

Does the Constitution call for the criminalisation of hate speech?

*Marelize Marais**

Abstract

The clear-cut exclusion from constitutional protection of 'hate speech' contemplated by section 16(2)(c) of the Constitution is not *per se* concerned with the expression or promotion of hurtful or offensive discriminatory views, not even if intentionally aimed at disadvantaging the target group. Rather, it is concerned with the devastating human rights risk that irrational, cruel behaviour may be borne out of the hatred instilled in others by the inflammatory speech of reckless orators who advocate hatred. The article submits that existing legislative measures do not satisfactorily meet the responsibility to take necessary legislative measures to safeguard society against the realisation of this risk. It points out that while expression under section 16(2)(c) of the Constitution to a substantial extent falls within the ambit of existing criminal offences, in particular the common law offence of incitement to commit a crime, expression contemplated by section 16(2)(c) that incites others to inflict harm by means that do not constitute criminal offences, for instance, discrimination or the promotion of hatred, is prohibited under section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, but not criminalised. Expression of this nature should be criminalised, but only when the inciting action or attitude will have the effect of victimising target groups to the extent that they are effectively prevented from exercising their constitutional rights, in particular their right to freedom of expression. An analysis of the Draft Prohibition of Hate Speech Bill, 2004 reveals that the Bill fails to provide appropriate protection. Taking into account the guarantees of the Constitution including the right to freedom of expression, international commitments, comparative law and, most significantly, relevant features of South African society, the conclusion is reached that the criminalisation of incitement to promote hatred on the grounds stipulated in section 16(2)(c), as well as on the additional grounds of sexual orientation and nationality, is indeed called for.

1 Introduction

Section 16(2) of the Constitution of the Republic of South Africa, 1996 (the

*Senior Lecturer, Department of Public Law, Faculty of Law, University of the Free State.

Constitution), categorically excludes '(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 constitutional protection under the right to freedom of expression as guaranteed in section 16(1) of the Constitution. This denial of any opportunity for justification under section 36 of the Constitution indicates that expression of such a nature is intrinsically irreconcilable with the foundational values of our democratic society. It underscores government's constitutional responsibility to take necessary legislative measures to safeguard society against the realisation of the risk that the unprotected expression holds.¹ The risk contemplated by section 16(2)(c) is that the groups that relate to the grounds that it specifies, and those who support them, will be victimised to the extent that they are effectively prevented from exercising their constitutional rights including the right to freedom of expression. It will be contended that other vulnerable groups have become similarly exposed and are warranting similar protection.

The article will submit that existing legislative measures do not satisfactorily meet this responsibility. In this regard the international condemnation of expression of such nature, in particular by the International Covenant on Civil and Political Rights (ICCPR),² the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),³ and the Universal Declaration of Human Rights (UDHR),⁴ to all of which South Africa is a party, will be taken into account. From a comparative perspective in particular hate speech prohibitions in Germany and Canada will be discussed. Against this background relevant characteristics and realities of South African society will be considered.

First the conclusion will be reached that the prohibition of 'hate speech' contemplated by section 16(2)(c) should also apply to the grounds of nationality and sexual orientation.

The focus will then shift to the need for the criminalisation of hate speech in South Africa. It will be taken into account that, because justification under section 36 of the Constitution for the limitation of freedom of expression within the ambit of section 16(2)(c) is not required, the state is permitted to proscribe the expression, subject only to the rule-of-law requirement of a rational relationship between legislation and its legitimate purpose. However, the nature of the prohibition may nevertheless require consideration of its effect on protected

¹Section 7(2) of the Constitution provides as follows: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

²Office of the High Commissioner for Human Rights (OHCHR) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (accessed 2015-02-22).

³OHCHR <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed 2015-02-22).

⁴OHCHR <http://web.archive.org/web/20080313093428/>; <http://www.unhchr.ch/html/menu6/2/fs2.htm> (accessed 2015-02-22).

rights. The inhibition of the legitimate exercise of the right to freedom of expression that criminalisation and criminal sanctions may entail, is paramount in this regard.

It will be pointed out that expression under section 16(2)(c) of the Constitution to a substantial extent falls within the ambit of existing criminal offences, in particular the common law offence of incitement to commit a crime. Expression contemplated by section 16(2)(c) that incites others to inflict harm by means that do not constitute criminal offences, for instance, discrimination or the promotion of hatred, is prohibited under section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act),⁵ but not criminalised. It will be submitted that criminalisation of expression of this nature will be necessary, and hence required, when the inciting action or attitude will have the effect of victimising target groups to the extent that they can no longer exercise their constitutional rights, in particular their right to freedom of expression. Taking into account the guarantees of the Constitution, international commitments, comparative law and, most significantly, relevant features of South African society, the conclusion will be reached that the criminalisation of incitement to promote hatred on the grounds stipulated in section 16(2)(c), as well as on the additional grounds of sexual orientation and nationality, is indeed called for. The extreme nature of the expression contemplated by section 16(2)(c) will be reiterated. The categorical exclusion from protection is not *per se* concerned with the expression or promotion of hurtful or offensive discriminatory views, not even if intentionally aimed at disadvantaging the target group. Rather, it is concerned with the devastating human rights risk that the advocacy of hatred poses and that the international community and South African society have witnessed, and are still witnessing. In other words, it is concerned with the potential that irrational, cruel behaviour may be borne out of the hatred instilled in others by the inflammatory speech of reckless orators.

In the final instance, the Draft Prohibition of Hate Speech Bill, 2004, will be evaluated in the light of the conclusions that have been reached. It will be indicated that the Bill fails to provide appropriate protection against the aforementioned risk. An offence in terms of section 16(2)(c) of the Constitution, but with the additional grounds of nationality and sexual orientation, and requiring intention, will properly address the necessity for the criminalisation of hate speech, while, at the same time, having due regard for the value of freedom and, in particular, the right to freedom of expression.

⁵Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See Marais and Pretorius 'A contextual analysis of the hate speech provisions of the Equality Act' (2015) PER 902 at 902-931 PER [http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2015volume18no4/2015\(18\)4MarPre.pdf](http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2015volume18no4/2015(18)4MarPre.pdf) (accessed 2016-03-16).

2 Section 16(2) of the Constitution in context

The right to freedom of expression is entrenched in section 16(1) of the Constitution. In the sense that section 16(2) explicitly and categorically places the expression that it describes outside the ambit of the right to freedom of expression, it serves as an ‘internal modifier’⁶ of this right.⁷ An understanding of the reasoning for not rather following the general constitutional limitation approach, namely, to broadly define rights and freedoms and then to subject limitations thereof to justification in terms of the proportionality analysis required by section 36, requires a historical perspective.

In the aftermath of World War II, the shocking and disillusioning reality of humanity’s capacity for cruelty, and of the vulnerability of democratic arrangements and universally recognised foundational human values, motivated the international community to commit to internationally recognised, non-negotiable norms.⁸ 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.⁹ 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.¹⁰ What eventually emerged internationally was the recognition, within the context of freedom of expression as

⁶Woolman and Botha ‘Limitations’ in Woolman, Bishop and Brickhill *Constitutional law of South Africa* (2011) 34-30.

⁷Section 16 provides as follows:

- (1) Everyone has the right to freedom of expression, which includes –
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

⁸The Universal Declaration of Human Rights – History of the Document <http://www.un.org/en/documents/udhr/history.shtml> (accessed 2015-07-16).

⁹*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) para 27.

¹⁰See the discussion of the concept ‘representative democracy’ by Roux ‘Democracy’ in Woolman, Bishop and Brickhill (n 6) 10-08–10-11. See also *South African National Defence Union v Minister of Defence* (n 9) paras 7-8. See Marais *The constitutionality of categorical and conditional restrictions on harmful expression related to group identity* LLD thesis University of the Free State (Bloemfontein) (2014) 25-29.

guarantor of democracy, 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.¹¹ This led to restrictions of freedom of expression, but, as will be indicated, subject to the condition of necessity. Article 18 of the German Basic Law (which came into effect in 1949) reflects this disillusionment with the absolute ability of a free democracy to sustain itself without having to restrict the very fundamental freedoms that define it, including freedom of expression.¹² It provides that whoever abuses freedom of opinion, in particular freedom of the press, as well as other stipulated rights in order to attack the free, democratic basic order categorically forfeits these basic rights. Rosenfeld remarks that the particular provision means that the German justification for the protection of freedom of expression based on the idea of democracy¹³ 'does not encompass extremist anti-democratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets'.¹⁴

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) as the first international instrument to address the aforementioned reality. Lengthy discussions followed and it was not until 1966 that two covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁵ were adopted by the General Assembly. The ICCPR entered into force in 1976. Its so-called hate speech clause, 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.

¹¹The Universal Declaration of Human Rights – Human Rights Law http://www.un.org/en/documents/udhr/hr_law.shtml; Woolman 'Dignity' in Woolman and Bishop *Constitutional law of South Africa* (2008) 36-1-36-4.

¹²See Brugger 'The treatment of hate speech in German constitutional law' (2003) *German LJ* 4 at 5. It is notable that radical political parties have been banned twice in the history of the Federal Republic of Germany. The extreme right-wing Socialist Empire Party was banned in 1952 and the extreme left-wing Communist Party of Germany was banned in 1956.

¹³The German Constitutional Court regards the basic right to freedom of expression as absolutely essential to a free and democratic state, 'for it alone permits that constant spiritual interaction, the conflict of opinion, which is its vital element'. See BVerfGE 7, 198 (15 January 1958) para B.1.2 <http://www.iuscomp.org/gla/judgements/tgcm/v580115.htm> (accessed 2015-07-16).

¹⁴Rosenfeld 'Hate speech in constitutional jurisprudence: A comparative analysis' (2002-2003) *Cardozo LR* 24 at 1549; Krotoszynski 'Comparative perspective on the First Amendment: Free speech, militant democracy, and the primacy of dignity as a preferred constitutional value in Germany' (2004) *Tulane LR* 78 at 1590.

¹⁵International Covenant on Economic, Social and Cultural Rights [Full reference] <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> (accessed 2015-02-22).

Article 20 has to be read in conjunction with Article 19, which protects both the right to hold opinions without interference and the right to freedom of expression. Article 19(3) contains requirements for the restriction of the exercise of the right to freedom of expression that are substantially the same as those of the general limitation clause, Article 29, of the UDHR. Restrictions are required to be necessary for one or several of the stipulated purposes, namely:

- (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.

It has been contended that ‘the only time when speech should attract criminal penalties on the ground that it incites hatred’ is laid down in Article 20.¹⁶

During the period that the ICCPR was being finalised, a widespread fear of the revival of authoritarian ideologies inspired the adoption of the ICERD¹⁷ in 1965. Article 4(a) of the ICERD 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 organisations or activities as an offence punishable by law; ...

Because of the potential threat to the rights of freedom of expression and

¹⁶See Bukovska, Callamard and Parrmer ‘Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred. Work in progress’ 2010 <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf> 5, 9 and 18-19. The study was prepared for the Regional Expert Meeting of ARTICLE 19 (see n 80 below) organised by the Office of the High Commissioner for Human Rights (OHCHR) in Vienna from 8 to 9 February 2010 (accessed 2015-07-26).

¹⁷ICERD 1966 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (accessed 2015-03-07).

freedom of association that Article 4 entails, its interpretation and application have led to much controversy.¹⁸

The first concern is caused by the fact that, read in isolation, the first phrase is extremely broadly worded. Lerner contends that the phrase should be linked to the condemnation of propaganda and organisations in the introductory paragraph. In his view, it should, moreover, be accepted that the 'strongly preventive or pro-active mode' of Article 4 reflects on such phenomena as 'the discourses of dehumanisation that are characteristic elements of genocidal processes or other forms of oppressive action'.¹⁹ Furthermore, it should be noted that, as was confirmed by the Committee of Ministers of the Council of Europe in its *Recommendation R(97)20*, 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.²⁰ 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.

Different stances have been taken on whether the implementation of Article 4 is mandatory. The Committee on the Elimination of Racial Discrimination (CERD), in General Recommendation 7,²¹ confirmed that it is. The United States of America, however, considers the First Amendment to the United States Constitution and the UDHR as overriding the ICERD.²² Further, the United Kingdom holds that the ICERD is not mandatory and that its language allows a country to adopt laws limiting hate speech only when deemed necessary in order to achieve the end specified in the earlier part of Article 4.²³ Canada, in turn, argues that the rights and limitations in the ICERD should be balanced. This

¹⁸Lijnzaad *Reservations to UN-Human Rights Treaties - Ratify and Ruin?* (1994) 142-143. Lerner *The UN Convention on the Elimination of All Forms of Racial Discrimination* (1979) 4-8; Thornberry *Forms of hate speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* (2008) 9-18. <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/2008Seminar/Pages/ExpertPapers.aspx> (accessed 2015-07-25).

¹⁹Lerner 4-8.

²⁰Recommendation R(97)20 of the Committee of Ministers of the Council of Europe to member states on 'hate speech' (Explanatory Memorandum) 1997 para 18. [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(1997\)020&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1997)020&expmem_EN.asp) (accessed 2015-07-17).

²¹General Recommendation 7 on Article 4 of the ICERD http://www.bayefsky.com/general/cerd_genrecom_7.php (accessed 2015-03-07).

²²US reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination <http://www1.umn.edu/humanrts/usdocs/racialres.html> (accessed 2015-07-25).

²³Trager and Dickerson *Freedom of expression in the 21st century* (1999) 127-128; Lerner (n 18) 53; *Jersild v Denmark* 1993 15890/89 (ECHR) para 21.

approach is reflected in section 319 of the Canadian Criminal Code²⁴ and in its assessment in terms of section 1 of the Canadian Charter of Rights and Freedoms in the leading case, *R v Keegstra*.²⁵ From a comparative perspective,²⁶ more detail in this regard is relevant in the context of this and other aspects of the article, including the narrow conceptual interpretations and the consideration of the unwanted counter-effects that hate speech prohibitions may entail.

Section 319²⁷ of the Canadian Criminal Code prohibits the public incitement and the wilful promotion of hatred. It stipulates a number of defences. The charge against Keegstra related to statements made by him while teaching social studies classes. He taught that all the major events of history were connected to one central theme, namely a Jewish conspiracy to take over the world and rule it through the mechanism of one world government. He also taught that the Jews were responsible for World Wars I and II. He linked the Jewish people to the American, French and Russian revolutions. He furthermore taught that Jews formed secret societies to pursue their evil plan to rule the world and controlled the government, the banks, the courts and the media, that the Holocaust was a hoax, and that the Talmud was the 'blueprint' for this one world government. For confirmation of his views, he pointed to the New Testament.²⁸

In their analysis of section 319(2)(b), both the majority and dissenting judges first examined whether section 319(2) of the Code violated section 2(b) of the Charter. The majority opinion stated that any activity which attempts to convey

²⁴Criminal Code RSC 1985 c C-46 <http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html> (accessed 2015-07-26). Section 319(2) criminalises the wilful promotion of hatred against an identifiable group.

²⁵*R v Keegstra* [1990] 3 SCR 697.

²⁶The Constitutional Court has recognised the comparative value of Canadian jurisprudence with respect to freedom of expression. See, *inter alia*, *Case v Minister of Safety and Security*, *Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC).

²⁷The section reads as follows:

- (1) Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
 - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.
- (2) Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
 - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.
- (3) No person shall be convicted of an offence under subsection (2)
 - (a) if he establishes that the statements communicated were true;
 - (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
 - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
 - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

²⁸*R v Keegstra* (n 25) para 1.

meaning through a non-violent form of expression, including expression which 'wilfully promotes hatred', has expressive content and falls within the scope of section 2(b). They reiterated that even threats of violence are not excluded from the definition of expression envisioned by section 2(b).²⁹ The dissenting judges were in general agreement with the majority at this stage of the analysis.³⁰ In the second phase of the analysis, the Court, in terms of section 1 of the Charter, examined whether section 319(2) was a reasonable limit which was demonstrably justified in a free and democratic society. At the outset of his section 1 analysis, Chief Justice Dickson described the harms caused by hate propaganda. Secondly, he identified the harm that hate speech imposes upon 'society at large'. He expressed the view that if members of the larger community are persuaded by the message of hate speech, they may engage in acts of violence and discrimination, causing 'serious discord' in the community.³¹ The majority held that the objective, namely preventing pain to the target group and reducing racial, ethnic, and religious tension and, perhaps, violence, was of sufficient importance to warrant overriding a guaranteed right. It was stated that Canada's international obligations emphasised the importance of this objective. The provision was also found not to be overly broad or vague. The reasoning was that its definitional limits rather ensure that it will capture only expressive activity which is openly hostile to the above-mentioned objective. The word 'wilfully' restricts the reach of the section by requiring proof of either an intent to promote hatred or knowledge of the substantial certainty of such a consequence. The word 'hatred' further reduces the scope of the prohibition. This word, in the context of the section, must be construed as encompassing only the most severe and deeply felt form of opprobrium. Further, the exclusion of private communications from the scope of the section, the need for the promotion of hatred to focus upon an identifiable group, and the presence of the section 319(3) defences, which clarify the scope of section 319(2), all support the view that the impugned section creates a narrowly confined offence.³² The dissenting judges, while agreeing that the objective was an important one, disagreed on whether section 319(2) was a reasonable and proportional means of securing the objective.³³ They reiterated that the actual effects of section 319(2) might be counter-productive and, instead of stemming hate propaganda and promoting social harmony and individual dignity, might promote the cause of hate-mongers by providing them with publicity and even by provoking sympathy for them.³⁴

²⁹*Id* para VI.

³⁰*Id* (McLachlin J dissenting) para II.

³¹*Id* para VII C 1.

³²*Id* (McLachlin J dissenting) para IV A 2.

³³See the discussion in Marais *The constitutionality of categorical and conditional restrictions on harmful expression related to group identity* (n 10) 202-205.

³⁴*R v Keegstra* (n 25) para II.

The inclusion of the requirement of intention in section 319 relates to a further controversial facet of Article 4 of the ICERD, namely the fact that racist intent is not explicitly required. Thornberry states that a stance that 'the mere act of dissemination is penalised, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination', violates basic principles of criminal liability in many, if not most, jurisdictions. In his view, it is not unreasonable to read the Convention as laying down that the local application of the relevant provisions 'will be embedded in criminal law principles'.³⁵ The required intention will include awareness of the risk that the audience will respond to the advocacy of hatred.³⁶ Actual response will generally be a significant indication that the speech did constitute the required incitement, as well as that the speaker did foresee, or should have foreseen, the response. On the other hand, the absence of a response at the time of the assessment will not disprove that 'hate speech' as contemplated was intended or that incitement was constituted.³⁷

The following decisions of the Committee on the Elimination of Racial Discrimination (CERD) illustrate the nature of the required incitement. The last-mentioned case concerned statements that contained ideas based on racial superiority or hatred.

*Zentralrat Deutscher Sinti und Roma et al v Germany*³⁸ concerned a complaint regarding a letter published in an issue of the journal of the Association of German Detective Police Officers. The letter, *inter alia*, stated that Sinti and Roma were disproportionately involved in criminal activities, and that hardly any Roma worked regularly and paid social insurance. The state party argued that not every discriminatory statement satisfies the elements of the offence of incitement to racial or ethnic hatred. There must be a certain targeting element for incitement of racial hatred. The CERD, without referring to specific arguments on the merits, concluded that the facts before it did not disclose a violation of Articles 4(a) and 6 of the ICERD.

In *LK v The Netherlands*³⁹ actions were taken by local inhabitants who gathered outside a house in respect of which a lease had been offered to the complainant, a Moroccan citizen. These actions included threats that, if he were

³⁵Thornberry (n 18) 14.

³⁶See the approach of the court in *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 2 SCR 100.

³⁷*Freedom Front v South African Human Rights Commission* 2003 11 BCLR 1283 (SAHRC) 1297.

³⁸*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 2015-07-25).

³⁹*LK v The Netherlands* 1993 4/1991 (CERD) <http://www1.umn.edu/humanrts/country/decisions/CERD-DLR.htm> (accessed 2015-03-07); Joseph, Schultz and Castan *The International Covenant on Civil and Political Rights* (2003) 553-559.

to accept the lease over the house, they would set fire to it and would damage his car. Moreover, in a petition to the municipality, it was noted that he could not be accepted in the street and that another house should be allocated to him. It was found that these actions constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin and were therefore contrary to Article 4(a) of the ICERD.⁴⁰

At issue in the case of *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway*⁴¹ was whether certain statements fell within any of the categories of impugned speech set out in Article 4, and, if so, whether those statements were protected by the 'due regard' provision of Article 19 of the UDHR. The statements were made during a march in Askim in commemoration of Nazi leader Rudolf Hess. Mr Sjolie, who led the march, upon reaching the town square, made a speech in which he, *inter alia*, stated:

...every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts; ...

and:

Our dear Führer Adolf Hitler and Rudolf Hess sat in prison for what they believed in, we shall not depart from their principles and heroic efforts, on the contrary we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism ...⁴²

The majority of the Norwegian Supreme Court held that the speech contained derogatory and offensive remarks, but that no actual threats had been made, nor had any instructions been given to carry out any particular actions. The CERD, contrary to the finding of the Norwegian Supreme Court, considered these statements to contain ideas based on racial superiority or hatred. In the view of the CERD, deference to Hitler and his principles and 'footsteps' had to be taken as incitement at least to racial discrimination, if not to violence.⁴³

Against this background, it is significant that section 16(2) of the Constitution specifically and closely resembles Article 20 of the ICCPR. This, by implication, signals the approach to the CERD that was adopted by the drafters of the

⁴⁰*LK v The Netherlands* (n 39) paras 6.3 and 6.6.

⁴¹*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 2015-03-07).

⁴²*Id* para 2.1.

⁴³*Id* para 10.4.

Constitution. General Comment 11 on Article 20⁴⁴ of the ICCPR articulates this approach when it states that a limitation that is justified on the basis of Article 20 must necessarily comply with Article 19(3).⁴⁵ General Comment 34⁴⁶ 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.⁴⁷

According to Nowak, a sensible interpretation of Article 20 will take into account its responsive character with regard to the Nazi racial-hatred campaigns which ultimately led to the murder of millions of human beings on the basis of racial, religious and national criteria.⁴⁸ Draft General Comment 34⁴⁹ stipulates that, when a 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.⁵⁰ Schmidt contends that there must be exceptional reasons for such restrictions.⁵¹ The restriction must be proportional in severity and intensity to the purpose being sought.⁵² The least intrusive and restrictive measures should be applied in order to minimise the chilling effect on freedom of expression.⁵³

⁴⁴General Comment 11 on Article 20 of the ICCPR1983 <http://www1.umn.edu/humanrts/gencomm/hrcom11.htm> (accessed 2015-03-07).

⁴⁵Nowak *UN Covenant on Civil and Political Rights CCPR Commentary* (2004) 477; *Ross v Canada* 2000CCPR/C/70/D/736/1997 (UNHRC) para 10(6).

⁴⁶General Comment 34 on Article 19 of the ICCPR 2011 paras 52-54 <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (accessed 2015-03-07).

⁴⁷Eltayeb *The limitations on critical thinking on religious issues under Article 20 of ICCPR and its relation to freedom of expression* (2008) 10 www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/PaperEltayeb.doc (accessed 2015-03-07); General Comment 34 (n 46) para 51.

⁴⁸Nowak (n 45) 474-475; Jahangir 2008 *Special Rapporteur on freedom of religion or belief: References to 'incitement to religious hatred'* para 47 www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/PaperJahangir.doc (accessed 2015-03-07).

⁴⁹Draft General Comment 34 on Article 19 of the ICCPR 2010 <http://www1.umn.edu/humanrts/gencomm/hrcom34.html> (accessed 2015-03-07).

⁵⁰General Comment 34 (n 46) paras 35-36.

⁵¹Schmidt *Limits to the restrictions to freedom of expression – criteria and application* (2008) 5-6 www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/PaperSchmidt.doc (accessed 2015-03-07).

⁵²Nowak (n 45) 460; Van Dijk *et al Theory and practice of the European Convention on Human Rights* (2006) para 14.4.1 793-794; General Comment 34 (n 46) para 34; *Unabhängige Initiative Informationsvielfalt v Austria* 2002 28525/95 (ECHR) para 35.

⁵³Jayawickrama *The judicial application of human rights law – national, regional and international jurisprudence* (2002) 709-710.

The elements of section 16(2)(c) of the Constitution will be discussed in more detail below. In particular, the differences in the formulation of section 16(2)(c) of the Constitution and Article 20 of the ICCPR will be highlighted and scrutinised. These are the substitution of 'harm' for 'discrimination, hostility or violence' and the grounds of race, religion, gender and ethnicity for race, religion and nationality.

3 The terms of section 16(2)(C) of the Constitution

Section 16(2)(c) of the Constitution 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'. The terms 'advocacy' and 'hatred' should be construed in relation to each other, taking into account the fact that the expression should ultimately incite concomitant action.

Black's Law Dictionary defines 'advocacy' as 'the act of pleading for or actively supporting a cause or proposal'. Chief Justice Dickson in *R v Keegstra* described 'hatred' as 'a most extreme emotion that belies reason', and hate propaganda as repudiating and undermining democratic values with 'unparalleled vigour' and with 'condemnation of the view that all citizens need be treated with equal respect and dignity'.⁵⁴ He added that 'hatred against identifiable groups thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society'.⁵⁵ These excerpts from *R v Keegstra* were quoted with approval in *Abramjee and Kamnies v Qwelane*,⁵⁶ a finding of the South African Human Rights Commission. The purpose of the quotation was to describe the narrower ambit of hate speech under section 16(2) of the Constitution in contrast to hate speech contemplated by section 10 of the Equality Act.⁵⁷ The so-called Camden Principles⁵⁸ likewise describe 'hatred' and 'hostility' in the context of Article 20 of the ICCPR as referring to 'intense and irrational emotions of opprobrium, enmity and detestation towards the target group'.⁵⁹

⁵⁴ *R v Keegstra* (n 25) para VII D (i).

⁵⁵ *Id* para D iii a.

⁵⁶ *Abramjee and Kamnies v Qwelane* 2008 GP/2008/0161 (SAHRC).

⁵⁷ The Commission held that the discriminatory reference *in casu* to individuals as 'coconuts' did not constitute hate speech contemplated by s 16(2)(c) of the Constitution, but did constitute a transgression of s 10 of the Equality Act.

⁵⁸ '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 2015-07-26). The Camden Principles were prepared by 'ARTICLE 19', a charitable company that was set up to defend the right to freedom of expression (n 80). The principles were formulated during discussions involving a group of high-level UN and other officials, as well as civil society and academic experts in international human rights law on freedom of expression and equality issues, at meetings held in London on 2008-12-11 and 2009-02-23/24.

⁵⁹ *Id* Principle 12(1). Principle 12 is specifically concerned with incitement to hatred. It provides as follows:

Commentators on Article 20 of the ICCPR contend that 'incitement' requires more than just a likelihood that a risk of ensuing harm is created.⁶⁰ Section 130(1) of the German Criminal Code⁶¹ reflects this same approach in its requirement that the incitement of hatred be 'in a manner capable of disturbing the public peace'. Section 319(1)⁶² of the Canadian Criminal Code requires the incitement to be 'likely to lead to a breach of the peace'. Section 16(2)(c) of the Constitution reflects these notions of incitement. It is concerned with incitement, born out of hatred towards a target group that instils a desire to harm members of that group.⁶³ Milo, Penfold and Stein contend that the speech 'must instigate or actively persuade others'.⁶⁴

It is essential that the determination of whether expression constitutes incitement in this sense, be sensitive to context. The following references and examples demonstrate this point.

Nowak states that a previous violent response by certain parts of the population to perceived criticism is a relevant consideration in ascertaining what

- 12.1 All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech).³ National legal systems should make it clear, either explicitly or through authoritative interpretation, that:
- i The terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.
 - ii The term 'advocacy' is to be understood as requiring an intention to promote hatred publicly towards the target group.
 - iii The term 'incitement' refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.
 - iv The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.
- 12.2 States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12.1.
- 12.3 States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1.
- 12.4 States should ensure that persons who have suffered actual damages as a result of hate speech as defined by Principle 12.1 have a right to an effective remedy, including a civil remedy for damages.
- 12.5 States should review their legal framework to ensure that any hate speech regulations conform to the above.

³This is based on art 20(2) of the International Covenant on Civil and Political Rights.

⁶⁰See Bukovska, Callamard and Parmar (n 16) 5, 9 and 18-19.

⁶¹See Brugger (n 12) 29.

⁶²Section 319(1) provides as follows:

- Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.

⁶³Milo, Penfold and Stein 'Freedom of expression' in Woolman, Bishop and Brickhill *Constitutional law of South Africa* (n 6) 42-80.

⁶⁴*Id* 42-83. Currie and De Waal *The Bill of Rights handbook* (2013) 355-356 hold a contradictory view, namely that 'incitement' should be read as meaning an intention (to cause harm) or as being directed at (causing harm).

will give rise to incitement of hostility and violence.⁶⁵ While all types of hate speech have the power to intimidate minority groups, and in the process disrupt society, hate speech that attempts to minimise or justify past instances of such violence can be extremely disruptive.⁶⁶

Section 130(4) of the German Criminal Code⁶⁷ illustrates the considerable extent to which context can affect hate speech prohibition. It specifically criminalises the glorification or justification of 'National Socialist rule of arbitrary force'. In the *Wunsiedel* decision,⁶⁸ the court concluded that, while section 130(4) was content-neutral in the sense that it aimed at protecting public peace, it did not pursue this protection in the content-open, general manner required by Article 5(2) of the Basic Law.⁶⁹ On the contrary, it specifically prohibited the public expression of opinions that enunciate a specific attitude to national-socialism.⁷⁰ The section was nevertheless held to be constitutionally compatible on the basis of the historical dimension of injustice and horror that national socialist rule brought to Europe and large parts of the world. The court reasoned that the propagandistic affirmation of the violent and arbitrary national socialist rule constituted an attack on the identity of the German community, could evoke profound concerns abroad, would have effects beyond the general battle of opinions, and could not be captured by the general limitations of freedom of expression. It reiterated that constitutional limits of public political discourse are not exceeded by the dissemination of anti-constitutional ideas, but by an active and aggressive attitude to the free and democratic basic order.⁷¹

Amendments to hate-speech legislation in Canada illustrate that context is not stagnant. Chief Justice Dickson in *R v Keegstra*, in an overview of hate propaganda and freedom of speech, related that it was in response to an upsurge in neo-Nazi activity in Canada, the United States of America and Britain that, in 1965, the Minister of Justice had set up the Cohen Committee to study hate propaganda. On the recommendation of the Committee, the Criminal Code was amended by the addition of the offences of advocating genocide (section 318), public incitement of hatred likely to lead to a breach of the peace (section 319(1)),

⁶⁵Nowak (n 45) 474-475.

⁶⁶Kahn 'Cross-burning, holocaust denial, and the development of hate speech law in the United States and Germany' (2006) 83 *Univ of Detroit Mercy LR* 192; *Ross v Canada* (n 45) para 6.11.

⁶⁷German Criminal Code (*Strafgesetzbuch*, StGB) 1998 <http://www.iuscomp.org/gla/statutes/StGB.htm>.

⁶⁸*Wunsiedel decision* BVerfG 1, BvR 2150/08 (4 November 2009).

⁶⁹*R v Keegstra* (n 25) para I C.

⁷⁰*Wunsiedel decision* (n 68) paras 52-68.

⁷¹Payandeh 'The limits of freedom of expression in the *Wunsiedel* decision of the German Federal Constitutional Court' (2010) *German Law Journal* 11(8) 934-935; *Wunsiedel decision* (n 68) paras 64-68.

and wilful promotion of hatred (section 319(2)).⁷² In 2004, the definition of identifiable groups was amended to include sexual orientation.⁷³ According to Cohen, the impetus behind the amendment was, among other things, anti-gay hatred propaganda generated by the Kansas-based Reverend Phelps, who gained notoriety in Canada when he threatened to stage an anti-gay demonstration on the front lawn of the Supreme Court.⁷⁴ Phelps's propaganda represented a growing body of hate propaganda aimed at silencing and persecuting sexual minorities and inciting violence against them.⁷⁵ In March 2013, as a result of pressure from various interest groups and individuals, the House of Commons passed a law adding 'gender identity' to the list of protected grounds under the Canadian Human Rights Act and the Criminal Code.⁷⁶ Subsection 318(4) defines 'gender identity' as, 'in respect of a person, the person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex that the person was assigned at birth'. Pillay similarly argues that the impact and meaning of the publication of a cartoon branding Islam's holiest figure as a suicide bomber and a terrorist cannot be interpreted in isolation from recent global events, namely that many around the world have come to equate the war on terrorism with a war against Islam.⁷⁷ This has resulted in Muslims being stereotyped, isolated and disadvantaged, and harmed in different ways.⁷⁸ These contextual circumstances evidently enhance the risk of addressees being incited by the advocacy of hatred against Muslims, especially expression depicting them as terrorists.⁷⁹ Later in this section, in the discussion of hate-speech grounds, this approach will be related to relevant circumstances in the South African context that call for an extension of the relevant grounds.

The next issue is the interpretation of 'harm'. Theoretically, the term is extremely broad. However, the desire, born out of hatred, to inflict harm will hardly be satisfied by insubstantial hurtful, harmful or offensive acts. ARTICLE 19⁸⁰

⁷²Article 5(1) protects the right to freedom of expression. Article 5(2) provides as follows: 'These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor'.

⁷³Previously s 318(4) restricted 'identifiable group' to 'any section of the public distinguished by colour, race, religion or ethnic origin'.

⁷⁴Cohen 'More censorship or less discrimination – sexual orientation hate propaganda in multiple perspectives' (2000-2001) 46 *McGill LF* 69 at 72-73.

⁷⁵*Ibid.*

⁷⁶Bill C-279, 20 March 2013.

⁷⁷Pillay 'Undo the cartoon wars: Free speech or hate speech?' (2010) *SALJ* 463 at 482.

⁷⁸*Ibid.*

⁷⁹*Ibid.*

⁸⁰ARTICLE 19 is a company limited by guarantee, registered in England and Wales. It campaigns with people around the world for the right to exercise free-expression rights. It has offices in Bangladesh, Brazil, Kenya, Mexico, Tunisia, Senegal and the United Kingdom, and works in collaboration with 90 partners worldwide. See <http://www.article19.org/pages/en/what-we-do.html>

accordingly suggested⁸¹ that the term 'discrimination' in the context of Article 20 should be construed as discrimination with the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁸² 'Violence' should be understood as the intentional use of physical force or power against another person, or against a group or community, that either results in, or has a high likelihood of resulting in, injury, death, psychological harm, mal-development or deprivation.⁸³ 'Hostility' implies a manifested action. It is not just a state of mind, but implies a state of mind which is acted upon. It can be defined as the manifestation of hatred, meaning the manifestation of 'intense and irrational emotions of opprobrium, enmity and detestation towards the target group'.⁸⁴ In accordance with this description, Milo, Penfold and Stein contend that harm in the context of section 16(2)(c) of the Constitution may include physical as well as psychological harm, but does not extend to expression which merely stirs up feelings of hatred in the audience, even though the expression may be experienced as extremely hurtful by the target group.⁸⁵

The final issue is the selection of grounds. Instead of nationality, race and religion in Article 20 of the ICCPR, the stipulated grounds in section 16(2)(c) of the Constitution are race, gender, ethnicity and religion. In *Freedom Front v South African Human Rights Commission*,⁸⁶ it was pointed out that the first three grounds and, to a lesser extent, religion were the very lines on which South African society was legally and systemically divided. In terms of the 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. Religious doctrines were offered as rationale for both the justification and the condemnation of apartheid ideology.⁸⁷ 'These divisions were the fault lines of our society and represented the points at which we were most vulnerable'.⁸⁸

With respect to religion, it has to be added that apartheid laws directly implicated religious freedom. Social justice is a religious principle in many

(accessed 2015-03-30).

⁸¹Bukovska, Callamard and Parrmer (n 16) 7.

⁸²*Ibid.*

⁸³*Ibid.*

⁸⁴*Ibid.*

⁸⁵Milo, Penfold and Stein in Woolman, Bishop and Brickhill *Constitutional law of South Africa* (n 6) 42-83.

⁸⁶*Freedom Front v South African Human Rights Commission* (n 37).

⁸⁷Chapman and Spong *Religion and reconciliation in South Africa* (2003) 3.

⁸⁸*Freedom Front v South African Human Rights Commission* (n 37) 1292.

religions in South Africa. Mahatma Gandhi, 'one of the builders of the Hindu faith', expressed his belief that his political, personal, family and social actions were part of religious duty.⁸⁹ The government's stance that racial separation was in accordance with scriptural doctrine, in particular Christianity, was regarded by many Christians as 'blatantly unscriptural'.⁹⁰ The Episcopal Synod of the Church of the Province of South Africa, for example, issued a statement as early as 1948 in which it identified itself with an earlier declaration that 'discrimination between men on the grounds of race alone is inconsistent with the principles of the Christian religion'. The bishops reiterated that 'human rights are rooted in Christian doctrine and apartheid should therefore be condemned at all costs'.⁹¹

With respect to the inclusion of gender, it is significant to mention that, more than a decade after the adoption of the ICCPR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted.⁹² Although it does not contain an explicit 'hate-speech clause', it in no uncertain terms condemns discrimination against women 'in all its forms' and requires states to pursue, by all appropriate means, a policy of eliminating discrimination against women and, to this end, to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation.⁹³ At the very time that the interim Constitution was being finalised, the International Criminal Tribunal for the former Yugoslavia (ICTY), a United Nations court of law established in 1993, was dealing with war crimes that took place during the conflicts in the Balkans in the 1990s. Judges of this court ruled that 'rape was used by members of the Bosnian Serb armed forces as an instrument of terror'.⁹⁴ In the context of the accentuated rejection of atrocities against women, the inclusion of gender in section 16(2)(c) of the Constitution can be construed as an indication of a commitment to affirm the values promoted by the CEDAW at all levels and to protect our society by all necessary means against atrocities of this nature.⁹⁵

Section 16(2) of the Constitution addresses expression related to nationality to the extent that it may constitute propaganda for war under section 16(2)(a), or incitement of imminent violence under section 16(2)(b). The omission of nationality as a hate-speech ground has to be considered. It is noteworthy that

⁸⁹Masuku 'Prophetic mission of faith communities during apartheid South Africa, 1948-1994: An agenda for a prophetic mission praxis in the democratic SA' (2014) *Missionalia* 151 at 163.

⁹⁰*Id* 151.

⁹¹*Id* 160.

⁹²CEDAW 1979 <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 2015-02-22).

⁹³*Id* Art 2.

⁹⁴See UN ICTY <http://www.icty.org/sid/10312> (accessed 2015-03-18).

⁹⁵See Russell-Brown 'Rape as an act of genocide' (2003) 21 *Berkeley Journal of International Law* 350 at 373-374.

nationality is also not listed as a prohibited ground under section 9(3) of the Constitution. This is probably because, at the time of the formation of the Constitution, discrimination based on nationality was not a societal issue that was perceived as constituting a prominent threat to society. In the meantime, very relevant developments have taken place. In 1997, the Constitutional Court case of *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*⁹⁶ explicitly acknowledged citizenship as analogous to the discrimination grounds specified in section 8(2) of the interim Constitution. 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.⁹⁷ A publication titled 'International migration, racism, discrimination and xenophobia' jointly produced in August 2001 by the International Labour Office (ILO), the International Organisation for Migration (IOM), and the Office of the United Nations High Commissioner for Human Rights (OHCHR), in consultation with the Office of the United Nations High Commissioner for Refugees (UNHCR),⁹⁸ relates the manifestation of xenophobia to severe economic inequalities and the marginalisation of persons from access to basic economic and social conditions. The publication states in its preface that:

the twenty-first century will be a new age of migration... One in every fifty human beings – more than 150 million persons – live outside their countries of origin as migrants or refugees. They are highly vulnerable to racism, xenophobia and discrimination. The extent and severity of these phenomena are becoming increasingly evident in the reports of mistreatment and discrimination against migrants, refugees and other non-nationals, which are emerging from every region in the world. The fact that an increasing proportion of international migration today is irregular and unauthorised, facilitates abuse and exploitation. But, even when their movements are legal and authorised, non-citizens face high levels of discrimination.

⁹⁶ *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC).

⁹⁷ Loots 'Xenophobia in South Africa: The time for introspection has come' <http://africlaw.com/2013/06/13/xenophobia-in-south-africa-the-time-for-introspection-has-come/> (accessed 2015-03-16); Hickel "'Xenophobia" in South Africa: Order, chaos, and the moral economy of witchcraft' (2014) 29 *Cultural Anthropology* 103-127 <http://dx.doi.org/10.14506/ca29.1.07> (accessed 2015-03-16).

⁹⁸ Declaration on Racism, Discrimination, Xenophobia and Related Intolerance against Migrants and Trafficked Persons adopted at the Asia-Pacific NGO meeting for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Teheran, Iran, on 18 February 2001 (Declaration) <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/xenophobia/#topPage> (accessed 2015-03-19).

It emphasises that most of the 'core rights' contained in the Universal Declaration of Human Rights⁹⁹ and the two major human rights treaties, the ICESCR and the ICCPR, are applicable to non-citizens.¹⁰⁰

Since 2008, xenophobic attacks on foreigners have occurred regularly in South Africa.¹⁰¹ Recently, in January 2015, a Somali shop owner shot and killed a 14-year-old boy during an alleged robbery in Soweto Township. The incident triggered waves of attacks and looting of foreign-owned shops.¹⁰² These attacks ignited xenophobic action in other parts of the country. The attacks exposed extreme hatred in society, and the vulnerability of citizens targeted by those who feel and incite such hatred.¹⁰³ It has been reported that 'South Africans from all walks of life not only encourage xenophobia, but no longer hesitate to act on these feelings'.¹⁰⁴ This entails that, similar to the effect of hate speech under section 16(2)(c) of the Constitution, those who are targeted are 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. In this context, to exclude nationality from the list of grounds makes no sense.

Finally, a focus on the ground of sexual orientation is required. While, at the time of the drafting of the Constitution, discrimination on this ground certainly existed in society, and was acknowledged by listing sexual orientation as a discrimination ground in section 9(3) of the Constitution, it was at no stage 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 however 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.¹⁰⁵ In June 2011, the Human Rights Council adopted the first United Nations resolution on sexual orientation and gender identity, expressing 'grave concern'

⁹⁹Article 2 of the UDHR.

¹⁰⁰It should be noted in this regard that South Africa has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by General Assembly Resolution 45/158 of 18 December 1990.

¹⁰¹Loots 'Xenophobia in South Africa: The time for introspection has come' (n 97) The article describes incidences of xenophobic attacks that illustrate the extent of the violence and hatred involved; Hickel (n 97).

¹⁰²*Ibid.*

¹⁰³*Ibid.*

¹⁰⁴*Ibid.*

¹⁰⁵UN 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 2015-07-27).

regarding violence and discrimination against individuals based on their sexual orientation and gender identity.¹⁰⁶ The resolution was presented by South Africa along with Brazil and 39 additional co-sponsors from all regions of the world. Human Rights Watch reported as follows:

The South African government has now offered progressive leadership, after years of troubling and inconsistent positions on the issue of sexual orientation and gender identity. Simultaneously, the government has set a standard for themselves in international spaces. We look forward to contributing to and supporting sustained progressive leadership by this government and seeing the end of the violations we face daily.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹

In conclusion, in the light of the above-mentioned considerations, I submit that in using section 16(2)(c) of the Constitution as an informative basis when the criminalisation of hate speech is considered, the grounds should include nationality and sexual orientation as well.

4 The prohibition of hate speech under existing law

The question arises to what extent expression of the nature contemplated by section 16(2)(c) of the Constitution, including the grounds of nationality and sexual orientation, is proscribed under existing law.

¹⁰⁶ *Ibid.*

¹⁰⁷ Human Rights Watch 'Historic decision at the United Nations' 17-06-2011 <http://www.hrw.org/news/2011/06/17/historic-decision-united-nations> (accessed 2015-03-19).

¹⁰⁸ 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' 17-11-2011 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/170/75/PDF/G1117075.pdf?OpenElement> (accessed 2015-03-16).

¹⁰⁹ UN Resolution A/HRC/RES/27/32 'Human rights, sexual orientation and gender identity' adopted on 02/10/2014 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/177/32/PDF/G1417732.pdf?OpenElement> (accessed 2015-03-16).

Expression as described falls within the significantly broader ambit of the categorical prohibition of hate speech in terms of section 10 of the Equality Act. It is evident from its broader application and the nature of the remedies that it provides that section 10 is not primarily aimed at the effective protection of members of society against expression of such extreme nature.¹¹⁰ It is rather concerned with compliance with the obligation in terms of sections 9(3) and (4) of the Constitution to prevent and prohibit unfair discrimination. It reflects the commitment in the preamble to the Constitution to 'heal the divisions of the past' mainly by means of restorative measures.¹¹¹ Where appropriate, an order made by an Equality Court in terms of, or under, the Act has the effect of an order of the said court made in a civil action.¹¹²

The Films and Publications Act¹¹³ criminalises the publication of hate speech with narrow application. Sections 16(4)(a)(ii) and 18(3)(a)(ii) provide for the classification of publications and films and games as a 'refused classification' on the basis that the publication, film or game 'contains the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm'. The sections exclude from the scope of hate speech, except with

¹¹⁰Section 21 (2) provides as follows:

After holding an inquiry, the court may make an appropriate order in the circumstances, including

- (a) an interim order;
- (b) a declaratory order;
- (c) an order making a settlement between the parties to the proceedings an order of court;
- (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
- (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
- (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
- (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question; (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
- (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
- (j) an order that an unconditional apology be made;
- (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
- (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
- (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;
- (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
- (o) an appropriate order of costs against any party to the proceedings; (p) an order to comply with any provision of the Act.

¹¹¹Preamble to the Constitution.

¹¹²Section 21(3) of the Equality Act.

¹¹³Films and Publications Act 65 of 1996.

respect to child pornography, a publication, film or game which, judged within context, is a *bona fide* documentary, a publication of scientific, literary or artistic merit, a film or game of scientific, dramatic or artistic merit, or is on a matter of public interest. When a film, game or publication was classified as a 'refused classification' any person who knowingly continues its publication or distribution will be guilty of an offence and liable, upon conviction, to penalties under section 24A(2).¹¹⁴ Further, anyone who knowingly publishes or distributes a publication that contains hate speech as defined above, when the publication, in violation of the requirements of section 16(1) of the Act, had not been submitted for classification, will be punishable on the same basis.¹¹⁵ *Bona fide* newspapers and magazines published by a member of a body which is recognised by the Press Ombudsman, and which subscribes and adheres to a code of conduct that must be enforced by that body, and broadcasters who are subject to regulation by the Independent Communications Authority of South Africa (ICASA), are respectively exempted from the obligation to submit publications for classification, and from any classification made or condition laid down by the Board.¹¹⁶

Section 17 of the Riotous Assemblies Act¹¹⁷ is concerned with 'incitement to public violence'. It creates a criminal offence in the following terms:

A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed.¹¹⁸

¹¹⁴Section 1 of the Act defines 'publication' as:

- (a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
- (b) any writing or typescript which has in any manner been duplicated;
- (c) any drawing, picture, illustration or painting;
- (d) any print, photograph, engraving or lithograph;
- (e) any record, magnetic tape, soundtrack or any other object in or on which sound has been recorded for reproduction;
- (f) computer software which is not a film;
- (g) the cover or packaging of a film;
- (h) any figure, carving, statue or model; and
- (i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet.

¹¹⁵See the interpretation of s 24(A)(2)(a) of the Act in *Print Media South Africa v Minister of Home Affairs* 2012 6 SA 443 (CC) paras 86 and 88.

¹¹⁶*Id* para 90. The Constitutional Court ordered that magazines should be afforded the same exemption as newspapers. See s 16(1) of the Act.

¹¹⁷Riotous Assemblies Act 17 of 1956.

¹¹⁸See Milton *South African criminal law and procedure*. Vol II: *Common law crimes* (1996) 92-95.

Currie and De Waal point out that the Act was never intended to protect against hate speech, but rather, specifically, to inhibit opposition to apartheid.¹¹⁹ They further point out that section 17 envisages that the 'public generally' may be incited, which is much broader than an incitement to imminent violence, and intention is not required. They conclude that the section is therefore unconstitutional and incapable of giving effect to section 16(2)(b) of the Constitution.¹²⁰ The same conclusion applies to section 16(2)(c). In accordance with this view, Meyerson contends that section 17 is unconstitutional because it criminalises speech 'even if the speaker is not actually inciting people to commit public violence, even if the danger is not imminent, and even if the public violence which might be committed would be committed by people with whom the speaker never intended to communicate, let alone incite'.¹²¹

Incitement to commit any crime is an independent offence under South African common law.¹²² Public violence is a criminal offence. Milton defines it as 'the unlawful commission, by a number of people acting in concert, of acts of sufficiently serious dimension which are intended violently to disturb the public peace or security or to invade the rights of others'.¹²³ Violence involves 'the exercise of force so as to inflict injury or damage to persons or property' and includes threats of violence.¹²⁴ The intentional incitement of public violence by means of the advocacy of hatred related to any prohibited ground will therefore constitute incitement to commit a crime. It is apparent that hate speech intended to incite the audience to harm the target group by means of discrimination, hostility and the infliction of psychological harm does not potentially constitute these offences.

There is broad consensus that the narrowly defined criminalisation of the deliberate and imminent incitement to commit a criminal offence, including violence in the sense of using physical force, does not violate or unduly restrict the right to freedom of expression.¹²⁵ The question is whether the incitement to violate basic human rights should be similarly treated. What should be considered is the potential consequential limitation of constitutional rights, a risk that only exists in the latter instance. Meyerson warns that to allow the state to suppress the expression of alleged dangerous views opens the door to the restriction of freedom of expression in the pursuit of non-neutral aims.¹²⁶ Moreover, the chilling effect of criminalisation may silence expression that challenges generally

¹¹⁹Currie and De Waal (n 64) 356.

¹²⁰*Id* 374. See *R v Segale* 1960 1 SA 721 (A): 730.

¹²¹Meyerson *Rights limited* (1997) 126.

¹²²Van der Merwe and Du Plessis *Introduction to the law of South Africa* (2004) 468; *Rex v Nhlovu* 1921 AD 485 at 492.

¹²³Milton (n 118) 76.

¹²⁴*Id* 85.

¹²⁵Meyerson (n 121) 121-122.

¹²⁶*Id* 124-125.

accepted norms. The answer lies in a distinction between the expression of opinion which may possibly influence the autonomous decisions that people make, even if to transgress the law, and the intentional use of words to encourage imminent illegal behaviour which will probably ensue.¹²⁷ It further lies in an unambiguous definition of the hate-speech offence¹²⁸ and a strict application of the elements of intention and imminence. In the application of the intention requirement, it should be acknowledged that one can incite to cause harm by advocating hatred without intending to do so. Scenarios are conceivable where a person advocating hatred may misjudge the disposition of the particular audience and may not realise that the audience may be incited by the particular expression of hatred to the extent that it might actually not only hate, but also harm the target group. The condemnation of the conduct, beliefs or ways of a certain group as a religious issue, and the expression of contempt for a certain group as part of a political campaign or cultural celebration, serve as examples.

5 The draft Prohibition of Hate Speech Bill

The Draft Prohibition of Hate Speech Bill was submitted as far back as 2004, but has as yet not been enacted, possibly related to problematic aspects of its formulation, as this discussion will show.¹²⁹ It explicitly aims to give effect to Article 4(a) of the ICERD, in particular:

to declare, amongst others, [as] 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.

It furthermore recognises the obligation on the state in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights, which is the cornerstone of democracy in South Africa, as well as the fact that section 16(2) of the Constitution provides that the right to freedom of expression does not extend to, among others, advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

¹²⁷*Id* 122-125.

¹²⁸See Baker 'Rethinking regulation and responses' in Herz and Molnar *The content and context of hate speech* (2012) 65-69. See also the minority judgment in *R v Keegstra* (n 25). See also the discussion of the application of the common law crimes of criminal defamation and *crimen iniuria* in Marais (n 10) 371-380.

¹²⁹The Annual Report 2012 / 2013 of the Department of Justice and Constitutional Development 72 <http://www.justice.gov.za/reportfiles/anr2012-13.pdf> (accessed 2015-07-27) states that '(t)he bill is to be informed by a policy framework that is being developed. The policy framework was submitted to Cabinet for approval, but there was a request for further research, which has since been completed'.

The following offence relating to hate speech is created. The definition draws from Article 4 of the ICERD as well as from sections 16(2)(c) of the Constitution and 10(1) of the Equality Act:

- 2 (1) Any person who in public¹³⁰ advocates hatred that is based on race, ethnicity, gender or religion against any other person or group of persons that could, in the circumstances, reasonably be construed to demonstrate an intention to
- (a) be hurtful;
 - (b) be harmful or to incite harm;
 - (c) intimidate or threaten;
 - (d) promote or propagate racial, ethnic, gender or religious superiority;
 - (e) incite imminent violence;
 - (f) cause or perpetuate systemic disadvantage;
 - (g) undermine human dignity; or
 - (h) adversely affect the equal enjoyment of any person's or group of person's rights and freedoms in a serious manner, is guilty of an offence.

Clause 3 stipulates that clause 2(1) does not apply to any *bona fide* engagement in (a) artistic creativity; (b) academic and scientific inquiry; (c) fair and accurate reporting in the public interest; or (d) publication of any information, advertisement or notice that is in accordance with section 16 of the Constitution of the Republic of South Africa, 1996. This provision resembles the proviso in section 12 of the Equality Act. In both instances, *bona fide* engagement in expression that is specifically protected in section 16(1) of the Constitution is excluded from the ambit of the prohibition. Engagement will not be *bona fide* if it is primarily intended as described in the proscriptions, rather than fulfilling its intrinsic purpose, for example, artistic creativity.¹³¹

Sentences include imprisonment for a period of up to six years in the case of a second or subsequent conviction.¹³²

The effect of the fusion of different hate-speech prohibitions is problematic. The quotation from Article 4(a) lacks the context provided by its introductory paragraphs. An essential and material element of section 16(2)(c) of the Constitution, namely incitement to cause harm, is absent from the definition. Although the prohibited expression is criminalised, intention is not required. A substantial chilling effect with respect to the expression of passionate opinions, in particular on equality issues, is inevitable. Furthermore, the following aspects in combination create a discrepancy. The requirement of the advocacy of hatred

¹³⁰See the definitions of 'in public' and 'public place' in clauses 2(3)(a) and (b) of the Bill.

¹³¹See Marais and Pretorius (n 5) 914-930.

¹³²Clause 2(2) of the Bill.

narrows the application of the drafted offence compared with the application of section 10 of the Equality Act, which contains no similar requirement. The offence is furthermore restricted to the grounds that it lists, while section 10 applies to all the prohibited grounds. However, the aims of the expression described in the offence and in section 10 coincide. The question that arises is why the intentional advocacy of hatred that actually incites to harm based on sexual orientation or nationality is not criminalised, while the advocacy of hatred based on gender which can reasonably be construed to demonstrate an intention to perpetuate systemic disadvantage is? Not even a view that the selection of grounds in section 16(2)(c) is fixed explains this differentiation and its effects. Moreover, 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 criminalisation¹³³ will be wasted to a substantial extent. These observations sufficiently indicate that the Bill does not achieve the narrow and clear definition that was contemplated above.

6 Proposed definition

It is my submission that an offence defined in the very same terms as section 16(2)(c) of the Constitution, but inclusive of the grounds of nationality and sexual orientation, and with the requirement of intention, if strictly applied by our courts in accordance with the above contentions, will achieve the necessary balance. This balance lies in the fact that the formation of an offence in these terms will not restrict or have the effect of inhibiting, expression which in any way realises the foundational values of freedom, human dignity and equality. It will, on the other hand, not tolerate valueless expression that seriously jeopardises the foundational values of or society. This approach, in contrast to the Bill which in its preamble explicitly recognises this responsibility, will give effect to the obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. It will also give effect to the applicable international conventions referred to. This includes, in particular, Articles 19 and 20 of the ICCPR as well as Article 4(a) of the ICERD as interpreted by a number of states. It is to be noted in addition that, while it can be reasoned that section 16(2)(c) by implication only applies to

¹³³Appropriate orders include payment of damages in respect of impairment of dignity, pain and suffering, or emotional and psychological suffering as a result of the unfair discrimination, hate speech or harassment in question, and non-compliance with an order of the Equality Court may warrant imprisonment. See ss 21(4)(b), 21(2)(d) and 30(1)(3) of the Equality Act. Section 10(2) provides for the referral of matters under s 10 that also constitute criminal offences, to the Director of Public Prosecutions.

expression in public,¹³⁴ an explicit requirement to this effect will contribute to clarity.

7 Conclusion

The international community has learnt that measures should be in place to safeguard society against hate propaganda with the potential to incite a cruel and inhumane onslaught on vulnerable groups which marginalises and intimidates them to the extent that the foundational values of humanity are destroyed. However, because freedom of expression is also the means by which society exposes that which is bad, challenges stereotypes and introduces innovative thinking, measures that are put in place to protect society against an effective onslaught on its foundational values by means of uncontrolled expression should be narrowly and clearly defined and meticulously applied. It is apparent that the drafters of the Constitution took these realities into consideration when they articulated section 16(2)(c) in extreme and narrow terms. Regulation in accordance with section 16(2)(c), but accommodating the fact that changing circumstances may create more, or other, vulnerable groups and related comparable threats, does not jeopardise the balance that is reflected by the section. The conclusion that the South African public is not sufficiently protected against the human rights violations contemplated by section 16(2)(c) in fact requires the state to take appropriate measures. The creation of an offence in line with section 16(2)(c), extending the grounds to include nationality and sexual orientation, is in fact necessary.

¹³⁴This is in accordance with the element of incitement and the approach that s 16(2)(c) is concerned with the protection of society against the risks described in para 2 above. See the discussion of this aspect in Marais (n 10) 310-314.