



## Freedom of Expression Institute - Position Paper on Hate Speech

### I. Freedom of Expression

#### The Constitutional Right to Freedom of Expression and Its Limitations

Freedom of expression is an inherent human right recognized by most modern democracies<sup>1</sup> and encompasses the liberty to hold opinions and share and/or receive ideas and information. South Africa is no exception, and this right is prominently featured in its Constitution. Section 16 of the Bill of Rights specifically protects freedom of expression as it relates to:

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

At times, this right can be in tension with others enshrined in the Constitution—notably the right to dignity (section 10) and equality (section 9). However, in South Africa, freedom of expression is not explicitly subordinate to these rights and should not be treated as such.<sup>2</sup>

The Constitution itself sets certain limitations on freedom of expression as outlined in s16(2) and does not protect:

- (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.

From the constitutional text, these limitations appear quite narrow, likely stemming from lessons acquired during the apartheid-era, when the regime used restrictions on speech as a tool to prevent political criticism.<sup>3</sup> As decided in *Islamic Unity Convention*,<sup>4</sup> additional limitations to freedom of expression may also be applied as long as they consider all relevant factors laid out s36, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;

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<sup>1</sup> Universal Declaration of Human Rights, accessible at <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>; International Covenant on Civil and Political Rights, accessible at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>2</sup> The FXI holds this position despite the Prevention of Unfair Discrimination and the Promotion of Equality Act 4 of 2000 and *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240.

<sup>3</sup> See, e.g., Native Administration Act of 1927 (making it a criminal offense to articulate “any words or [engage in] any other act or thing whatever with intent to promote any feeling of hostility between natives and Europeans”); Internal Security Act of 1982 (prohibiting all speech criticizing the government’s race policies).

<sup>4</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC)

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

### The Importance of Freedom of Expression

While the Constitution protects almost all expression, governmental bodies have broadened limitations beyond s16(2), which is greatly concerning for democratic vitality. Freedom of expression is essential to a fully-functioning democracy, ensuring that minority, as well as majority, groups have the opportunity to express themselves in the socio-political sphere. By facilitating discussion around different views—including those that are painful or even offensive—freedom of expression provides for thoughtful administrative decision-making and unlocks the potential to identify lingering intolerances plaguing South African society as well as remedies for past injustices. While some critics may argue for restrictions beyond those identified in the Constitution (see s16(2) above), relying on arguments regarding the protection of human dignity (s7(1) and s10), such attempts must generally be rebuffed in recognition of the symbiotic relationship between democracy and freedom of expression.

## **II. Hate Speech as a Limitation on Freedom of Expression**

### Problems with Defining Hate Speech in South Africa

In South Africa, no formal definition of hate speech exists, which has arguably lead to the continual broadening of what “hate speech” encompasses or how it might be expressed within South African law.<sup>5</sup> The government has recently even called for the criminalization of certain forms of hate speech, making a cohesive understanding of its parameters even more important.<sup>6</sup> The South African impulse to extend the scope of hate speech is perhaps justifiable given past injustices; however, the FXI posits that the way to address these harms is through open dialogue (even if offensive at times) as protected in s16 of the Constitution.

#### a. Constitutional Parameters

The Constitution does not specifically delimit what comprises “hate speech” per se, but does hint at its parameters in s16(2)(c), which limits constitutional protection over “advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.” As noted above, the contours of this limitation appear narrowly-drawn in terms of protected characteristics (i.e., race, ethnicity, gender and religion) and the nature of the offending speech (i.e., “advocacy of hatred” coupled with “incitement to cause harm”).

However, courts have extended them, purportedly in recognition of South Africa’s past marked by discrimination and internal divisions. In *Afri-Forum and Another v Malema and Others*, for instance, the South Gauteng High Court held that Malema and the ANC could no longer sing a song with the lyrics “shoot the Boer, shoot the farmer, they are rapists/robbers” since it constituted hate speech.<sup>7</sup> In its opinion, the court referred to the importance of the perceptions of a specific audience when evaluating whether an expression comprises hate speech. Focus

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<sup>5</sup> See, e.g., Promotion of Equality Act and Prevention of Unfair Discrimination Act 4 of 2000; *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240

<sup>6</sup> Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016

<sup>7</sup> *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240

thus shifts from the intent of the “expressor” to the reaction of the audience, whose power to determine the extent of hate speech increase dramatically. This shift in perspective is out of step with the constitutional mandate in s16(2)(c). *Malema* serves as a potentially dangerous precedent for broadening the constitutionally narrow parameters of hate speech.

b. Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

Despite the contours of hate speech outlined in the Constitution, Parliament extended hate speech’s purview under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (hereinafter the Equality Act), allegedly to comply with international obligations.<sup>8</sup> While the Act regulates hate speech, it draws its primary authority from s9 of the Constitution (the right to equality) instead of s16(2)(c) (the best “definition” of hate speech available in South Africa), demonstrating the country’s commitment to promoting equality and dignity over free expression. The Equality Act does not define hate speech, but in section 10 indicates that:

“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 incite harm; and
- (c) promote or propagate hatred.”

Though section 12 may protect expressions spoken in “good faith,” the Act signifies an unconstitutional departure from s16(2)(c) and effectively limits protected speech under s16(1) without sufficient justification from s36 of the Constitution as required by *Islamic Unity Convention*.<sup>9</sup> The Act also extends the characteristics protected under s16(2)(c) from “race, ethnicity, gender or religion” to, *inter alia*, “sex, age, disability, sexual orientation” (s9 of the Constitution and s10 of the Equality Act).

The FXI as *amicus curiae* challenged the constitutionality of the Equality Act on these grounds in *South African Human Rights Commission v Qwelane*.<sup>10</sup> The case involved an article entitled “Call Me Names, But Gay Is Not Okay” written by the former ambassador to Uganda, Jon Qwelane, and published in the Sunday Sun; an accompanying cartoon showed a man marrying a goat, appearing to equate homosexuality with bestiality. Upon publication, the gay community brought an action against Mr. Qwelane for hate speech under the Equality Act. In its *amicus curiae* brief, the FXI first compared the Act’s s10 provisions to s16(2)(c), determining that s10 was unconstitutionally broad.<sup>11</sup> Next, the brief considered whether there was a s36 justification for the expansions of the contours of hate speech over and above the Constitution, considering each of the relevant factors (i.e., “the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and [the availability of] less restrictive means to achieve the purpose”). The FXI argued that there was not sufficient justification under the s36 factors for the broadness of the parameters of hate speech evident in the Equality Act. Accordingly, it posited that the Act was unconstitutional. However, the court has not yet rendered a judgment

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<sup>8</sup> See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, accessible at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

<sup>9</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC)

<sup>10</sup> *South African Human Rights Commission v Qwelane* 44/2009 EQ JHB (EQ 13/2012)

<sup>11</sup> Heads of Argument on behalf of the First *Amicus Curiae* (Case No. 36314/13, 29 Sept. 2014)

on the organization's position in this case (it is expected shortly). Nevertheless, the manner in which the FXI analyzed the Act serves as an effective blueprint for evaluating whether future legislation—or even a single expression—is constitutionally protected under s16.

Though the Equality Act attempts to deter hate speech, it essentially emphasizes the *appearance* of equality, instead of attacking the root causes of discrimination underlying hate speech. The FXI contends that freedom of expression and its accompanying dialogue does more to quash subliminal discrimination lingering in South African society. Accordingly, hate speech should be narrowly understood according to s16(2)(c).

### c. Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016

Last year the South African Parliament again moved to limit hate speech further, *criminalizing* certain forms as laid out in section 4 of the Prevention and Combating of Hate Crimes and Hate Speech Bill (hereinafter the Prevention Bill):

“Any person who intentionally, by means of any communication whatsoever, communicates to one or more person in a manner that (i) advocates hatred toward any other person or group...; or (ii) is threatening, abusive or insulting towards any other person or group, and which demonstrates a clear intention, having regard to all the circumstances to (aa) incite others to harm any person or group, whether or not that person or group is harmed; or (bb) stir up violence against, or bring into contempt or ridicule, any person or group.”

The legislation must be opposed for the following reasons: First, the Bill would overlay yet a different understanding of the parameters of hate speech onto the South African legal landscape, fueling even more confusion. Second, it unconstitutionally extends hate speech beyond s16(2)(c) since it applies to speech that simply causes “contempt or ridicule.” As with the Equality Act, it also protects groups with different characteristics (e.g., albinism, gender identity, intersex) from those delimited in s16(2)(c) (“race, ethnicity, gender and religion”). Finally, the criminal sanctions attached to a violation would have a general “chilling effect” on speech, undermining the right to freedom of expression itself.

## **III. Hate Speech and Social Media**

Since hate speech was hastily added to the Prevention Bill of 2016 in the aftermath of several public rants—some of which were on social media platforms (e.g., the Penny Sparrow incident)—it is important to briefly examine how social media has affected the hate-speech landscape. Despite the changing nature of communications, the FXI cautions against restrictions on the right to freedom of expression that expand beyond s16(2)(c), especially since cases involving social media make up a small percentage of the caseload for both the FXI (10%) and the Equality Courts themselves (9%).<sup>12</sup> With the advent of the Prevention Bill, which clearly aims to regulate electronic communication,<sup>13</sup> an emphasis on freedom of

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<sup>12</sup> Submission by the Freedom of Expression Institute: National Hearing on Racism and Social Media in South Africa (2016) based on FXI Law Clinic analysis on 10 reports of racism and racial discrimination

<sup>13</sup> Prevention and Combatting of Hate Crimes and Hate Speech Bill of 2016, s4(1)(b) (“any person who makes available an electronic communication which constitutes hate speech as contemplated in paragraph (a)” has committed an offence of hate speech)

expression on these platforms increases in importance. As with regular expression, s16(2)(c) (only limiting an expression, if it constitutes “(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”) should provide adequate guidance on hate speech parameters over the Equality Act or the Prevention Bill in the context of electronic mediums.

#### **IV. The SAHRC and the Equality Courts**

Despite the overextension of the parameters of hate speech, incidents falling within the Constitutional (and—as long as it stays on the books—the Equality Act’s) limits do occur. In these instances, access to justice and potential remedies is essential to providing a sense of legitimacy to the South African legal system. Fortunately, there are two main places where South Africans can have their grievances addressed: (a) the South African Human Rights Commission and (b) the Equality Courts.

##### **a. The South African Human Rights Commission**

The SAHRC is a constitutionally-ordained body (section 184 of the Constitution) where individuals may lodge complaints when their rights, as protected in the Bill of Rights (s7 -s39), are violated. In the context of hate speech, those with grievances lay a complaint against the perpetrator with the SAHRC, which adjudicates on the matter. If the commission decides that further court action is necessary, it will take the matter to a formal court as in the *South African Human Rights Commission v Qwelane*, which originally submitted the case to the Johannesburg Equality Court.

##### **b. The Equality Courts**

The Equality Act, under the authority of s9 of the Constitution, established the Equality Courts to adjudicate matters relating to the right to equality, unfair discrimination and hate speech. Despite problematic aspects of the hate speech “definition” in the Equality Act, the FXI believes that the Equality Courts are a valuable tool for eradicating the spectre of apartheid by legitimizing the voices of those who feel violated. However, there is evidence that the average South African remains unaware of the existence or purpose of these courts.<sup>14</sup> This lack of awareness has eroded the court’s usefulness; for example, certain outposts of the Equality Courts have shut down because of a dearth of cases. The availability of the Equality Court’s should be promoted since they serve an important function within South African society.

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<sup>14</sup> Submission by the Freedom of Expression Institute: National Hearing on Racism and Social Media in South Africa (2016)

## V. Frequently Asked Questions and (Brief) Answers:

### 1) What is hate speech?

It is difficult to define hate speech with exactness in the South African context since the Constitution and subsequent legislation qualify its parameters in different ways. In cases such as these, the FXI believes that it is safest to rely on the Constitution. As laid out in s16(2)(c), hate speech relates to the “advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.” In order to understand the correct interpretation of this provisions and what behavior it covers, further litigation is required.

### 2) How does current legislation interact with the constitutional “definition” of hate speech?

As described above, the main legislative act qualifying the Constitutional definition of hate speech is the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. It defines the parameters of hate speech much more broadly than the Constitutional s16(2)(c) provisions, especially since it draws its authority from the s9 right to equality. The Act protects many more “group characteristics” and protects against speech that is “hurtful” in some cases, instead of speech that incites harm.

### 3) What are some examples of cases involving hate speech and their outcomes?

*Sonke Gender Justice Network v Malema*:<sup>15</sup> This case was brought before an Equality Court based on the comments of Mr. Malema insinuating that one of the woman who has allegedly been raped by Jacob Zuma had “enjoyed her time” with him. The court held that Malema’s statement had, in fact, constituted hate speech since it infringed on the right of women to have their dignity respected. This is a particularly wide interpretation of hate speech and does not appear to conform with the Constitution s16(2)(c) since his statement, though offensive, did not incite harm or advocate hatred; instead, the decision emphasized the s10 right to dignity.

*Human Rights Commission of South Africa v. SABC*:<sup>16</sup> The Broadcasting Complaints Commission held that derogatory and inflammatory statements about the Indian population in a Zulu song were advocacy of hatred based on race. The song polarized Zulus and Indians by demeaning and insulting Indians and suggesting that they were “worse than whites.” This decision stands in contrast with the decision in *Jethalal v Ngema and Universal Music* (discussed below) where the Durban and Coastal Local Division of the High Court refused to recognize the same song as constituting hate speech since it did not constitute “incitement to cause harm.”

### 4) Does the context and environment play a role in determining what constitutes hate speech?

This question draws from the outcome in *Jethalal v Ngema and Universal Music*.<sup>17</sup> In this case, the High Court held that the song ‘AmanNdiya,’ which contains racist lyrics towards peoples of Indian descent, did not constitute hate speech because there had not been a single

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<sup>15</sup> *Sonke Gender Justice Network v Malema*, File No. 02/2009

<sup>16</sup> *Human Rights Commission of South Africa v SABC* 2003(11) BCLR 92 (BCCSA)

<sup>17</sup> *Jethalal v Ngema and Universal Music* (Case No. 3524/2002, 28 June 2002)

documented case of violent action undertaken against these people because of the song. The High Court, thus, refused to extend an interim interdict prohibiting the publishing, marketing and selling of the song. The fear of the applicant that the song would cause widespread bloodshed and race riots did not, in fact, come to fruition. The outcome of this case suggests that context and environment may play a significant role in determining the outcome of a hate speech case.

**5) What can I do if I find myself the victim of hate speech?**

As described above, the most effective ways to address any grievances related to hate speech is to take a case before the South African Human Rights Commission or the local Equality Court. The Equality Act (which created the Equality Court system) stipulates that all High Courts are automatically designated as Equality Courts, but more importantly affords the bulk of adjudicative powers relating to equality matters to the Magistrate's Courts.