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Hate speech:

The South African *Qwelane* case and why it is relevant for Namibia

What is the *Qwelane* Case about?

“Speech is powerful – it has the ability to build, promote and nurture, but it can also denigrate, humiliate and destroy. Hate speech is one of the most devastating modes of subverting the dignity and self-worth of human beings.”

These are the opening lines of a judgment of the Constitutional Court of South Africa delivered on 30 July 2021. The question the Court had to grapple with was how to strike a balance between the fundamental right to free speech and the equally fundamental need to protect society against hate speech that violates constitutionally-protected dignity.

In South Africa, hate speech against persons based on certain prohibited grounds (such as race, sex and sexual orientation) is prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – more commonly referred to simply as the “Equality Act”.

Mr Qwelane, the applicant, was a popular columnist who wrote an article comparing homosexuality to bestiality. In the words of the Court, this article constituted “detestation and vilification of homosexuals on the grounds of sexual orientation”. The article’s publication in the *Sunday Sun* newspaper in 2008 resulted in a landslide of complaints to the South African Human Rights Commission (SAHRC), which then initiated proceedings in the Equality Court.

The SAHRC asserted that Mr Qwelane’s article was prohibited hate speech. In response to this, Mr Qwelane argued the Equality Act’s prohibition on hate speech was overly broad and vague, and thus an unconstitutional violation of freedom of expression.

Definition of hate speech

There is no international definition of hate speech, although two international conventions mention the issue.

The International Covenant on Civil and Political Rights requires nations that are parties to it to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

The International Convention on the Elimination of All Forms of Racial Discrimination prohibits “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”.

In South Africa, the Equality Act's provision on hate speech stated that no person may use speech that "could reasonably be construed to demonstrate a clear intention to (a) be hurtful (b) be harmful or to incite harm (c) promote or propagate hatred" on the prohibited grounds. The listed grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The statute also forbids hate speech on any other ground where discrimination on that ground causes or perpetuates systemic disadvantage or undermines human dignity. It thus serves as an important tool for redressing the wrongs of the past.

One of the key questions considered by the Court was how to distinguish "hurtful" speech from "harmful" speech. Must hate speech be both hurtful and harmful as well as promoting hatred? Or is any one of these impacts sufficient to make the speech into "hate speech"?

Another key issue was where to draw the balance between prohibiting hate speech and protecting the right to free speech.

The relation between hate speech and freedom of expression

The Court found that the right to freedom of expression includes the right to express unpopular or even offensive beliefs. It noted that a healthy democracy requires a degree of tolerance towards speech that shocks or offends.

But hate speech is something more. Hate speech goes beyond merely being offensive. It expresses extreme detestation and vilification that can provoke discriminatory activities against a specific group in society. Speech becomes hate speech when it attempts to violate the rights of another person or group of persons based on their group identity. And, since the dignity of the person being spoken about is protected by the Constitution, hate speech cannot be allowed. But, to avoid undermining freedom of expression, prohibitions on hate speech must be clearly, carefully and narrowly drawn.

Against this backdrop, the Court held that being "hurtful" alone is not sufficient to turn constitutionally-protected speech into hate speech. The term "hurtful" is too broad and vague, especially since it is used alongside the word "harmful" in the South African statute – indicating that these two words must have different meanings.

Speech might be "hurtful" if it is distressing or offensive, without attempting to invoke hatred against a person because of their membership in a specific group. So, according to the Court, equating hurtful speech with hate speech sets the bar too low and is thus an unjustifiable limitation on freedom of speech.

In contrast, the term "harmful" can refer to either physical harm or deep emotional and psychological harm that severely undermines the dignity of the targeted group. Speech that is both harmful *and* intended to promote hatred against a specific group of persons is not constitutionally protected by the right to freedom of speech – especially where it perpetuates the subordination of vulnerable and marginalised groups that characterised the apartheid era. The Court concluded that both of those elements must be present to justify the prohibition of hate speech – a clear intention to be harmful or to incite harm, and a clear intention to promote or propagate hatred.

Applying this test, the Court found that Mr Qwelane's article constituted hate speech. It undermined the dignity of the LGBT+ community, and that community's place in society as human beings of equal worth, equally deserving of the human dignity which is protected by the Constitution. Mr Qwelane's article galvanised discrimination, hostility and violence against the LGBT+ community.

Mr Qwelane passed away while the case was under consideration, so the Court was unable to order an apology or any other form of personal restitution – but it did issue an order declaring that the offending statements made against the LGBT+ community constituted hate speech, in the hope that this official pronouncement would give some comfort to the targeted group.

Why is this case relevant to Namibia?

The constitutions of Namibia and South Africa are not identical, but both do protect equality, dignity and freedom of speech. The case also relied on international standards and laws in other countries that Namibian courts would also be likely to look to in cases involving hate speech.

It is particularly relevant to Namibia now, given that the Office of the Ombudsman is in the process of drafting a bill on hate speech for future consideration by Parliament. The ruling of the South African Constitutional Court gives some important guidance on how to make sure that legislation prohibitions on hate speech can be consistent with constitutional protections for freedom of speech.

A law against hate speech is likely to pass constitutional muster if it provides a clear definition of what is prohibited, and if it addresses speech that is both harmful and an incitement of hatred against members of specific groups.

Speech that is offensive or hurtful without inciting hatred against specified groups is part of the robust debate that characterises true democracies. But hate speech undermines dignity and equality. In the words of the South African Constitutional Court, it is “the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy”.

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