



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Subcommittee
FROM: Executive Director
DATE: 1 February 1996
RE: Revised Memorandum on "Hate Speech" from the Independent Panel of Constitutional Experts

We enclose for your consideration a revision of the memorandum on "Hate Speech" tabled by the Independent Panel of Experts on 31 January 1996.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487, E-mail: conassem@iaccess.za



You've made your mark



Now have your say

THE NEW CONSTITUTION

MEMORANDUM

TO: Members of the Constitutional Committee Subcommittee
FROM: Executive Director
DATE: 1 February 1996
RE: Revised Memorandum on "Hate Speech" from the Independent Panel of Constitutional Experts

We enclose for your consideration a revision of the memorandum on "Hate Speech" tabled by the Independent Panel of Experts on 31 January 1996.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

01 February 1996

**To: Louisa Zondo
Constitutional Assembly**

Herewith a corrected version, with some additional information, of the "hate speech" memo distributed on Wednesday 31 January. Please distribute to all relevant persons, including those involved in bi-laterals and multi-laterals on the Bill of Rights (e.g Ms Naledi Pandor, Ms Mavivi Manzini, Mr Willie Hofmeyer, Senator M E Surty, Ms Dene Smuts, Mr Colin Eglin, Senator R Radue and Ms Sheila Camerer.)

Thank you

Panel

01.02.96

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 01 FEBRUARY 1996

RE: THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION AND "HATE SPEECH" (SECTION 15) (CORRECTED VERSION WITH ADDITIONAL INFORMATION IN PAR. 4)

1. INTRODUCTION

At the CC Sub-Committee meeting of 22 January 1996 the Panel was requested to provide an opinion on the exclusion of "hate speech" from the constitutional protection of free speech (in section 15(2) of the Third Edition of the Working Draft of the Constitution (18/12/1995)). Aspects which were specifically mentioned in the debate included the question whether "incitement to discrimination" does not in itself constitute criminal behaviour, what the effect of a specific limitation of a right could be on the application of the general limitation clause, whether freedom of expression could be abused by those engaging in "hate speech" and whether the free expression clause could be used as a defence in criminal proceedings based on acts of "hate speech".

The memo thus addresses two main issues, namely (a) whether, or to what degree, "hate speech" should be disqualified from constitutional protection; and (b) whether such disqualification or limitation should be addressed by way of a specific limitation or exclusion in the clause on freedom of expression, or be left as a matter of general limitation of rights.

The term "hate speech" is used as shorthand for the kind of expression referred to in Section 15(2) of the Working Draft.

2. "HATE SPEECH"

2.1 Some brief comparative references

2.1.1 The USA

The US - where freedom of expression has been referred to as a "shining star" in the "constitutional constellation" and "the matrix of all rights", or a first order right - **goes further than any other country in affording protection to "hate speech" as constitutionally protected free expression.** (For this reason the USA could not ratify the relevant international law instruments, which are referred to below, without reservations.) The Supreme Court has affirmed the right of Nazis to

march on a public street in a suburb populated by Jewish concentration camp survivors, upheld the right of the Ku Klux Klan publicly to call for the expulsion of blacks and Jews in harsh language (such as that "there might have to be some revenge taken", that Jews should be "returned to Israel" and a call to "bury the niggers") and regarded the burning of a cross outside the house of a black family as constitutionally protected expression. A state is not permitted to forbid or proscribe advocacy of the use of force or law violation, **except where such advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"** (Brandenburg v Ohio 395 US 444(1969) 447; also see Smith v Collin 439 US 916(1978) and RAV v City of St Paul 112 SCt 2538(1992)). Required is therefore that the speaker has **intended** to cause **imminent lawless action**, as well as that the expression is **likely** to result in such action. The test is a strict one.

2.1.2 Germany

The democratic order is perceived to be more endangered by inflammatory racist propaganda in Germany, because of its history, and a more restrictive approach is followed. Freedom of expression is seen to operate within an interrelated set of fundamental rights and standards and has to be reconciled with the rights and liberties of others and with social values recognized by the Constitution. **The German Criminal Code (Arts 130 & 131) prohibits attacks on the human dignity of individuals and groups, as well as the incitement of racial hatred.** (The fundamental rights of citizens may also be limited or forfeited in terms of Article 18 of the Constitution, if used to destroy the democratic constitutional order and political parties which seek to impair or abolish the free democratic basic order may be declared unconstitutional by the Constitutional Court. The principle involved is referred to as "militant democracy" - a democracy has to defend itself aggressively, rather than be destroyed by anti-democratic forces.)

2.1.3 Canada

In a majority judgment the Supreme Court (in R v Keegstra (1990) 3 SCR 697, where a school teacher was convicted, in terms of S 319(2) of the Criminal Code, of the wilful promotion of group hatred after communicating anti-Semitic teachings to students) upheld the relevant section of the Criminal Code and found that the limitation of **free expression (protected in S 2(b) of the Charter of Rights and Freedoms) was demonstrably justifiable in a free and democratic society, in terms of the limitation clause (S1) of the Charter.**

2.1.4 International Law

The need to prevent incitement of racial hatred is recognized in

international human rights law. For example, Article 20 of the International Covenant on Civil and Political Rights states:

- "1 Any propaganda for war should 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."

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) proclaims that state parties shall, amongst other things, "(d)eclare 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 group or group of persons of another colour or ethnic origin".

South Africa will obviously have to respect the provisions and spirit of any international law instruments to which it becomes a party. The Draft Constitution also includes references to international law, e.g in the interpretation clause (S 39(1)) which states that a court must consider international law when interpreting the Bill of Rights.

The recent European Court of Human Rights decision in the case of *Jersild v Denmark* (36/1993/431/510) provides an interesting reference point. The Supreme Court of Denmark confirmed the conviction by lower courts of a television journalist, for broadcasting racist remarks by youths, who were members of a Neo Nazi group (the Greenjackets), of aiding and abetting the youths, who were also convicted. The relevant sections of the Penal Code dealt with statements or other communication "insulting or degrading a group of persons on account of their race ..." etc and made "assistance" of the commission of the crime by "instigation, advice or action" an offence. Before the European Court the journalist submitted that the relevant clauses of the Penal Code violated the free expression protection clause (Art 10) of the European Convention. With a majority of 12 to 7 the European Court found in favour of the journalist. The majority and minority agreed, however, that the Greenjackets themselves did not enjoy the free expression protection of Article 10.

2.2 "Philosophical/Conceptual" Perspective

2.2.1 Why is freedom of expression important?

Possible answers to this question may help to throw some light on the question whether all free expression deserves constitutional protection, or how and how far it could be restricted.

At least in theory, freedom of expression is widely recognized as a very important fundamental human right. Philosophers, constitutional lawyers and other commentators advance mainly three interrelated

explanations for the importance of free expression.

Firstly, speech and other modes of expression are forms of self-fulfilment. People's inherent dignity as human beings is related to their ability to express their thoughts and emotions and to communicate with others.

Secondly, progress is not possible without freedom of expression. It is argued that all expression, directly or indirectly, contributes to the process of "searching for truth". Thus it is argued by some that even false or malicious statements have some value, and would be distinguished from truthful ones in the "market place of ideas", where people are all free to contradict and convince one another.

Thirdly, freedom of expression is essential for democracy. The freedom to facilitate peaceful change through protest is often an alternative to violent revolution, and a democracy necessarily has to live to some extent with the risks presented by anti-democratic ideas. In this sense freedom of expression is a necessary condition for other rights and freedoms.

One or more of these explanations are open to criticism and a satisfactory free expression jurisprudence must draw upon several strands of theory, rather than on only one of the above.

2.2.2 Is "hate speech" speech or expression at all? Should it be protected?

Some would argue that certain activities do not qualify as "speech" or "expression" in the first place. (It could, e.g. be asked whether parking a car, disrupting traffic, rape or murder could qualify as "expression" in certain circumstances.) It is suggested that, for present purposes, all forms of human expression or communication can be regarded as "expression" - including speech, singing, dancing, demonstrating, wearing certain clothes and displaying symbols.

However, words are **not merely abstract**. Speech is **action**, which can be used for a variety of aims, including to intimidate, suppress, injure, or eliminate others. "Hate speech" could amount to a direct **assault** on the dignity and equality of others. The fact that something is "expression" does not mean that it should be **constitutionally protected expression**. It could, e.g, be argued that forms of expression which are not related to, or which even offend the above-mentioned underlying reasons for the recognition of free expression, do not deserve protection. "Hate speech" which may well be self-fulfilment, but is aimed at stifling or stultifying the self-fulfilment of others, which does not attempt to contribute to any "search for truth", or which is aimed at destroying democracy rather than enhancing it, militates against the very reason for the protection of free expression. To rely on the right and the ideal of freedom of

expression in such a case amounts to abusing and undermining freedom of expression. Furthermore, all people are obviously not always free to express themselves and to "fight it out" as equals in a "market place of ideas". It is also clear that the history of and socio-political circumstances prevailing in a society have a direct influence on its ability and willingness to tolerate varying degrees of "hate speech". Finally, in spite of the accepted importance of freedom of expression, it is not an absolute right in any society.

2.2.3 What exactly should be prohibited?

Assuming that some forms of "hate speech" do not deserve constitutional protection, the question is: What exactly should a prohibition be aimed at? One possibility is to attempt to prevent **the harmful consequences** of "hate speech", such as a civil war, riots, racial or religious violence, or violence against women. Then the questions are **how real, how likely and how immediate or imminent** the danger must be. Does the emotional and psychological injury caused by the blatant violation of the dignity of individuals or groups qualify as "harm", even though no physical violence is likely to ensue? Another possibility is to target the **intent, the wilfulness**, of the speaker, regardless of whether any consequences would follow or not. The above-mentioned American test is strict, in that it requires (1) the **intent** to incite or produce (2) **imminent lawless action, as well as** (3) the **likelihood** of such imminent action.

2.3 Legal mechanisms to curb "hate speech"

"Hate speech", pornography and other forms of expression could be prohibited or curbed in a number of ways, including (1) criminal sanctions to provide for the indictment, conviction and punishment of speakers or publishers and (2) censorship legislation in terms of which e.g. publications and films could be controlled or banned. The advantages and disadvantages of each of these are debatable, but not relevant for present purposes.

Whichever common law or statutory mechanisms that are used, have to conform with the Constitution, and specifically with the free expression clause in the bill of rights, in order not to be unconstitutional and invalid. An accused in a criminal trial could, e.g., successfully raise as a defence the unconstitutionality of a criminal statute in terms of which he or she is charged. If such legal measures to prohibit or declare punishable by law certain forms of "hate speech" are envisaged, the Constitution will in some form or another have to provide for the limitation of the right to free expression.

The Constitution as such could not directly create a criminal offence. Additional statutory measures are necessary to do so. For example, the fact that the Constitution might, in the equality clause, state that

no person may discriminate against another on grounds of race, does not mean that discrimination, and incitement to discrimination, will automatically be punishable. Appropriate criminal sanctions still have to be put into place and such measures have to conform with the relevant rights and limitations entrenched in the Constitution.

3. THE WORDING OF SECTION 15(2) OF THE DRAFT

Section 15(1) protects freedom of expression. In terms of Section 15(2) this protection does not extend to certain forms of "hate speech".

The wording - and especially the phrases "propaganda for war" and "advocacy of hatred ... that constitutes incitement to discrimination" - correspond to a considerable degree with the above-quoted wording of Article 20 of the International Covenant on Civil and Political Rights.

The formulation seems to be wider than the earlier mentioned American test of *Brandenburg v Ohio*.

4. LIMITATION : GENERAL OR SPECIFIC?

As indicated by the TC 4 Experts in their Explanatory Memoranda Vol 1, the alternative to Section 15(2) is to leave the limitation to the general limitation clause. As to the question whether the general limitation clause (S 35 of the Draft) sufficiently allows for the legal prohibition of "hate speech", or whether a specific limitation in the clause on freedom of expression is necessary or advisable, a brief explanation of the effects of both approaches might be useful.

To some extent the exact implications depend on whether or not a rigid "different stages of enquiry" approach is going to develop in South African jurisprudence, as opposed to an approach in terms of which different tests or stages of enquiry will be applied at the same time in a more holistic manner.

If only a general limitation clause is adopted (and assuming that it will be formulated more or less like Section 35), criminal legislation prohibiting "hate speech", e.g, will firstly be tested against Section 15 (which won't then have 15(2)). If such legislation is found to violate the right to freedom of expression, at least on the face of it, the next question would be whether the legislation complies with Section 35, and specifically whether it embodies a limitation which is **reasonable/justifiable/necessary** (depending on the final formulation of S 35), in an **open democratic society based on freedom and equality**. If the legislation does not meet the standards of Section 35, it is unconstitutional. (It could further be argued that the onus to convince a court is on the party who alleges unconstitutionality, in the first stage, and on the state, in the second.)

If a specific reference to "hate speech" is included in Section 15, it defines

hate speech as described in the section out of the scope of the right (by stating that the protection "does not extend to" "hate speech"). If the same two stage enquiry is applied and the answer to the first question is that the legislation concerned does not only target "hate speech", it again means that freedom of expression is violated, on the face of it. The state can then, on the second question, try to convince the court that the limitation is nevertheless reasonable etc in terms of Section 35. So, both the specific limitation and the general limitation clause will play a role in the enquiry.

However, if the answer to the first question is that what the legislation deals with is in fact "hate speech" as described in Section 15, the right has not been violated and the enquiry does not move on to the second stage.

Therefore, it is argued that the **reasonableness** (etc) and **open democratic society** tests do not enter the enquiry in the case of the last mentioned possibility, but only the specific wording of Section 15(2). This fact would partly be a consequence of any specific limitation and does deserve consideration. However, it also has to be kept in mind that the references to the **values that underlie on open democratic society, international law and foreign law** in the interpretation clause (S 39(1)) would, to the extent that there is room for different nuances of interpretation, necessitate a look at comparative material from other democratic societies anyway, when the actual limits between free speech and "hate speech" are to be decided. Furthermore, if the courts do not rigidly follow a two-stage approach, it could be expected that the standards mentioned in the limitation clause will in some way play a role in the enquiry regarding the scope of Section 15.

Because a specific limitation identifies a particular phenomenon and isolates it from the protection of the clause, whereas a general limitation clause provides for the general limitation of all rights, a specific limitation would - generally - limit a right more than a general limitation clause would as far as the particular phenomenon described in the specific limitation is concerned. This does not necessarily always have to be the case, however. The wording of the specific clause could also be such that its potential to limit the right is less than that of the general clause. If, e.g, the very strict and narrow wording of the above-mentioned American *Brandenburg v Ohio* test is used in the specific limitation of "hate speech", forms of expression falling outside the scope of that wording might still be disqualified from protection as free expression, in terms of the general clause, where references to open democratic societies based on freedom and equality and to international law would draw in, e.g, the standards applied in Germany, Canada and international law. The significance of such a specific limitation would then be more symbolical than practical.

Perhaps it should also be mentioned that the term "limitation" of rights is not necessarily always accurate, although it is generally used.

Finally, it deserves to be mentioned that, whatever the technical legal consequences of the two approaches may be, **the historical, cultural and**

socio-economic situation in a country is also relevant (as indicated above and is clear with reference to e.g. the USA and Germany). If South Africans feel that it should be stated clearly that certain forms of hate speech fall outside the scope of the right to free expression, in other words that **no one has a right to engage in such speech**, the specific mentioning of the exclusion in the free expression clause is justified. The exact wording then obviously deserves close scrutiny. **This is a political decision to be taken by representatives of the people of South Africa.**

5. CONCLUDING REMARK

Perhaps the broader question regarding the use of specific limitation clauses and a general limitation clause with regard to a number of rights in the bill of rights deserves attention and has to be investigated and debated with reference to the chapter as a whole, also for the purpose of consistency and coherence.