

**FREEDOM OF EXPRESSION
INSTITUTE
MODULE SERIES**

**HATE SPEECH AND
FREEDOM OF EXPRESSION**

IN SOUTH AFRICA



THE RAIT H
FOUNDATION

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Preface

The Freedom of Expression Institute sought to prepare a module on Hate speech in South Africa with the aim of providing basic insight on the framework of hate speech as an aspect of freedom of expression to individuals, communities, social groups and civil society in general. This comes out of the need to address remnants of the apartheid era institutionalised racism that have manifested themselves among certain communities and groups in the form of hate speech. There is a need to educate the wider public in efforts to clarify what exactly hate speech is and in that be in a position to address it decisively.

The concept of hate speech makes reference to speech that attacks the person or group to whom it is targeted on the basis of hatred or incitement of harm. In South Africa hate speech provisions are still underdeveloped and there is a need to look to development through case law.

Freedom of expression has been established as a key freedom required for sustaining a democracy. However with every right comes responsibility and therein is the need for a limitation on the right to freedom of expression so as to prevent the destructive and regressive effect it could have. This module will facilitate discussions around the country on the subject of hate speech and contributions to this effort will be incorporated into submissions shaping the proposed legal framework on hate speech in South Africa.

RAITH FOUNDATION

This module was produced with support from the RAITH Foundation. The Foundation's vision of success is a just and fair society in which (a) people are aware of and able to exercise their rights and responsibilities and (b) organizations, the state, private sector and civil society are held accountable for their actions.

The Freedom of Expression Institute extends a vote of thanks to the RAITH Foundation for funding this important contribution to the work of the Institute in promoting the right to freedom of expression. With this support, the Institute will continue to advocate and promote the exercise of freedom of expression; eliminating inequalities in access to information and other associated rights towards the realization of an open, accountable and democratic society for all.



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CHAPTER 1: INTRODUCTION

1.1 The Freedom of Expression Institute

The Freedom of Expression Institute (FXI) is a not for profit non-governmental organization which was established in 1994 to protect and foster the right to freedom of expression. The FXI's primary objectives are to fight for and defend freedom of expression; to oppose censorship; to fight for the right of equal access to information and knowledge; and to promote access to media and a free press. In taking on this broad public interest mandate, the FXI campaigns against any limitations imposed on these freedoms by the state, private sector or civil society through civic education, research, advocacy and litigation. It provides support in solidarity with those whose right to free expression is abused or denied. The Freedom of Expression Institute networks and engages with groups advocating for greater openness and transparency in government and campaigning for sustainable forms of democracy both locally and internationally. Additionally, the FXI campaigns for the freedom, diversity, representativeness, transformation and independence of all media.

1.2 Core Programmes

The FXI currently is engaged in the following programmes; Anti-censorship Programme, Access to Information Programme and Media & ICTs Programme. In this, the FXI performs the following specific rights based activities;

a. *Litigation, legal advice and support*

The FXI, through its Law Clinic, has provided easily accessible legal advice on freedom of expression including artistic freedom, academic freedom, freedom of the media and the rights of people to gather and protest. It has also built the body of law on freedom of expression by making use of high impact litigation and Constitutional Court cases that have assisted in defining more clearly the right to freedom of expression. This is an area where the FXI has had considerable success and has added in building the organisation's profile to enable it to advance its status as the leading organization on freedom of expression in South Africa.

b. *Research and monitoring*

The FXI has been involved in monitoring the development and implementation of policy and legislation. The research focus of the FXI is critical in contributing towards the building of the body of knowledge and to raise broad public awareness on the right to freedom of expression. Past research work has been key in informing its advocacy and legal interventions. The research component also aims to produce information that is accessible to all sectors of the public be it academic research papers or popular education; thus serving to mainstream the issue of freedom of expression, and broadening and deepening the right.

c. *Civic education, advocacy, lobbying and campaigns*

The key strength of FXI has been its involvement in the development of policy and legislation pertaining to freedom of expression. It has assisted in developing the Constitutional provisions by making submissions on policy and legislation to government and Independent Communications Authority of South Africa (ICASA). This area of work has been the legacy of the FXI and an area where it has been most successful. As a result of its lobbying and advocacy work, the FXI has become the lead organisation on the issue of freedom of expression and as such has become a respected organisation whose opinion, views and submissions are sought after by the state, media and other organisations in the sector.

1.3 Why this module was produced

This module was produced to sensitize the reader on the nature and forms of hate speech that exist in the South African context.

The module introduces in brief the South African landscape where hate speech is concerned, in identifying provisions and draws comparison to International instruments towards an understanding of hate speech in South Africa. It traces where hate speech is at present in South Africa and explores any shortfalls it may have and finally makes recommendations if applicable as to the development of Hate speech laws in South Africa.

This module is hoped to guide discussion, based on established and international best practices for the development of a concise approach and response to hate speech on

the legal, policy and advocacy front.

1.4 Who this is meant for

This module is designed for any and all parties that take interest in Freedom of Expression issues and concepts, both locally and internationally. This includes individuals, social and community movements, community based organizations, religious affiliated organizations, women's groups, youth groups, LGBTI (AQ) and other minority rights activist groups.

1.5 What this module aims to achieve

Learning outcomes

This module is aimed at imparting knowledge of Hate speech in South Africa to the reader.

After reading this module, the reader must be able to;

- i) Define hate speech;
- ii) Understand the environment around hate in the South African context;
- iii) Understand how hate speech as a concept fits in to Freedom of Expression;
- iv) Identify the challenges that are posed by the current legal provisions on hate speech;
- v) Identify possible opportunities to advance the exercise of the right to free expression.

1.6 Chapter Summary

The FXI sought to prepare a module on Hate speech in South Africa with the aim of providing the reader with some basic insight on the framework of hate speech as an aspect of freedom of expression. The need to educate the public on the subject of hate speech stems from the realization that whenever the issue of hate speech is brought to the fore in litigation or otherwise, a need to make the determination of what actually constitutes hate speech has to be made. This module addresses the lack of clarity around hate speech provisions.

This module does not in itself make the determination of what hate speech is in the South African context. It does however seek to bring the reader into the discussion that is on-going around hate speech in South Africa. The aim being that the reader can be conversant in issues surrounding hate speech. Identify with the challenges that are posed by hate speech provisions, as well as begin to consider what can be done with such challenges so as to advance the broader right of freedom of expression.

CHAPTER 2: PROTECTING FREEDOM OF EXPRESSION

2.1 What is freedom of expression?

Freedom of expression relates to the liberty to be able to hold opinions and to impart and/or receive these as well as ideas and information to others in any form.

In the South African context the scope of freedom of expression is grounded on the Constitution of the Republic of South Africa (the Constitution), which makes provision for the right to freedom of expression as a fundamental right. Section 16 of the Bill of Rights delimits freedom of expression as it relates to;

- a. Freedom of press and other media,*
- b. Freedom to receive or impart information and/ or ideas,*
- c. Freedom of artistic creativity, as well as*
- d. Academic freedom and freedom of scientific research. ¹*

Freedom of Expression is the best way of attaining the truth, it advances the ability to criticise or converse one another without fear and allows us to get to the truth. It is a vital part of the democratic process as free debate about public issues facilitates the strengthening of a democracy. It is a manifestation of individual autonomy allowing for rational and un-coerced decision making.

Freedom of expression encourages everyone to tolerate the views of others and it protects the right of the dissenters. It is for these reasons that the right of Freedom of expression is regarded as an imperial right which is worthy of observance and protection in any free society.

2.2 What freedom of expression ensures

Freedom of expression ensures a society with a culture of critical conversation and tolerance in and around all aspects. This ensures if not respect, recognition of fundamental human rights and freedoms. Further to that when people are not barred from expressing their views the all-important discourse that is required to strengthen

¹ S16 (1) of the Constitution of the Republic of South Africa Act 106 of 1996

a democracy is facilitated.

2.3 The importance of freedom of expression

The importance of free expression to a democratic society cannot be overstated and continues to be a point of advocacy for the maintenance of a healthy democracy. One of the most significant guarantees that freedom of expression provides is its allowance for all citizens to participate in their systems of governance. In essence, democracy is the rule of the people, by the people, for the people, as such; it is expression through communication or action that ensures that the will of all in society is communicated. This is achieved as this right provides a platform for such communication to facilitate the enjoyment of other rights such as civil-political and socio-economic rights.

One of its most important functions is that decision-making at all levels is preceded by discussion and consideration of a representative range of views. A decision made after adequate consultation is likely to be a better one which mirrors the opinions, interests and needs of all concerned, than a decision taken with little or no consultation.²

Freedom of expression is identified as one of the key elements of holding any government to account, through discourse it influences the manner in which the government affects the will of the people over which it governs. This is evident in the facilitation of freedom of expression through the right to protest. Groups are then able to make their grievances and concerns known to the government who it is hoped would listen to the voices of the people and take remedial action thereafter.

2.4 Can and should freedom of expression be limited?

As with all rights, the right to freedom of expression requires that it be exercised with the responsibility not to infringe on other rights. In South Africa, the Bill of Rights outlines this requirement that all rights be exercised within this limitation of responsibility to others.

Most legislation relating to freedom of expression has an express limitation inserted, that makes it clear what free expression cannot extend to. The internal limitation

² Dr Mark Cooray 'The importance of Freedom of Expression' accessible at <http://www.ourcivilisation.com/cooray/btof/chap211.htm> accessed on the 22/01/2014

within the South African Constitution is unique in that it is the only right within the Bill of Rights that contains an internal limitation clause. This is indeed attributed to the South African history of apartheid which seemed to thrive on discrimination, hate speech and harassment. The writers of the Constitution were cognisant of that history and the need to take steps to highlight the responsibility that lies with the ever so important right to freedom of expression.

The South African Constitution states that Freedom of Expression cannot extend to expression that enlists:

- a. *Propaganda for war;*
- b. Incitement of imminent violence; or
- c. Advocacy of hatred that is based on race, ethnicity gender or religion and that constitutes incitement to cause harm.³

This is to say that responsible exercise of free expression is such that it is within the confines of expression that does fall within section 16(2) of the Constitution.

The need to limit certain rights is due to the fact that careless exercise of the right may infringe on the rights of others and thereby become destructive as evidenced from the apartheid history of South Africa. It is prudent therefore that the right be limited.

2.5 Chapter Summary

Freedom of expression has been established as liberty to share, communicate, impart and receive ideas and information and is one of the key freedoms required to sustain a healthy democratic state. It is recognized to enhance or strengthen a democracy through the identification of the peoples will through what they express and how they express it. Like any right it is a right to be guarded, protected and most importantly exercised responsibly so as not to be destructive, and for this reason it is a right that is often reflected with inbred limitations that ensure it is exercised responsibly.

³ S16 (1) of the Constitution of the Republic of South Africa Act 106 of 1996

CHAPTER 3: WHAT IS HATE SPEECH?

3.1 What does hate speech mean?

In the South African context no formal definition of hate speech exists. The meaning is commonly derived from context of legal instruments that have an impact on hate speech such as the Constitution of the Republic of South Africa 106 of 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

For the reason above for one to formulate a definition for hate speech one looks to international instruments and foreign law definitions of the concept of hate speech. Any definition of hate speech will have its foundation in the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (“ICERD”) in which Article 4 relates to banishing all forms of discrimination, amongst which declares;

“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”

Hate speech has thus been described as *“any speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates a protected individual or group”*.⁴

Other Authors better define it as *‘speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground including race, nationality, ethnicity, country of origin, ethno-religious identity, religion, sexuality, gender identity or gender.’*⁵

Evident from all definitions stated is the connotation of speech possessing an inherent ability to “incite harm” be it of a violent, prejudicial nature or otherwise to the

⁴ Daniel E. Hall ‘e-Study Guide for: Constitutional Values : Governmental Power and Individual Freedoms’ (Facts 101 study guides) ISBN 9780131717695, Google e-Book.

⁵ Linda Daniele, (MA (Journalism) candidate, UTS)’ Regulation of the Media: Hate Speech Essay’ accessible at http://linda-daniele.wordpress.com/2013/02/03/regulation-of-the-media-hate-speech-essay/#_ftn1 accessed on 16 January 2013.

individual or group to whom it is directed, and that such harm should inflict an attack based on discriminatory grounds such as race, nationality, ethnicity etc.

3.2 Legislation around hate speech

Currently in South Africa only two pieces of legislation have bearing on hate speech, these are:

a. *The Constitution of the Republic of South Africa Act 106 of 1996*

The Constitution of South Africa is the supreme law of the state and takes precedence to any legislative enactment and any law contrary to it is null and void.

The Constitution sets out in its Bill of rights and entrenches the right to freedom of expression as a primary right. This right is found in Section 16 of the Constitution and reads:

Freedom of Expression

16. (1) everyone has the right to freedom of expression, which includes; –

- (a) Freedom of press and other media;
- (b) Freedom to receive or impart information or ideas;
- (c) Freedom of artistic creativity; and
- (d) Academic freedom and freedom of scientific research.¹

(2) The Right to in subsection (1) does not extend to –

- (a) Propaganda for war;
- (b) Incitement of imminent violence; or
- (c) Advocacy of hatred that is based on race, ethnicity gender or religion and that constitutes incitement to cause harm.

It is sub section (2) of the right stated that has the bearing on the regulation of hate speech. The idea of hate speech therefore is borne of the limitation of expression in that it cannot extend to the points set out in subsection (2) of section 16.

b. *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*

Popularly known as the “*Equality Act*” has one of its objectives “*the prohibition of hate speech*” and this objective is embodied in its section 10, which reads;

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

- (a) Be hurtful;
- (b) Be harmful or to incite harm;
- (c) Promote or propagate hatred.

3.3 An overview of international instruments on hate speech

Several international instruments have a bearing on hate speech provisions as we know them today. All such instruments have their foundation in the ideal of observation of the fundamental right of freedom of expression, which should not extend to hate speech or highlighting the need to eradicate all forms of discrimination even through speech. The most prominent of which are:

a. *International Convention on the Elimination of all forms of Racial Discrimination (ICERD) of 1956*

This is a convention to which South Africa is a signatory, the convention seeks to enhance the principles of equality and dignity inherent to all human beings among which is the prohibition of hate speech. This is apparent in article 4 of the Convention which reads:

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 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..*⁶

b. International Covenant on Civil and Political Rights (ICCPR) of 1966

This is a convention to which South Africa is also a signatory. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial.⁷ Article 19 of the Covenant relates to freedom of expression and states that:

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*

⁶ Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination, accessible at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> accessed on 17/01/2014

⁷ Article 19 of the International Covenant on Civil and political Rights, accessible at http://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights accessed on 17/01/2014.

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:

- i) For respect of the rights or reputations of others,*
- ii) For the protection of national security or of public order (ordre public), or of public health or morals.⁸*

c. European Convention on Human Rights (ECHR) of 1950

Formally the Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty to protect human rights and fundamental freedoms in Europe. Fittingly so it recognizes freedom of expression as fundamental right and outlines the limits to which it cannot extend. Such provision is found in Article 10 of the convention and reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Implications of these instruments on hate speech

The bearing these instruments have on hate speech is in their recognition of the fundamental nature of freedom of expression as a right. The various instruments make it clear that the exercise of the right should not extend to the infringement of others

⁸ Article 10 of the European Convention on Human Rights, accessible at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed on 17/01/2014

rights through derogatory and discriminatory speech, which hate speech falls under.

Based on the ICERD and for European Countries the European Convention on Human Rights (“ECHR”) many states of the world make provision for hate speech in their laws and have modelled such laws around such conventions. In some countries in the form of criminal laws (which are laws punishable by the state) and in some forming the basis of civil laws (which are contestable between legal persons in court). Examples of countries that have hate speech laws include Australia, Belgium, Brazil, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Iceland, India, Indonesia, Ireland, Japan, Jordan, New Zealand, Norway, Poland, Serbia, Singapore, Sweden, Switzerland, Thailand, United Kingdom and the United States.

3.4 The impact of hate speech on freedom of expression

The dilemma that exists where hate speech is concerned is the inherent need to strike a balance between full exercise of ones right to freedom of expression which will at times involve the expression of information or ideas “that offend, shock or disturb” the next person, or group. It submitted that that such are the demands of a pluralist society, where tolerance and broadmindedness should prevail, as without these a democracy would fail.⁹

According to Pillay and Azriel, “hateful speech undermines the values of pluralism and diversity, by communicating a message that some community members are less worthy than others merely by their membership of a certain group”.¹⁰ An issue that is highlighted in the widespread debate as to whether hate speech unduly infringes on and thereby limits freedom of expression.

In the South African context this is also an on-going debate one which some authors cite as a result of the underdevelopment of the law around hate speech.¹¹

It is submitted that where an utterance (in the offensive) is made it must be distinguished from mere hurtful language as opposed to hate speech, the former it seems

⁹ Maria Paschou, 'Freedom of Expression vs. Hate Speech: A European Youth Campaign' (2013) Civicus World Alliance for Citizen Participation, accessible at <https://socs.civicus.org/?p=3854> accessed on 17/01/2014

¹⁰ Karmini Pillay, Joshua Azriel “ Banning hate speech from public discourse in Canada and South Africa: A legal analysis of both countries constitutional court and human rights Institutions' (2012) Vol 7, S A Public Law Journal

¹¹ Ibid

should fall in the prescripts of tolerance and taken to form democratic discourse. Yet what would constitute the latter, is when viewed objectively speech that has the “propensity to incite hatred and cause harm to a person or group of persons” such speech should be deemed hate speech and not be protected by the Constitution.¹²

3.5 Chapter Summary

With no existing formal definition in the legislative framework of hate speech, the definition can be deduced from provisions relating to hate speech in the constitutional framework or international instruments. On examination of the above it stands out clear that the concept of hate speech makes reference to speech that attacks the persons or group to whom it is targeted on the basis of “racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to cause harm” among other things. This description of hate speech underlies various hate speech legislative frameworks worldwide and can also be seen from the South African Constitution.

For purposes of hate speech two pieces of legislation can be said to be of effect in the South African Constitution and the Equality Act. It has been shown that international Instruments such as Human Rights Conventions are the cornerstone of hate speech provisions and can be looked to, to better understand the concept of hate speech. In South Africa and worldwide it is said that the existence of hate speech is actually a limitation on the all-important right to Freedom of Expression, as it contradicts the notion of encouragement of democratic and other discourse which at times requires tolerance to views that may not be palatable to all tastes, yet pluralism requires it.

In South Africa it seems to be a point of consensus hate speech provisions are still on the underdeveloped side and we continue to look to development of it through case law and possibly any other interventions in future.

¹² Taryn van Deventer (Bowman and Gilfillan) ‘When does freedom of Expression win the race?’ accessible on <http://www.bowman.co.za/eZines/Custom/Litigation/NovemberNewsletter/HateSpeech.html> accessed on 13/01/2014.

CHAPTER 4: HATE SPEECH FREEDOM IN SOUTH AFRICA

4.1 Regulation of Hate Speech in South Africa

The regulatory framework of hate speech in the South African Context takes the form of the regulations being found in the regulatory legislative framework as set out above, same being:

1. The Constitution of the Republic of South Africa Act 106 of 1996, and
2. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The means of enforcement of the legislative framework that regards to hate speech are in the form of three institutions being:

a. *The South African Human Rights Commission “SAHCR”*

This is usually the first port of call for individuals who seek recourse for a grievance that pertains to a violation of any or all human rights as apparent in the Constitution. Among which is the right to Freedom of Expression on the one hand and the right to equality or dignity on the other. Often people with a grievance that relates to hate speech will lay a complaint to the SAHRC, which then adjudicates on the matter. Matters adjudicated on by the SAHRC may result in further court action should the SAHRC determine that the violation of the said human right warrants court deliberation.¹³

b. *The Equality Courts*

Persons aggrieved by a violation of their right to equality, unfair discrimination and hate speech may proceed to make such a case at the Equality courts of South Africa.

The Equality Courts were created by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Act”), which was promulgated as a direct result of section 9 of the Constitution of the Republic of South Africa 108 of 1996. Equality Courts across the country have been operational since late 2003.¹⁴

¹³ The complaints procedure may be found at <http://www.sahrc.org.za/home/21/files/Revised%20Complaints%20Handling%20Procedures%20of%20the%20SAHRC%20240212.pdf> accessed on 20/10/2014

¹⁴ *Infra*

The purpose of Equality Courts is to adjudicate matters specifically relating to infringements of the right to equality, unfair discrimination and hate speech, with a view toward eradicating the ever present post-apartheid spectre which essentially has divided the country along racial, gender and monetary related lines.¹⁵

c. High Courts of South Africa

South African High Courts are designated by the department of Justice as automatic Equality Courts; however the process of lodging an equality court process in the High Court is not an automated one. Matters that can be taken to the high court are matters only on condition:

1. *An order is made by an Equality Court of the Magistrate's Court which exceeds the normal civil jurisdictional limit of the Magistrate's Court, or*
2. *Where such order pertains to unfair discrimination which does not fall within one of the prescribed grounds, such an order must be confirmed by the High Court having jurisdiction prior to such order being of force and effect.*
3. *In addition, an appeal to the High Court lies from decisions made by Magistrate's Court Equality Courts.*¹⁶

4.2 Cases impacting the discourse of Hate Speech

Afri-Forum and Another vs. Julius Sello Malema

The issue of hate speech had not seen frequent court actions until the case of Afri-forum vs. Julius Sello Malema¹⁷ (the “Malema case”) which became the leading hate speech case in South Africa. Where Malema was accused of hate speech after singing a song publicly that contained the utterance “Dubula ibhunu, Dubula amabhunu baya raypha” translated to mean “shoot the Boer/farmer, shoot the Boers/farmers they are rapists”.

In a controversial judgment at the South Gauteng High court of South Africa, Jus-

¹⁵ The equality court Explained, accessible at <http://www.polity.org.za/article/the-equality-court-explained-2011-05-19> accessed on 20/01/2014

¹⁶ Op cit note 13

¹⁷ Afri-Forum and Another v Malema and Others (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240

Justice Collin Lamont found that the utterance by Malema was indeed hate speech and could not be justified by the argument that the song was of historical significance. The judgments point of contention among many was the fact that Justice Lamont further went on to interdict both Malema and the ANC from singing the song in both public and private spaces failing which they would be in contempt of court. This, it is submitted, was a drastic limitation to freedom of Expression, which was unwarranted.

Part of the judgment included reference to one's consideration of their audience where certain utterances are made and the taking into account how such utterance may be received and further interpreted by the audience.¹⁸ This drew the criticism that even where a majority of people saw nothing wrong with a certain utterance if a certain group thought differently that would actually count, in this way all interpretations of the words by the different groups should be accepted as the meaning. It is unfortunate that the judgment avoided dealing with a difficult legal problem, namely that the song inevitably would be viewed differently, depending on the audience.¹⁹

The case as was expected taken on Appeal to the Supreme Court, whose outcome was eagerly awaited so as to shed light on the elements of hate speech that remained marred in uncertainty, this however did not happen as the matter was settled prior to the finalization of the case.

FXI Position

FXI had entered as amicus in the appeal case and had we been given the opportunity we would have addressed the proper interpretation of the prohibition of hate speech in section 10(1). That it should be narrowly construed because it prohibits speech protected by section 16(1) of the Constitution. We sought to focus on the requirement of section 10(1), that a prohibited statement must be one which "could reasonably be construed to demonstrate clear intention" to be hurtful. It calls for an objective but entirely context driven enquiry into the "clear intention" of the speaker. It does not include meanings which others particularly

¹⁸ Pierre de Vos, "Malema Judgement: A re-think on hate speech needed" accessible on <http://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/> accessed on 20/10/2013

¹⁹ Ibid

outsiders may mistakenly attribute to him.

Prior to the case above however the courts decisions relied heavily on the fact that there need be a clear incitement of harm or violence for it to be labelled hate speech as seen with the following two cases;

Human Rights Commission of South Africa v SABC ²⁰

The Broadcasting Complaints Commission held that derogatory and inflammatory statements about the Indian population in a Zulu song were advocacy of hatred based in race. The song, according to the Commission, polarised Zulus and Indians by demeaning Indians and insinuating that they were the cause of the poverty of Zulus and were worse than whites. It is also important to note that South African courts have, perhaps as recognition of the importance of the right to freedom of expression, recognised that however offensive advocacy of hatred may be, it does not rise to the level of proscribed hate speech until it also tends to “incitement to cause harm.” ²¹

Ramesh Dharamshee Jethalal v Mbongeni Ngema and Universal Music ²²

The Durban and Coastal Local Division of the High Court declined to extend an interim interdict which prohibited the publishing, marketing, distributing and selling of the song “Amandiya” – being track sixteen in the CD “Jive Madlokovu”. (This is the same song that the Broadcasting Complaints Commission had held to be derogatory and demeaning of Indians). The song had been on the market for three months prior to the granting of the interim interdict. The court referred to the fact that there had not been a single documented case of violent action by Blacks against Indians which could be ascribed to the song during that time, and found that the fear expressed by the applicant that the song would lead to race riots and bloodshed was founded merely on his own opinion and was not borne out by any fact. Although the court had little doubt that the song was racist – since it contrasts one race (Blacks) with another race (Indians) in a very generalised and unspecific way – it emphasised that section 16(2) of the Constitution is not

²⁰ Human Rights Commission of South Africa v SABC 2003(11) BCLR 92 (BCCSA)

²¹ Department of Justice and Constitutional Development RSA, South Africa’s Combined 2nd to 6th periodic report to the United Nations Committee on the Elimination of Racial Discrimination covering the period 2002 to 2011, at 45.

²² Ramesh Dharamshee Jethalal v Mbongeni Ngema and Universal Music (Case No: 3524/2002, 28 June 2002)

aimed at the advocacy of hatred based on race as such, but at advocacy of hatred based on race which also constitutes incitement to cause harm. Both elements – advocacy of hatred based on race, and incitement to cause harm – had to be present. Since there had been no violent actions against Indians, the targets of the racist song, the court declined to extend the interdict.²³

As mentioned earlier the cases prior to Malema seemed to focus its decision making with regards to the specific incitement of harm or violence which is more so aligned with the parameters of section 16(2) of the Constitution. The Malema case however seems to focus more on the guidelines of the Equality Act wherein the emphasis is more so on the intention of the speech. In light of the Malema case having left the hate speech debate unsettled, the Qwelane case below is hoped to be the glimmer of hope that will settle the debate on what constitutes hate speech.

The South African Human Rights Commission vs. Jon Dubula Qwelane

This case is currently in the courts and its developments include going as far as challenging the constitutionality of the provisions of the Equality Act.

The case is based on Mr Qwelane's ("Qwelane") article that was published in the Sunday Sun newspaper titled "Call me names, but GAY is not okay" this caused considerable outrage in the Gay community which laid a complaint against Qwelane at the SAHRC for hate speech. At the time of print the matter was still in the process of a High Court application as to the constitutionality of Section 10 of the Equality Act (FXI intervening as Amicus Curiae). The Applicants in this regard argue that S10 lack clarity and is vague, further that it does not mirror the constitution from which it was conceived. It argues that the wide phrasing of the section lands people (in this case, journalists) with no clear idea of what is prohibited or not.

The argument of the hate speech provisions of the Equality is one that has been a point of contention amongst freedom of Expression circles, and thus it will be

²³ Department of Justice and Constitutional Development RSA, South Africa's Combined 2nd to 6th periodic report to the United Nations Committee on the Elimination of Racial Discrimination covering the period 2002 to 2011, at 45 and 46

of interest to note the outcome of this case. The case has the opportunity to shed more clarity on the issue of what it is that actually constitutes hate speech in South Africa.

4.3 Challenges of Hate Speech in South Africa

Hate speech in the South African context has no formal definition in any Act and has for this reason caused considerable confusion where it is contended.

The Constitution and common law as above mentioned in this chapter try to bring clarity where hate speech is concerned. The only other source of guidance as to the nature of hate speech can be derived from the one legislation that is said to regulate hate speech in South Africa which is the “the Equality Act”. The second chapter, in particular section 10 of the Act, deals with prevention, prohibition and elimination of unfair discrimination, hate speech and harassment.

In its Section 10 the Equality Act outlines that what is prohibited (hate speech) is *the publication, propagation, advocacy or communication of words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to;*

- a. *Be hurtful;*
- b. *Be harmful or to incite harm and*
- c. *Promote or propagate hatred.*

The wording “reasonably construed” posed and continues an inherent difficulty in determining what constitutes hate speech and is seen as confusing and at times contradictory,²⁴ scholarly commentary has attempted to explain it as to mean that the test employable in determining what constitutes hate speech as:

“not strictly one of intention but whether a reasonable person could interpret the conduct as demonstrating a clear intention”

²⁴ Shaun Techner “The hate Speech provisions of the Promotion of Equality and prevention of Unfair Discrimination Act 4 of 2004: The good the bad and the ugly” (2003)Vol 19, SAHRJ at 354

Meaning that expression should not necessarily when spoken result in or cause hurt or harm to the person whom it is directed, yet must merely be construed in that manner.

²⁵ This it is argued is perilous as it could result in people undertaking litigation to settle scores or in intimidate persons of certain groups. ²⁶

The court seems to reduce the construction to the effect of the words, in the case of *Afri-forum and Another v Malema* 2010 (5) SA 235 it was held that

“The true yardstick of hate speech is neither the historical significance thereof nor the context within which the words are uttered, but the effect of the words, objectively considered on those directly affected or targeted thereby”

4.4 Opportunities for advancing freedom of expression

As a legal concept the best way of developing standing legal provisions is often presented by litigation where court pronouncements form precedent and thereby create the legal order in that respect. The same is hoped for the development of hate speech. Though not much significant litigation has arisen in this area it is hoped that the cases that are at present under deliberation will develop the hate speech laws as they occur.

It seems from the apparent gaps that exist in the hate speech laws that further research on the best way to deal with hate speech in the South African context may be required. Comparative studies with other jurisdictions could be helpful in aligning the South African hate speech framework to that of the global context.

By developing hate speech laws to be much clearer to all persons that are law abiding citizens, this advances freedom of expression in the sense that it allows the citizens to fully exercise their right to Freedom of Expression without infringing on the rights of others or breaking the law as the parameters for which they should abide will be clear. As the problem with laws as unclear as the hate speech laws in this country is that people tend to not fully exercise their rights to express themselves in fear of being found on the wrong side of these laws, what suffers in that regard is the so required discourse that enhances a democracy.

²⁵ Op cit note 1 at 354

²⁶ Ibid

4.5 Chapter Summary

The legal framework around hate speech in South Africa comprises as two legislative sources namely the Constitution, the Equality Act and common law. The means of enforcement ranges from the section 9 institution the South Africa Human Rights Commission, the specialized Equality court all the way to the High courts including the Constitutional court.

In terms of Litigation (court process) there has not been ample litigation as relating to speech in South Africa. It is notable though that one of the first few cases that related to hate speech which was the “Malema” case which in its tenure unravelled the now significant debate of what it is exactly that constitutes hate speech in the South African context. The Malema case however was not conclusive on the matter and the next case that is looked to achieve the clarity that was sought in the Malema case is that of “Qwelane” which is still under the court process.

In addition to case law being looked to for the clarity and development of hate speech provisions; it is key that having identified the gaps that exist in hate speech provisions that research especially of a comparative nature to other jurisdictions that have more developed hate speech laws need be done.

5. Feedback Questionnaire

- What do you understand by the term Freedom of Expression?

- Are you able to broadly define hate speech?

- Do you understand the environment around hate speech in the South African context?

- Do you understand how hate speech as a concept falls in the freedom of expression?

- Do you understand why it is important to develop understanding of hate speech in South Africa?



6. Glossary of terms

Advocacy	- the act of pleading for, supporting, or recommending; active espousal
Amicus curiae	- a person, not a party to the litigation, who volunteers or is invited by the court to give advice upon some matter pending before it. Also called friend of the court.
Appeal	- a formal question as to the correctness of a ruling by a presiding officer.
Contempt of court	- willful disobedience to or open disrespect for the rules or orders of a court
Covenant	- an incidental clause in such an agreement.
Citizen	- all people who live within that particular country.
Interdict	- any prohibitory act or decree of a court or an administrative officer.
Legislation	- a law or a body of laws enacted.
Litigation	- a lawsuit/ court case
Pluralist	- a theory that there is more than one basic substance or principle.
Prejudicial	- causing prejudice or disadvantage; detrimental.
Promulgated	- to make known by open declaration; publish; proclaim formally or put into operation

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4. The South Africa human right Commission v Jon Dabula Qwelane (FXI Intervening as amicus) case number: 44/2009 EQ JHB (EQ 13/2012)
5. Qwelane/ Minister for Justice and Constitutional Development and others Case no: 36314/1

Legislation:

1. The Constitution of the Republic of South Africa Act 106 of 1996
2. The Prevention of Unfair discrimination and the Promotion of Equality Act 4 of 2000

International Conventions:

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2. International Covenant on Civil and political Rights, accessible at http://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights accessed on 17/01/2014.
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BECOME A MEMBER OF THE FXN

The Freedom of Expression Network is a coalition of grassroots based formal and informal organizations in all 9 provinces within South Africa. It is an association of social movements, community based organizations and not for profit organizations operating in various fields with an interest in advancing freedom of expression as a facilitative right for the realization of open, accountable and sustainable democracy. The FXN maintains a strong and mutually beneficial relationship with the Freedom of Expression Institute which ensures lasting impact of the programmes implemented.

WHY JOIN THE FXN?

By becoming a member of the FXN, your participation will help advance the fight for freedom of expression and other related rights such as the right to access information, protest, association and assembly. The Freedom of Expression Institute believes that this is important towards the realization of a truly open, accountable and transparent government and sustainable democracy.

In addition; as a member, you will receive constant updates of FXI coordinated;

- Trainings,
- Consultative meetings
- Other events, and
- Newsletters

HOW TO BECOME A MEMBER

To join this growing network, please provide the following details;

1. Name of organization/ individual,
2. Location
 - Province, and
 - Town
3. Contact details (Provide at least 1 of the details below):
 - Cell number,
 - Telephone number, OR
 - E-mail address

Send the details above to the FXI through any of the following;

- Call: 011 482 1913
- Fax: 011 482 1906
- SMS: 072 655 4177
- E-mail: organiser2@fxi.org.za



FXI LAW CLINIC

The FXI is one of the few human rights civil society organizations that have a dedicated Law Clinic to handle matters directly related to our organizational vision and purpose. Through the Law Clinic, the FXI has provided easily accessible legal advice on freedom of expression including artistic freedom, academic freedom, freedom of the media and the rights of people to gather and protest. It has also built the body of law on freedom of expression by making use of high impact litigation and Constitutional Court cases that have assisted in defining more clearly the right to freedom of expression. The law clinic also aims to educate and inform the general public on the laws around freedom of expression and does so by engaging in workshops, trainings and seminars.

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