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance in accordance with international law obligations. In its preamble it states that South Africa has committed itself to uphold the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban. It proceeds by adding that it gives effect to requirement in terms of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which the Republic is a signatory State, to declare, among others, an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.

In particular the reference to the ICERD calls for comment.

THE ICERD⁷¹

South Africa's commitment to the ICERD is indeed relevant, in particular in the context of the unprotected expression contemplated in section 16(2). It is, however, problematic that references to it in the Bill are selective to the extent that an out of context, incorrect impression of broadness is created. Article 4 should be more comprehensively quoted in order to inform a contextualised understanding of the required action.

Article 4 of the Convention provides as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare [as] an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organisations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such

70 Equality Act: Preamble and sec 2.

71 ICERD: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (accessed on 10-12-2016)

organisations or activities as an offence punishable by law; ...

The adoption of the ICERD in 1965 was inspired by a widespread fear of the revival of authoritarian ideologies as is apparent from the condemnation of propaganda and organisations in the introductory paragraph of article 4. Furthermore, the Committee of Ministers of the Council of Europe in its Recommendation R(97)20 comments that the obligation in article 4 is qualified, in that states parties should have 'due regard' to the principles embodied in the UDHR and the rights expressly set forth in article 5 of the ICERD. Articles 18 and 19 of the UDHR respectively protect freedom of thought, conscience and religion, and freedom of opinion and expression. Article 5 of the ICERD constitutes a commitment to guarantee, amongst other rights, civil rights, including the right to freedom of thought, conscience and religion and the right to freedom of opinion and expression.⁷²

THE ICCPR

It is significant that section 16(2) of the Constitution specifically and closely resembles article 20 of the ICCPR which was adopted shortly after the adoption of the ICERD. Evidently acknowledgement of the ICCPR in addition to the ICERD is required. In particular article 20 of the Convention explicitly obliges states parties to adopt the necessary legislative measures prohibiting the action referred to.

Article 19 of the *ICCPR* reads as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20 reads as follows:

1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The Convention introduces relevant and compelling perspectives. UN General Comment 34 stipulates that, when a

⁷² For examples of relevant decisions of the the Committee on the Elimination of Racial Discrimination (CERD) see *Zentralrat Deutscher Sinti und Roma et al v Germany* 2008 038/2006 (CERD) http://www.bayefsky.com/pdf/germany_t5_cerd_38_2006.pdf (accessed 21-11-2016); *LK v The Netherlands* 1993 4/1991 (CERD) <http://www1.umn.edu/humanrts/country/decisions/CERD-DLR.htm> (accessed 21-11-2016). *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway* 2006 030/2003 (CERD) <http://www1.umn.edu/humanrts/country/decisions/30-2003.html> (accessed 21-11-2016).

state party invokes a legitimate ground for restriction of freedom of expression under article 19, it must demonstrate in a specific and individualised way the precise nature of the threat and the necessity of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. The least intrusive and restrictive measures should be applied in order to minimise the chilling effect on freedom of expression.⁷³

It further stipulates that article 20 may be considered as *lex specialis* with regard to article 19 only to the extent that it obliges states parties to adopt the necessary legislative measures prohibiting the action referred to, while article 19(3) merely entitles them to do so.⁷⁴

The Rabat Plan states that States “should ensure that, bearing in mind the interrelationship between articles 19 and 20 of the ICCPR, the domestic legal framework on incitement should be guided by express reference to article 20 of the ICCPR (‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’) and should consider including robust definitions of key terms like hatred, discrimination, violence, hostility, etc. It recommends that legislation can draw, inter alia, from the guidance and definitions provided in the Camden Principles on Freedom of Expression and Equality.⁷⁵

Accordingly, acknowledgment of international law obligations should not be selective, should include commitments to the guarantee of the right to freedom of expression, and should inform reservation of criminalisation for the extreme form of hate speech contemplated by article 20 of the ICCPR and section 16(2) of the Constitution.

2.5.2 SECTION 4 (1) OF THE BILL

The provisions in section 4(1)(b), 4(1)(a)(ii) and the broad selection of grounds extend the scope of the provision to cover expression outside the ambit of section 16(2)(c) of the Constitution. Without these provisions the prohibition would read as follows:

Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that advocates hatred towards any other person or group of persons; and which demonstrates a clear intention, having regard to all the circumstances, to incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; based on race, gender, religion or ethnic or social origin, is guilty of the offence of hate speech.

It was contended above that the inclusion of the grounds of sexual orientation and nationality is indeed required. Subject to a clear formulation that informs an interpretation that the communication is required to constitute incitement in the sense that the speaker should subjectively intend to incite the harm, and it should be objectively likely that such harm will result from the expression,⁷⁶ an offence in these terms will essentially fall within the conceptual ambit of section 16(2)(c). It is concerned with expression that victimises groups in our society to the extent that they, and those that support their cause, are no longer free to exercise their democratic rights, including

73 General Comment 34 on article 19 of the ICCPR 2011 paras 33-36.

<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

74 General Comment 34 paras 50-52.

75 ‘ARTICLE 19’ (2009) Camden Principles on freedom of expression and equality

<https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (accessed 21-11-2016).

76 Milo D, Penfold G and Stein A 2008. “Freedom of expression” in S Woolman and M Bishop (eds), Constitutional Law of South Africa: 42-72.

the right to freedom of expression. As contended above, existing offences that criminalise incitement to commit a crime, including assault and public violence, do not cover hate speech that incites the audience to harm the target group by means of discrimination, hostility and the infliction of psychological harm, and section 16(2)(c) by implication requires the legislator to protect our society against extreme expression of this nature by the most effective available means, which, in this context, is criminalisation.

In contrast, the provisions which will next be discussed, are problematic. They fall outside the scope of section 16(2)(c). To the extent that they involve constitutionally compliant expression, they need to be restricted. To the extent that they address expression that constitutes unfair discrimination, but not hate speech contemplated by section 16(2)(c) of the Constitution, they should rather be dealt with in terms of the Equality Act that was designed to give effect to the section 9 obligation to prevent unfair discrimination and promote equality. The focus of the Act is on changing attitudes and on transforming and, ultimately, healing our convalescing society. Criminalisation of unfair discrimination contemplated by the provisions and remedies of the Act, will not have these remedial effects.

Sections 4(1)(b) and 4(1)(a)(ii) extend the scope of the offence of hate speech to include intentional communication in a manner that is threatening, abusive or insulting towards any other person or group of persons, and which demonstrates a clear intention, having regard to all the circumstances, to ... bring into contempt or ridicule, any person or group of persons, based on the grounds that are listed.

Terms like threatening, abusive and insulting have synonyms like hostile, unmannerly and discourteous. Contempt *inter alia* means disapproval and ridicule has synonyms like laughter and mimicry. The implication is that a woman who in a hostile manner accuses her male colleagues of chauvinistic behavior, or threatens to expose their conduct, or a black man that states that apartheid has taught him that whites cannot be trusted, may be guilty of a criminal offence. A comedian who rudely mimics black or female leaders, or politicians or engineers for that matter, will face a jail sentence. A church that proclaims that its scriptures teach that only males are suitable to be church leaders, or that homo-sexuality is sinful, will need to go underground. All these remarks are *prima facie* constitutional and requires no categorical restrictions at all. These examples illustrate the unduly restrictive effect of the provision on all the stipulated forms of freedom of expression in section 16(1) of the Constitution to the extent that our democracy is threatened. It violates human dignity as autonomy. It threatens freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research and, inevitably, freedom of the press. In particular it smothers debate that provides opportunity to challenge discriminatory views in order to ultimately effectively promote equality and human dignity.

This is in contrast with the relevant aims and provisions of the Equality Act described above.

Finally, it is accepted that the exclusion of age as a ground for hate speech in the sense of unfair discrimination by means of expression is an oversight. On the other hand, the inclusion of occupation or trade is again problematic. The Constitutional Court has pointed out that the pejorative meaning of discrimination is related to the unequal treatment of people “based on attributes and characteristics attaching to them” and has cautioned against a narrow definition of the terms and attributes and characteristics. In *Harksen v Lane* the Court stated that

(w)hat the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who

have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features...⁷⁷

A prohibition of unfair discrimination in the form of hate speech which is not subject to a fairness analysis assumes unfairness when there is compliance with all the essential elements of the prohibition. It is not feasible to define circumstances in which a differentiation based on trade or occupation will categorically be unfair in the sense that it is unduly violative of human dignity and equality.

2.6 CONCLUDING REMARKS

The Draft Bill does not distinguish between extreme hate speech under section 16(2)(c) of the Constitution that indeed calls for criminalisation, and hate speech in the sense of unfairly discriminatory expression that requires transformative measures. The effect is that the design of the provisions of the Equality Act directed at achieving the promotion of equality and the prevention of unfair discrimination, where appropriate, by means calculatedly steering away from criminalisation, is not only wasted, freedom of expression as a guarantee of constitutional democracy is violated. The following oft-quoted dictum from the majority judgment in *President of the Republic of South Africa and Another v Hugo* equality approach articulates our challenge:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.⁷⁸

The comprehensiveness and approach of our nation's commitment to the achievement of this ideal society in the preamble of the Constitution is remarkable. As members of the South African family, we pledge commitment to one another's healing, to empathy, to the ideal of freedom and prosperity for all. We pledge to build a prosperous and fair society deserving of every South African's loyalty and esteem. From this basis we will confidently promote our values in the family of nations. The unnuanced categorical criminalisation of free expression that is contemplated by the Draft Bill jeopardises this commitment.

⁷⁷ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489.

⁷⁸ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).