

Criminalising hate speech: An opportunity not without controversy.

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Growing up, it was not uncommon to hear the phrase "men are dogs" - often used by many of my matriarch during those acute episodes of romantic relationships gone wrong. I never took it literally and neither did I apply my mind to what they were implying, until I suffered similar disappointment in my own relationships and the phrase assumed new meaning. I began to appreciate its reference (rightfully or not) to men's propensity for multiple relationships and men seemed to understand it similarly, and life went on. But what if I called a man a dog in 2018?

South Africa is at the brink of enacting legislation to criminalise hate speech. The Prevention and Combating of Hate Crimes and Hate Speech Bill is in its final stages, having been approved by cabinet in March 2018. Hate crime in South Africa is rife – characterised by racism, homophobia and xenophobia amongst others. To date, hate speech has been governed by the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. This legislation makes hate speech illegal but as a civil rather than a criminal offense. To this end, the envisaged new Bill will see hate speech become a criminal offense. According to the bill, for something to be considered hate speech or a hate crime it must have a "clear intention to be harmful or to incite harm or promote or propagate hatred on the basis of age, albinism, birth, colour, culture, disability, ethnic or social origin, gender or gender identity, HIV status, language, nationality, migrant or refugee status, race, religion, or sex, which includes intersex or sexual orientation." Despite these clear parameters, the passing of the bill has been associated with controversy and suspicion. In order to build social cohesion, a sense of nationhood whilst embracing our diversity, it is important that South Africans engage with the necessity of this piece of legislation, its intent and understand its parameters.

However, there are many other instances, where in spite of legislation, undesirable utterances, practices and behaviour have continued. Certainly, in addressing religious intolerance, driving a change in moral and social norms has been shown to be more effective and productive than criminalization. Similarly, in South Africa, there needs to be a conversation about heteronormative values before the LGBTIQ community can enjoy their freedoms as enshrined in the constitution – and the assumption that this legislation will change the perceptions of the general population is misplaced.

Whilst one cannot condone the racist, sexist, xenophobic and homophobic sentiments and utterances expressed by various members of our society, there is a real danger that the bill might curtailing freedom of speech which is one of the cornerstones of our constitution. It is clear from the bill that one of the resultant effects will be censorship of speech, and discrimination based on viewpoints is an egregious form of content discrimination. Under this law, Penny Sparrow's public spat referring to black people as monkeys would not go unpunished, but going back to my earlier example, one wonders whether the next time I called my husband a dog I will face prison time. Similarly, religious groups have raised their concerns about whether their teachings on morality and conduct, based on specific scriptures, might be reported as hateful and inciteful. Luckily, the bill specifically excludes "anything done in good faith in the course of engagement in any *bona fide* artistic creativity, performance or other form of expression, academic or scientific inquiry or fair and accurate reporting or commentary in the public interest, in so far as it does not advocate hatred that constitutes incitement to cause harm, from the ambit of hate speech." In spite of these exceptions, within the general public, the rights to freedom of expression and equality are essential for fostering a tolerant, pluralistic and diverse democratic society.

There are also criticisms that this bill will stifle constructive discussions that must be had about the transformation of South Africa as a country. This argument is at the heart of whether social change can be achieved merely through legislation. While the bill itself legislates against hate speech – it can never address the sentiments themselves. In legislating, South Africa is once again throwing the law at gross social ills without addressing the root cause of the problem. Many believe the bill will merely lead to covert discrimination and resentment from those who will have to disguise their bigotry and that this is synonymous with putting band aid on a gushing wound. Some have even argued that equality is better promoted through positive measures to increase understanding and tolerance, rather than through censorship of views perceived as injurious to targeted groups. Homophobic remarks like those made by the Zulu King Zwelithini when he said people who practise same sex relations are rotten - will under this Bill attract criminal charges. Will that make him any less homophobic or might he be forced to reserve any such homophobic sentiments to themselves? Does it matter at all?

There are several cases where legislation has been used to drive social change. In the United Kingdom the Public Order Act applicable in England and Wales provides for a maximum sentence of seven years imprisonment for hate speech and hate crimes. Likewise, in France a law from 1972 prohibits hate speech and this crime is punishable with a penalty of up to a year in prison with a possibility of revocation of civil liberties. Through these pieces of legislation, both nations have been able to significantly reduce hateful and discriminatory utterances. In both countries the emphasis is placed on showing intent to do harm because of hate rather than simply saying hateful things. However, the reality is that apart from the most obvious cases it is difficult to prove intention to cause harm.

Lastly, hate speech is often associated with unequal power relations, premised on the legacy of colonialism, apartheid and race and gender-based inequalities in South Africa. There is a fear that given the fact that financial muscle gives an unfair advantage when it comes to litigation, such power relations will be re-enforced. On the other hand, those who are in favour of the bill point to the fact that criminalising bigoted outbursts and conduct will have financial as well as social consequences as those convicted of such crimes might find themselves unable to travel abroad, publicly shamed and excluded from certain employment opportunities.

All things considered there seems to be wide spread support for this bill from those who believe intolerance must be punished severely after centuries of dehumanising discrimination. Many believe, rightfully so, that the criminalisation of hate crime will bring us closer to understanding its nature and frequency, both important for informing other interventions. However, more engagement still needs to happen with South Africans on the parameters of the bill and what the implications to our society will be. The bill itself, whilst dealing with a social issue, can never replace the need for ongoing dialogue in this rainbow nation about diversity, respect for others and dealing with institutionalised discrimination and unjust power relations. Justice and Correctional Services Minister Michael Masutha is quoted as saying “we are clear that this Bill of itself may not end racism and other intolerances but will create an instrument that will hold those guilty of committing the acts accountable before the law.”

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