

CRIMINALISING RACISM in tumultuous times

The South African government is drafting the Prevention and Combating of Hate Crimes and Hate Speech Bill, which was to be tabled in Parliament by September 2016. This is despite existing laws governing unfair discrimination, hate speech, crimen injuria and defamation under which acts of racism can be prosecuted. *Gregory Houston and team discuss the draft Bill.*

Baskets of bitterness

2016-09-18 – News24
<http://www.news24.com/Tags/Topics/racism>

We need to talk about South Africa's everyday

2016-05-10 – News24
<http://www.news24.com/Columnists/MaxduPreez/we-need-to-talk-about-south-africas-everyday-racism-20160510>

The rise of a new black racism in South Africa

Ebrahim Harvey 16 May 2016 – Mail & Guardian
<http://mg.co.za/article/2016-05-16-00-the-rise-of-a-new-black-racism-in-south-africa>

Springbok player's wife condemns racist trolls

2016-10-07 – News24
<http://www.news24.com/Tags/Topics/racism>

The Prevention and Combating of Hate Crimes and Hate Speech Bill responds to a surge in racist incidents, as well as calling for stricter penalties for racists. It provides for the criminalisation of conduct that amounts to incitement, instigation and conspiracy to commit hate crimes, and hatred encouraged through racist comments on social media.

What is 'racism'?

One of the key areas of contention in developing anti-racism law has been the government's conceptualisation of the term 'racism'. There is currently no clear definition of racism in South Africa. It is only in the draft National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) where an overt definition of racism is provided: 'an ideological construct that assigns a certain race and/or ethnic group to a position of power over others ... Racism is a denial of people's basic human rights, dignity and respect. Its expression ranges from small, everyday acts of discrimination, through to barriers and omissions that may be inadvertently established at an institutional level, to acts of threatening behaviour and violence.'

The NAP envisages a policy framework that will be the basis for legislation

dealing with hate crimes, as well as additional measures focused on the criminal prosecution of hate speech. The definition provided in the NAP may, however, inadequately address the historical roots of racism.

Fighting racism through the courts

Current legislative provisions for the prosecution of acts of racism are primarily contained in the Equality Act.

The Equality Act (2000) prohibits unfair discrimination, hate speech and harassment. Hate speech is defined as the publication, propagation or communication of words that are based on gender, disability and race, which must demonstrate a clear intention to be hurtful, harmful or to incite harm and to promote or propagate hatred. Do we need more than this to address racist actions in South Africa?

The Act also provides for the establishment of equality courts, where cases of discrimination can be heard. In February 2004, in the first case considered by the Equality Court, Professor Pierre de Vos (Constitutionally Speaking) and his (gay) partner won a case against the owners of a gay bar in Cape Town after the owners admitted that they had discriminated against De Vos' partner because of his race. As part of a settlement, which was made an order of court, the bar was ordered to pay R10 000 to a non-profit organisation of their choice.

The Equality Court can refer a civil case involving hate speech for criminal prosecution, thereby providing a forum where civil remedies are available against hate speech and unfair discrimination based on race. However, they have not been well-utilised and available remedies have not been tested sufficiently.

A drawback with all criminal prosecutions is that the standard of proof required (beyond reasonable doubt) is higher than a balance of probabilities. This makes it easier for complainants to prove their case in the Equality Court, where the lower standard

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of proof (a balance of probabilities) weights the balance in favour of the victims.

South Africa is not the first country in the world to seek solutions to this problem. Internationally, the UN Convention on the Elimination of all forms of Racial Discrimination (1965) is indicative of the recognition that racism is a political problem, and that governments should play a central role in eliminating all forms of racial discrimination, outlawing hate speech, and criminalising membership in racist organisations.

Anti-racism and hate speech criminal legislation is found in many countries around the world. For instance, the Public Order Act applicable in England and Wales provides for a maximum sentence of seven years' imprisonment. The French law of 1972 prohibits hate speech. The penalty for violating this prohibition is up to a year of imprisonment and/or a fine of up to €45 000. The Gayssot Law in France introduced a new way of punishing racists in 1990: at the discretion of judges, guilty parties can be stripped of certain civil liberties, such as the right to stand for public office.

Criminalising racist speech and conduct can send a zero tolerance message; the criminal record stays with the perpetrator and has long-lasting consequences.

Effectiveness of anti-racism laws

There is wide disagreement about the effectiveness of anti-racism laws. Some argue that at the very least the existence of such legislation signals to society that racism is an intolerable evil, others that stiffer penalties may discourage

perpetrators from carrying out acts of racism. Still others claim that there is evidence that anti-racism legislation is effective as racially aggravated charges have been brought and convictions or guilty pleas obtained since the introduction of this kind of legislation elsewhere.

On the other hand, critics of existing anti-racism legislation in other countries describe the laws as weak, lacking in sufficient enforcement, ineffective and symbolic. Critics also point to the difficulty found in proving discriminatory behaviour, especially the intention to 'provoke discrimination, hate, or violence'.

Notably, Mari Matsuda describes the impact on individuals when governments fail to do something: 'To be hated, despised and alone is the ultimate fear of all human beings. ... The aloneness comes not only from the hate message itself, but also from the government response of tolerance. ... The government's denial of personhood by denying legal recourse may be even more painful than the initial act of hatred'.

On balance, South African public sentiment seems to be more in favour of new legislation than against it, wanting to see dignity upheld and racist conduct punished.

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Note: A version of this article appeared as an opinion piece in various newspapers.