Freedom of expression and hate speech in Namibia

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Introduction

The case of Elvis Kauesa,[1] a junior police officer who challenged the constitutionality of a section in the Police Act prohibiting him to publicly criticise senior officers, is in many ways a benchmark decision for Namibia. It defined freedom of speech extremely widely, and set a very liberal example of purposive constitutional interpretation.

Not only did it determine the scope of freedom of expression in terms of the stare decisis rule, it also influenced later cases dealing with the limitation of constitutional rights.

The Kauesa case has placed Namibia in the category of constitutional states that will not lightly deviate from the constitutional right to freedom of expression. In the process, the Namibian Supreme Court has followed the Canadian example, staying clear of the egalitarian liberal approach of an almost non-derogated right to freedom of speech, but also extensively limiting the grounds for derogation. There are not many liberal democracies in the world where a section in a Police Act prohibiting junior officers to criticise their seniors in public will be declared an overbreadth and unconstitutional by the highest court in the country.

In the traditional discussion, especially in the United States, the question has always been whether freedom of speech was absolute or whether there could be derogations. The egalitarian liberals such as Dworkin[2] have always insisted that freedom of speech is absolute. Western European countries were strongly influenced by anti-Nazi legislation after World War II in West Germany: it became standard practice in many states to limit the scope of freedom of speech by enacting anti-hate-speech legislation.

The German Penal Code is the most extreme example of derogative measures limiting free speech. It makes a denial of the Holocaust a crime, prohibits even a debate about the values of Nazism, and includes a clear prohibition of racial hate speech.

With the growth of the pornographic industry in the 1960s, voices went up in the United States to restrict the publishing and distribution of violent hard-core pornographic material. The discussion is ongoing. Kateb[3] argues that

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1 *Kauesa v Minister of Home Affairs and Others*, 1995 NR 175 (SC).

2 Dworkin (1977, 1985).

3 Kateb (1989).

pornography and racial hate speech may offend, but it does much less harm than political speeches and religious sermons. Political speeches are often mere spin, and politicians have no intention to fulfil their election promises. They can humiliate their opponents and create unrealistic expectations. Yet, no one will argue that political speeches should be prohibited. The same, Kateb says, goes for religious sermons: they are often authoritarian, fundamentalist, and without scientific foundation; and they can have extremely negative effects on their listeners. He doubts that pornography or hate speech can create nearly as much harm.[4]

Feminists, on the other hand, have argued that the objectification of the female body is enough reason to limit the distribution of pornographic material legally. Langton[5] argues that egalitarian liberals such as Dworkin should be in favour of the action against pornography because of its degrading and inferior attitude towards women.

Brugger[6] points out that neither constitutional law nor international law explicitly and consistently permits or prohibits hate speech. He identifies two possibilities to look at hate speech from an a priori acceptance of the basic principles of freedom of speech. The one is the radical North American view that sees freedom of speech and expression as an almost non-derogable right. These countries prioritise freedom of speech over interests such as dignity and privacy. On the other hand, several Western European countries followed Germany and developed anti-hate speech legislation:[7]

The opposing view, shared by Germany, the member states of the Council of Europe, Canada, international law, and a minority of US authors, views hate-filled speech as forfeiting some or all of its free-speech protection. This group of nations assigns a higher degree of protection to the dignity or equality of those who are attacked by hate speech than to the verbally aggressive speech used to attack them. Under this system, hate speech is not only unprotected, it is frequently punishable under criminal law, and individuals or groups who are the victims of hate speech frequently prevail in court.

Brugger[8] points out that this development is closely linked to the Federal Republic of Germany's experience after World War II. The new government and nation wanted to set themselves apart from the previous regime and its hate speech and hate crimes. The Penal Code contains several sections concerning hate speech, specifically the general sections 186–200 dealing with Beleidigungsdelikte (criminal defamation) or Delikte gegen die persönliche Ehre (delicts of insults to personal honour). The courts allow groups to launch complaints if they can be

4 Ibid.
5 Langton (1990:311ff).
6 Brugger (2002).
7 Ibid.
8 Ibid.

targets of defamation, provided one can clearly identify the group as separate and if each of the members of such group is clearly included in the insults or defamation. The defamation does not have to be a public act: it only needs to be in the presence of a third person.

Similarly, sections 84–91 of the German Penal Code deal with collective defamation, including propaganda by unconstitutional and National Socialist organisations, and the display of Nazi symbols such as the Nazi salute and the swastika.

The prohibition of hate speech became a vehicle for getting away from the sad history of the past. Moreover, the hate speech provisions are not seen as contradicting the freedom of expression clause in the post-WWII constitution or Grundgesetz ("Basic Law").[9]

The Kauesa[10] case did not deal with hate speech but with the personal defamation of senior officers in the Namibian Police by a junior staff member. In this instance, the Supreme Court took an unequivocal decision in favour of the freedom of expression. In the proportionality test applied by the Court, the importance of an open and free discussion of past oppression, in a society where race was the most fundamental aspect of one's existence, exceeded the interests of individual police officers.

But Kauesa did not address the issue of harmful and hate speech in general. It dealt with a special case and a specific Act, which the Court felt would limit future discussion and debate on issues such as Affirmative Action and proactive programmes to redress the past.

State v Smith

After the Kauesa case, Namibia was confronted with constitutional challenges based on anti-racial discrimination and anti-pornographic legislation, the first being a product of the independent post-apartheid Parliament, the second based on the Calvinist moral legislation of the colonial apartheid power.

In the case of State v Smith and Others,[11] the constitutionality of yet another Act limiting freedom of speech was tested.[12]

9 *Grundgesetz für die Bundesrepublik Deutschland. 1949; vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Gesetz vom 28. August* 2006 (BGBl. I S. 2034). The freedom of expression clause is Article 5(1), which reads as follows: *"Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt."*

10 1996 (4) SA, 965 (NMS).

11 1996 NR 367 (HC).

12 It is interesting that the first significant case of contravening the Act only came in 1996, five years after its enactment. Also in 1996, at the 47th Session of the Committee of the Elimination of Racial Discrimination, one of the Commissioners, Adv. Andrew Chigovera, asked the Namibian

This time it was section 11 of the Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991). The specific section reads as follows:

(1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with intent to –

(a) threaten, ridicule or insult any person or group of persons on the ground that such person belongs or such group of persons belong to a particular racial group; or

(b) cause, encourage or incite disharmony or feelings of hostility, hatred or ill-will between different racial groups or persons belonging to different racial groups;

(c) disseminate ideas based on racial superiority.

The case emanated from an advertisement in a Windhoek newspaper congratulating the Nazi Rudolph Hess on his birthday. In an obiter dictum in the initial Kauesa case,[13] a full bench of the High Court found section 11 to be constitutional. However, as we have seen, the judgment was overturned by the Supreme Court.

The Judgement

After defining the sufficiently significant object of the Act, the Court applied the tests of the Canadian benchmark case of Rex v Oakes,[14] (also applied in the Supreme Court Kauesa case) to determine if the derogations from Article 21(1) and (2) of the Constitution –[15]

were reasonable, and rationally connected to the objective

representative, Mr Utoni Nujoma, if the fact that the Prosecutor-General had to institute all prosecutions under the Act did not limit its application. It is also clear from Namibia's State Report that no significant prosecutions took place under the Act. The question was still on the agenda in 2007. Committee on the Elimination of Racial Discrimination (1996).

13 *Kauesa v Minister of Home Affairs and Others,* 1994 NR 102 (HC).

14 1986 (26) DLR 4 200.

15 See the quote in the text of *Rex v Oakes,* supra: "… once a sufficiently significant objective is recognised, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': *R v Big M Drug Mart Ltd*, supra. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question: *R v Big M Drug Mart Ltd,* supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

impaired the right to freedom of expression to the least extent possible, and

were reasonable in a democratic society.

Frank, J (as he then was) failed the Act on every requirement. The Court clearly sees the Act as a bridge from the old apartheid order to the new democratic, constitutional era.[16] The significant objective of the Act is the prevention of a recurrence of the type of racism and its concomitant practices, which prevailed prior to independence in Namibia. The Act is the bridge over which a racist society needs to cross from the apartheid-based values and morals to a new democratic, constitutional era, where people are respected, regardless of their race or ethnic origin.

Consequently, the Court concluded that groups of persons who had never featured in the pre-independence era and were never part of or party to the social pressure amongst the various peoples in Namibia could not be seen as objects justifying the restrictions of freedom of speech described in Article 21 (a) and (b) of the Constitution.

The definition of racial group in the Act goes beyond what is required. In this specific case, the insult to the Jewish people by the heroic treatment of a Nazi war criminal and the sensitivities of the Jewish people were not sufficient justification to derogate from a broad interpretation of the constitutional freedom of speech.[17]

It is not clear exactly what the Court has in mind when it excludes groups of persons –[18]

… who never featured in the pre-independence of this country and were never part of or party to the social pressure amongst the different people … making up the population that was occasioned by the erstwhile racist policies.

Does it mean that only previously disadvantaged groups can expect the Act to protect them from a continuation of the humiliation of the apartheid era? Or does it mean that the Act and its implementation are reserved for all the groups who represented different interests before independence?

In both these instances, the interpretation of the Court seems too narrow. While the sad colonial history of Namibia was undoubtedly the inspiration for and the background to the Act, its objectives seem to be more than just redressing the past. It includes a preventative element, something like the slogan of the Jewish people after the Holocaust: Never again! In other words, the sufficiently significant objective of the Act also includes the prevention of discrimination against all groups, racial and ethnic, irrespective of their place and role in pre-independent Namibia.

16 The metaphor was first used by the late Etienne Mureinik; see Mureinik (1994:31).
17 *S v Smith and Others*, supra, p 372.
18 Ibid.

The illustrations of the Judge reveal the flaw in his argument. In his understanding, the animosity that Namibians felt towards Spanish pirating of Namibian fishing resources and the negative feelings they expressed towards the Batswana people as a result of the island dispute between Botswana and Namibia[19] should not be protected by the Act. Protecting the Spanish and Batswana can clearly not be related to the prevention of racism or social pressure between groups of people within Namibia.

However, since these animosities can easily change into xenophobia and discrimination against all Batswana living in Namibia, or worse, include Tswana-speaking Namibians, a broad interpretation of the term racial group is needed in crossing the bridge from a racist to a non-racial society.

The Jewish community, once a major role player in Namibian society, has dwindled to a very small, yet influential group in Namibia. Taking into account Namibia's history, including the strong National Socialist party that operated in Namibia before and during World War II, as well as the fact that the Jewish community is a very small minority, their sensitivities to the advertisement were not taken into account.[20]

When the South African version of this Act, the Promotion of Equality and Prevention of Unfair Discrimination Act, was discussed in an open forum of the Joint Committee of Parliament, the Jewish Board of Deputies in South Africa requested that hate speech be criminalised:[21] a clear indication that the Jewish community still experience abuse in South Africa.

Following the Oakes case, the Court criticised the Act for not allowing language or publications that might be offensive to certain groups if the facts contained therein were true. Offensive language or even views shocking and disturbing to the state or to sectors of the population were needed to build a democratic society, the Court found.

The Namibian Act, unlike the Canadian Criminal Code,[22] does not provide for statements that may cause disharmony, but are intended to oppose and remove racist practices. Consequently, the Court found that the Act, as it stands, did not impair freedom of expression to the least degree possible, in that the Act inhibited and stifled public debate on important issues such as Affirmative

19 At the time of the judgment, Namibia and Botswana were at loggerheads over the ownership of what Namibians referred to as *Kasikili Island*. The International Court of Justice later ruled in favour of Botswana.

20 It seems as if the judge had problems with the case from the outset. David Lush of the Media Institute of Southern Africa reported that, on the first day of the hearing, the defence requested further particulars, more specifically which parts of the advertisement had led to the charges. Thereupon Justice Frank reportedly stated: "What is the case against these people and who did they insult?" See Lush (1995).

21 Parliamentary Monitoring Group (1999).

22 Sections 318 and 319.

Action and historical assessments; moreover, it found that section 11(1) was overbroad and unconstitutional.[23]

Consequences of the judgment

The State did not appeal against the judgment and Parliament opted to amend the Act. The amendments followed the case almost to the letter.[24] The new section 14(2) exonerates racist language and publication envisaged in section 11(1) if it is a subject of public interest, part of a public debate, and the truth – or on reasonable grounds believed to be true. It also excludes prosecution if someone contravenes section 11(1) with the intention to improve race relations and to remove racial insult, tension and hatred.[25]

The exclusions are extremely broad. It is no surprise that no one has been prosecuted under section 11(1) since the Smith case. Even in cases where prosecution should at least have been considered, neither the public not the authorities even mention prosecution under the Act. A case in point is the outburst of the SWAPO Party of Namibia Councillor Mandume Pohamba against the Oukwanyama Traditional Authority.[26] Pohamba called the Traditional Authority sell-outs and traitors, and as having betrayed the liberation struggle. He added that they were working against the wishes of the majority. He also threatened that SWAPO would act against teachers and public servants who joined the new political party, the Rally for Democracy and Progress (RDP)

The Chairman of the Traditional Authority, George Nelulu, complained in writing to the Regional Governor, using the words of section 11(1) in his petition:[27]

23 *S v Smith*, supra, p 374.

24 The Racial Discrimination Prohibition Amendment Act, 1998 (No. 26 of 1998).

25 The full text of the changes reads as follows:

11 (1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with the intent to:

(a) Threaten or insult any person or group of persons on the ground that such person belongs or such persons belong to a particular racial group; or

(b) Cause, encourage or incite hatred between different racial groups or persons belonging to different racial groups; or

(c) Disseminate ideas based on racial superiority.

14 (2) No person shall be convicted of an offence under subsection (1) of section 11 –

(a) if the act complained of was, at the time of the commission thereof, relevant to any subject of public interest, the discussion of which was for public benefit, and if on reasonable grounds such person believed the statement or statements concerned to be true; or

(b) if such person, in good faith and with the intention of removing matters tending –

(i) to threaten or to insult any racial group or any person belonging to such racial group; or

(ii) to cause, encourage or incite hatred between different racial groups or between persons belonging to different racial groups; or

(c) if it is established that the language, publication or distribution complained of communicated the truth and that the main purpose thereof was to so communicate the truth and not to cause any of the acts referred to in that subsection.

26 Shivute (2008).

27 Ibid.

People like Pohamba are sowing seeds of hatred, ethnic division and tension, and engage in hate speech that stirs political tensions.

The background to the attack is increasing tension between the two major Owambo tribes, the Oukwanyama and the Ondonga, as well as between the RDP – led by former SWAPO stalwart Hidipo Hamutenya – and SWAPO, the ruling party.

Human rights activist Phil ya Nangolo sees it as part of a systematic marginalisation of the Oukwanyama. While several people, including the Traditional Authority, took offence at Councillor Pohamba's statements, no one even mentioned the possibility of prosecution under section 11(1) of the Act. Furthermore, neither the Police nor the Office of the Prosecutor-General made any effort to take the matter further. Have the Namibian public lost faith in the Act since its amendment? Or does the narrow understanding of the objectives of the Act by the bench in the Smith case play a role? Is the Act only seen as a tool to deal with white-on-black hate speech and tension?

Do the historical disparity and the apartheid society determine what racism in Namibia is? While this part of former Judge Frank's judgment did not find its way into the amendment of the Act, it seems to be an interpretive tool in deciding on prosecution. In 2005, activist Methusal Matundu – also known as Malcolm X Matundu – carried a placard stating "Kill all whites" during a public demonstration in Windhoek. He stated the reason for his placard at the court (after his first appearance) as follows:[28]

The intention was to solicit the support of black people to employ that strategy, because the Mau Mau school of thought, of which I'm the head, believes that killing all white people is the only way that we will get people to take black people seriously.

While the facts seem to be clear, the case was postponed several times and eventually withdrawn in order to give the Police more time for investigation. It is unlikely that the Prosecutor-General considers the facts of the case to be one of the exceptions of section 14 of the Act that would make prosecution impossible: Matundu can hardly be said to believe on reasonable grounds that the killing of whites is a practical necessity in Namibia. Neither can his harsh position be an invitation to meaningful debate, for his outrageous position obviously excludes debate. The only logical conclusion one can reach as regards the withdrawal of the case is that the unfortunate narrow perception of the objectives of section 11(1) of the Act, together with the 1998 amendments, has limited its application to such an extent that aggrieved Namibians are forced to the old common law remedy of crimen injuria.

In preparation for its eighth State Report to the Convention on the Elimination of all Forms of Racial Discrimination, the treaty body requested Namibia to explain

28 Menges (2005).

why no prosecutions had been executed under the Racial Discrimination Prohibition Act.[29] In response, Namibia blamed the amendments to the Act.[30] The report goes on to point out that it is no longer an offence to ridicule anyone on the grounds that such person belongs or such persons belong to a particular racial group, as originally provided for in section 11(1)(a) of the Act, or an offence to cause, encourage and incite disharmony or feelings of hostility or ill will between different racial groups or persons belonging to different racial groups as originally provided for in section 11(1)(b).[31]

Aggrieved people who have been insulted and humiliated on the grounds of their race or on the grounds of belonging to a specific group have effectively lost the remedy of section 11 of the Racial Discrimination Prohibition Act. The Prosecutor-General now has to go back to the common law crime of crimen injuria in order to prosecute cases of hate speech, racial or group humiliation, or offensive acts. The alternative was to follow the egalitarian position and see freedom of speech as an absolute right.

The existence of the Racial Discrimination Prohibition Act is a clear indication that government wanted legislation to deal with racial abuse and hate speech. Both the Kauesa Supreme Court case and the Smith case agreed that freedom of speech was not absolute. However, the amendment of the Act came close to shutting the door on derogations in cases of hate speech and of racial or group ridicule or humiliation.

The Smith case, while following Kauesa in its broad interpretation of freedom of expression, made some crucial legal errors. The understanding of the Act as a mere bridge to take Namibia from its apartheid past to a democratic society is but one of the intentional objectives of the Act: it is not only the oppressed of the previous dispensation that need protection against racial discrimination.

Examples of oppressed-turned-oppressor abound. Moreover, those groups who were not part of the Namibian scene in the pre-independent era – the economic refugees from other African countries, political refugees, and foreigners working in Namibia – are all vulnerable and in need of protection against racial discrimination. Even the strong Oukwanyama may become vulnerable if they are attacked by political opponents.

It makes no legal sense to limit the application of the Racial Discrimination Prohibition Act to the pre-1990 context. The Act itself needs a thorough redraft.

29 It seems as if the Committee on the Elimination of Racial Discrimination was concerned that a white Prosecutor-General, having been part of the old apartheid dispensation, was not serious in prosecuting under the Act. In terms of section 18, all prosecutions under the Act must be instructed by the Prosecutor-General in person. However, developments after the retirement of Adv. Hans Heyman (who is white), indicated that the lack of prosecutions has more to do with the amendments to the Act than the person of the Prosecutor-General.

30 Republic of Namibia (2007:10).

31 Ibid

To make truth an exception to the violations of section 11(1) does not make sense either. In which form can the truth be justification for insulting a group or for creating disharmony, hostility or hatred between groups? Was the judge thinking of references to the historical oppression of the majority of the people by the white minority? If so, why do we need the truth test? After all, the mere fact that something is true does not mean that it cannot stir emotions and eventually result in people being abused on the ground of their race or ethnic origin. Think of the mentioned "Kill all whites" placard: would the placard be more acceptable if the author added "… because they committed genocide against us during the Herero–German War"? Or can we conclude that such utterances are allowed if a public speaker claims that whites can never be trusted because of their colonial and apartheid histories, or in the light of the historical truth of an oppressive pre-independent society?

'Publicly' or privately?

The fact that the Act demands a public statement or publication also makes it difficult to prosecute offenders. It seems as if the Office of the Prosecutor-General interprets this section extremely narrowly. The Namibian State Report comments that the public element of section 11(1) is also problematic for prosecutors and is one of the reasons why no prosecutions have been instituted in terms of it.[32]

The problem lies in the interpretation of the word publicly. During the author's period of employment a Police docket was forwarded to the Office of the Prosecutor-General for decision concerning racial remarks by the headmaster of a school to a teacher.[33] The suspect's lawyer submitted a request for withdrawal. He argued that the only way to give meaning to the word publicly was to interpret it as a statement in an open forum or publication accessible to the general public.

In terms of this interpretation, a high school staff room does not qualify as a public place. It is a closed meeting place for staff members only. Publicly demands something more: a public lecture, speaking at a rally, or any other event open to the broad public. This narrow interpretation was possibly accepted by the prosecutorial authority, hence the comment in the State Report. Most hate speech legislation goes much further than that. The Canadian Criminal Code uses the words statements other than in private conversations.[34] The German Penal Code makes provision for a heavier sentence if a conviction emanates from a public statement, but also criminalises private statements.[35] The South African Act even excludes the word publicly.[36]

32 Ibid.:11.

33 In terms of the confidentiality of the employer/employee relationship, the detailed facts of the case cannot be disclosed.

34 Canadian Criminal Code. RSC 1985, section 319(2).

35 *Strafgesetzbuch – (StGB)* BGBl 1974/60, section 185–187.

36 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (No. 4 of 2000), section 10.

Since the Act only applies to public utterances, the most vulnerable people are not assisted in their quest for self-worth and the eradication of racist or discriminatory language used against them. The workers on a building site, on a farm, or in a factory are extremely vulnerable – and the Act does not help them. Their only remedy remains the common law crime of crimen injuria, as the Namibian State Report to the Committee on the Elimination of Racial Discrimination has indicated.

Reaction from the Government

Given the time of the judgment, it is surprising that the government did not appeal. The best explanation for their decision is possibly the fact that the Smith decision seems to be in line with the strong defence of freedom of expression in the Kauesa case.

However, the Kauesa case was never intended to be an egalitarian option for unrestricted freedom of expression. The proportionality test of the Oakes case was used and, within the historical context of post-apartheid Namibia, the Supreme Court decided that Regulation 58(32) was an overbreadth:[37]

… its objective is obscured by its overbreadth and … there is no rational connection between the restriction and the objective.

Justice Dumbutshena made it clear that an unfavourable report which was true could be seen in the same light as an untruthful unfavourable report. In terms of Regulation 58(32) of the Police Act, however, any unfavourable report by a police officer constitutes a breach of the Regulation.[38] Nonetheless, there is a difference between hate speech, as envisaged in the Racial Discrimination Prohibition Act, and a national debate on the necessity for transformation in the Namibian Police. This difference was never fully recognised in the Smith case.

A better way to approach the Racial Discrimination Prohibition Act would have been to make the objectives clear in the amendment, which did not happen. The South African Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (No. 4 of 2000),not only included a long preamble, it also contained a section explaining the objectives of the Act.[39]

37 1996 (4) SA at 981.

38 Ibid.:984.

39 See e.g. the objectives that deal with hate speech and harassment:

2(b)(v) the prohibition of advocacy of hatred based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment. particularly on the grounds of race, gender and disability;

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and

A preamble similar to the one in the South African Act could have helped to clarify the differences between the Kauesa judgement and the Racial Discrimination Prohibition Act on this issue. While Justice Dumbutshena made specific provisions in his interpretation of the Constitution for the transition from apartheid to constitutionalism, the Act did not clarify why certain deviations from the right to free speech should be limited for the sake of a harmonious change from oppression to a democratic society. The first paragraph in the preamble of the South African Act refers to historical inequalities, while the second points to progress having been made in restructuring and transforming society:[40]

… systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.

The last paragraph of the preamble expresses the need for caring and compassionate relationships and guiding principles:

This Act endeavors [sic] to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

If an addition similar to the South African preamble and its objectives were made part of the Act, most of the amendments might have been unnecessary. While a democratic society needs an open interaction on ideas and ideology, and especially issues relevant to the restructuring and transformation of the post-apartheid society, it also needs to take cognisance of the importance of relationships built on equality, fairness, human dignity and freedom. In that sense, the emphasis on a free and aggressive right to debate all aspects of the transformation process and the simultaneous emphasis on the equality and dignity of the debating partners do not contradict each other.

A democratic Namibia needs to guard against the development of unequal relationships in language and conduct, as much as it has to facilitate debate on the content and form of the new society it is building.

In South Africa, the anti-hate speech sections of the Act survived an amendment in 2002. The academic debate moved away from the mere question of how to minimise the application of the restrictions on freedom of speech, to more substantive issues such as the question as to whether the word harm in the Act referred to physical harm only or included psychological harm; whether hate speech may limit freedom of expression, etc.[41] These issues have, unfortunately, never been discussed in Namibia.

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persons whose right to equality has been infringed.

40 Preamble, Promotion of Equality and Prevention of Unfair Discrimination Act.

41 See Albertyn et al. (2001); De Waal & Currie (2005:320ff); Marcus & Spitz (1999:20ff); Thechner (2003:349ff).

References

Albertyn, C, B Goldblatt & C Roederer (Eds). 2001. *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act.* Johannesburg: Wits University Press.

Brugger, W. 2002. "The treatment of hate speech in German constitutional law (Part I)". *German Law Journal*, December, 2, 12.

Committee on the Elimination of Racial Discrimination. 1996. *Summary Record of the 1169th meeting: Namibia, Venezuela. 06/11/96.* Geneva: United Nations Committee on the Elimination of Racial Discrimination.

De Waal, J & I Currie. 2005. *Human rights handbook.* Johannesburg: Juta.

Dworkin, R. 1977. *Taking rights seriously.* Cambridge, MA: Harvard University Press.

Dworkin, R. 1985. *A matter of principle.* Cambridge, MA: Harvard University Press.

Economist Staff Reporters. 2008. "Phil concerned about 'anti-Kwanyama drive'". Namibia Economist, 31 October.

Kateb, G. 1989. "The freedom of worthless and harmful speech". In Yack, B (Ed.). *Liberalism without illusions: Essays on liberal theory and the political vision of Judith N Shklar*. Chicago: University of Chicago Press.

Langton, R. 1990. "Whose right? Ronald Dworkin, women, and pornographers". *Philosophy and Public Affairs*, 19, 4:311ff.

Lush, D. 1995. *Editors appear before court on racism charges.* Action Alert Up-date, 20 December 1995. Available at https://listserv.heanet.ie/cgi-bin/wa?A2=ind9512&L=AFRIK-IT&P=4475; last accessed 3 July 2008.

Marcus, G & D Spitz. 1999. "Expression". In Woolman, S (Editor-in-Chief), T Roux & M Bishop (Managing Editors). 1999. *Constitutional Law of South Africa.* Johannesburg: Juta.

Menges, W. 2005. "'Kill all whites' call a strategy, says suspect". The Namibian, 10 October.

Mureinik, E. 1994. "A bridge to where? Introducing the Interim Bill of Rights". *South African Journal on Human Rights,* 10:31.

Parliamentary Monitoring Group. 1999. *Equality hearings – Minutes: Joint Committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill, 22 November 1999*. Available at http://www.pmg.org.za/minutes/19991121-equality-bill-hearings; last accessed 3 July 2008.

Republic of Namibia. 2007. *Reports submitted by States parties under Article 9 of the Convention: International Convention on the Elimination of all Forms of Racial Discrimination. 12th periodic reports of States parties due in 2005. Addendum – Namibia.* Geneva: United Nations Committee on the Elimination of Racial Discrimination.

Shivute, O. 2008. "Kwanyama chiefs hit back against insults". The Namibian, 11 June 2008.

Thechner, S. 2003. "The hate speech provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The good, the bad and the ugly". *South African Journal on Human Rights,* 19:349ff.