



# CONFRONTING RACISM CONSISTENTLY



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## ERNST ROETS

### Confronting racism consistently

#### INTRODUCTION

While it is important to acknowledge that the vast majority of people in South Africa are not racist, it goes without saying that racism remains a problem in South Africa. A recent study by the Institute for Race Relations (IRR) found that only 4,7% of people in South Africa regard “racism/xenophobia/reverse apartheid” as South Africa’s most serious unresolved problem. The IRR also found that about 72% of South Africans do not experience any racism in their daily lives.

On the other hand, AfriForum has certainly noticed an increase in hate speech and racism on social media in recent years, partly due to increased claims about white supremacy and “white monopoly capital.”

There are various definitions for racism and we should acknowledge that universal agreement on how racism should be defined is not a prerequisite for combatting racism. Having said that, however, we can mention that Merriam-Webster provides three possible definitions for the term “racism”, namely:

1. *a belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race*
- 2a. *a doctrine or political program based on the assumption of racism and designed to execute its principles*
- 2b. *a political or social system founded on racism*
3. *racial prejudice or discrimination*

### Racism, inequality and the case for minority rights

It is important to have clarity on certain principles and what the appropriate approach would be with regard to important topics that borders on or even overlaps with the broad topic of racism. One such principle is the issue of minority rights. Although minority rights are globally held in high regard and treated as a topic of great importance, it remains a controversial topic in South Africa. The controversy that surrounds minority rights is largely due to the ANC’s claims that calls for minority rights protection (especially by the Afrikaner minority) is nothing but an attempt to provide political cover for anti-black racism and for the continuation of apartheid.

Furthermore, it is often argued with regard to white minority that white people in South Africa are in general wealthier and, as a result, should not be treated as a vulnerable minority group, but rather as a dominant group.

IHS Global Insight Southern Africa found, for example, that the average annual income for white households in South Africa was R631 361 for 2015, where the average annual income for black African households was R113 197. Furthermore, according to Statistics South Africa, about 7% of white people in South Africa are unemployed (according to the official definition), as opposed to 27,9% of black Africans.

These figures resulted in increased claims that white people in South Africa are “economically dominant” and, as some have argued, that they should be targeted as a result in order to “dismantle white supremacy.”

Although the proponents of this argument may not be aware of it, the claim with regard to economic dominance is based on the definition of minorities, as proposed by Francesco Capotorti, Special Rapporteur of the United Nations’ Sub-Commission on Prevention of Discrimination and Protection of Minorities. While general consensus of how minority communities should be defined has not yet been reached, the definition proposed by Capotorti in 1977 is probably the definition most often quoted. Capotorti defines minorities as follows:

*A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*

The inclusion of the criteria that the group must be in a “non-dominant” position has led to extensive debates by scholars of international law. This was largely due to the fact that the definition was opportunistically interpreted by advocates against minority rights that wealthy minorities do not fit the definition of a minority and consequently do not deserve protection.

Recent developments in international law, which include several publications by the United Nations, have however debunked this interpretation, arguing the contrary: that it is precisely these so-called “wealthy minorities” that are the most vulnerable and whose chances of public persecution are the highest. The element of “non-dominance” should therefore be interpreted with reference to a variety of factors, including social, cultural and political factors. If economic factors were exclusively of importance for this definition (as is frequently argued in South Africa), the implication would be that the majority of communities that have become victims of genocide or ethnic cleansing in the

last century would not have had any claim to protection as minority groups, since the majority of these groups were in fact numerical minorities who did not have political power, but were in financial terms wealthier than the majority in their respective countries. These include the Jews in Germany, the Armenians and Greeks of Anatolia, the Muslims of Serbia and the Tutsi's in Rwanda.

It is precisely for this reason that the United Nations has come out in strong defence of minority communities whose claim to protection have been targeted in this regard. The United Nations Working Group on Minorities explicitly stated in 2002 that recognition as a minority community cannot be dependent on a question of wealth:

*To be clear, minority status and poverty are not co-terminus; in fact, membership in a strong, cohesive minority community may even improve the economic prospects of minorities because of factors such as solidarity, communal ownership of goods and wealth, or the psychological benefits of taking pride in one's ethnic, religious, cultural or linguistic identity. It is also sometimes the case that minority communities are economically dominant (for example, because of specialization in certain fields of employment), while still being denied a range of human rights, in particular access to political power and protection from discrimination.*

Further clarification was provided by the UN Development Programme in 2010:

*For example, numerical minorities in a dominant position might quickly become non-dominant when a regime changes and they find themselves subject to discrimination. Economically-dominant minorities could be simultaneously politically or socially excluded. Therefore, access to power must be assessed in a disaggregated manner to identify non-dominance and vulnerability in different spheres.*

From the above-mentioned it is fair to conclude that the claim has been debunked once and for all that minority communities who are wealthier than the majority should either be targeted or that these communities have no claim to minority rights protection. In fact, if any conclusion can be drawn from this regarding the application of double standards, it can only be that double standards should serve to protect in particular those communities that are numerically inferior and regarded as "economically dominant".

## Double standards

It has become clear, however, that double standards currently exist in South Africa when it comes to the topic of racism. An analysis by the Solidarity Research Institute (SRI) has found that a severe double standard exists, especially with regard to media reporting of racism in South Africa.

When Penny Sparrow, an unknown estate agent from KwaZulu-Natal, posted on Facebook that she would address the black people of South Africa as monkeys, a national media storm followed. More or less at the same time, a government employee in Gauteng, Velaphi Khumalo posted on Facebook that he wanted to cleanse the country of white people and that "we must act as Hitler did to the Jews." There are several differences between these two posts. The first is that Khumalo, as a government employee, has more political power than Sparrow. Secondly, as offensive as Sparrow's comments were, she did not make any call to action. Khumalo on the other hand made a clear call to action: a genocide of white people had to be committed. Thirdly, Sparrow was charged with hate speech and fined R150 000, which she had to pay to the Oliver and Adelaide Tambo Foundation. Khumalo on the other hand was given a warning by his employer (the Gauteng Department of Sport, Culture and Recreation in Gauteng). One of the most significant difference between these two cases, however, was the way in which were treated by the media. At least 4 501 media reports were published in 2016 that referred to Sparrow's racist post, as opposed to only 136 media reports on Khumalo. Further analysis reveals that several of the reports in which Khumalo was mentioned, were actually reports about Sparrow's post in which Khumalo's post was dealt with as a side note.

During August 2017, three incidents happened in or near the suburb of Montana in Pretoria in which the victims and the perpetrators were of different races. In the one case, two suspects violently assaulted Carel Kruger with a brick in the face. In another, Carine van Staden was shot in the chest during a road rage incident. In the third case people were assaulted at a KFC drive-through. The so-called KFC incident was different from the other two in at least three ways. It was the only case in which the perpetrators were white and the victims black. Secondly it was also the case that resulted in the least severe injuries. Thirdly – and most importantly – the case was extensively covered by the media, while the other two cases received very little attention.

A hi-jack drama occurred in Rustenburg in November 2016 during which Marlene Hurford and Grant Short were severely assaulted and were allegedly threatened with the words: "Vandag vrek julle wit bliksems!" (Today, you white buggers will die). After Hurford had blocked her stolen tablet, one of the attackers allegedly called the last number that she had dialed and threatened: "You white bitch, I'm coming for you." The story received very little public attention while it is

reasonable to assume that, had the perpetrator in this case been white and the victim black, it would have been elevated to a matter of national debate. It is clear that violent crimes in which white people are the victims and black people the offenders are not condemned with the same enthusiasm as crimes where black people are the victims and white people the offenders.

In the same week that the hair policy of a Pretoria high school was put in the spotlight and condemned because of a rule that girls may not wear Afro's to school, Luvuyo Menziwa, a member of the Student Representative Council (SRC) of the University of Pretoria, wrote on his Facebook page that he wanted to mow down white people with a bazooka and machine gun. Menziwa was only suspended from the SRC and received very little press coverage, especially in comparison to the Afro story. The manner in which these cases were handled creates the perception that telling school children not to wear Afro's to school has become a national crisis, whereas a black person expressing his desire to kill white people is viewed as being relatively normal and common-place.

During the notorious Knysna fires of 2017, in which seven people burned to death, about a dozen anti-white social media posts went unnoticed in the mainstream media, including comments that "white people are paying for their racist sins," that white people must "feel what it's like to lose their homes and belongings," and that the fires are worth celebrating because "we all know what the majority of the population is there." Only when a white person had made a homophobic Facebook post about the Knysna fires, was it picked up and quickly turned into a national news story.

It is also clear that cases in which perpetrators and victims are of different races and where the perpetrators are white are frequently branded as racist incidents, despite any proof of racism, while a suggestion of racism when the perpetrators are black is usually dismissed with aggression. This is a view that is especially propagated by the political commentator and journalist Eusebius McKaiser. McKaiser argues that it is reasonable to argue in certain circumstances that a person is guilty of racism until that person proves him- or herself innocent. From the context in which the argument is put forth, it is evident that he was referring particularly to white racism.

In this regard, there is a long list of incidents that have been extensively reported by the media and generally accepted by the public as incidents of racism and even categorised as such on news platforms, despite the fact that no proof of racial motives exist. Almost all of these incidents have received such broad coverage (and condemnation) that a mere reference to where it had taken place is sufficient to identify the case in point. These include the Spur incident, the KFC-incident, the Ocean Basket incident, the Coligny incident, the Scott Crossley incident, the Bakkie case and several "black face scandals" on university campuses. People who have been lambasted for their alleged racist

views despite any evidence of racism include Chris Hart and Gareth Cliff.

On the other hand, it is evident that the vast majority of perpetrators who commit farm murders are black, while the majority of victims are white. Any suggestion that these attacks are the result of anti-white racism is usually dismissed summarily as lacking evidence.

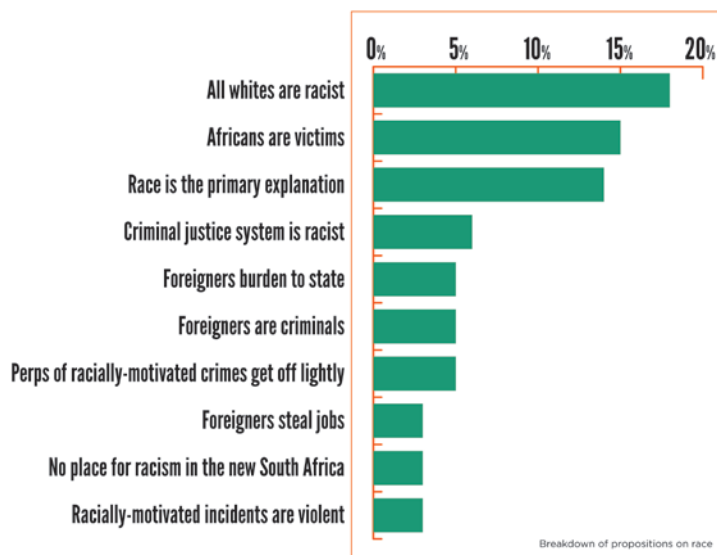
This is a clear example of double standards.

The report *Revealing Race: an analysis of the coverage of race and xenophobia in the South African print media* reveals that there is a predominantly "black victim/white perpetrator" narrative in South African media. It found that:

*Blacks consistently appear in the role of victim both of the crime committed against them and the unjust manner in which the justice system hears their cases. The media tends to represent the justice system as serving the interests of the rich and usually White people who can afford the best legal representation.*

Upon analysis of all the news articles monitored for the purpose of the report, a list of the propositions that were most prevalent on the topic of race was compiled. This list was compiled from a of six of South Africa's largest daily newspapers, six of South Africa's largest weekend papers and one particularly influential weekly paper. All the articles that dealt with race and racial discrimination for the period from February 2006 up to and including May 2006 were monitored. It was found that the proposition that "all whites are racist" was most prevalent, followed by "Africans are victims" and "race is the primary explanation."

**Graph 1: Breakdown of propositions on race**



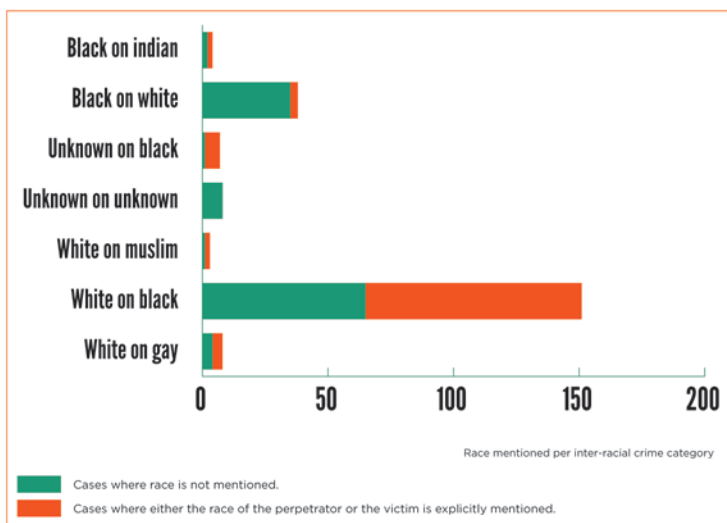


Source: Media Monitoring Project 2006.

This conclusion was reaffirmed by AfriForum's recent investigation. Upon analysis of 185 reports categorised as "racism" by the media, AfriForum found that 79% of these articles dealt with white on black racism. As has been mentioned before, news stories about black on white racism tend not to be covered to the same extent. In 41% of all news articles that dealt with white on black racism, no evidence of racism could be found.

Also, when categorising these articles according to who the victims and perpetrators were, and highlighting the cases in which the race of the perpetrator or the victim was mentioned, it is clear that there is a disproportionate reporting, not only of incidents where the perpetrator was white and the victim black, but also in highlighting the race of either the perpetrator or victim.

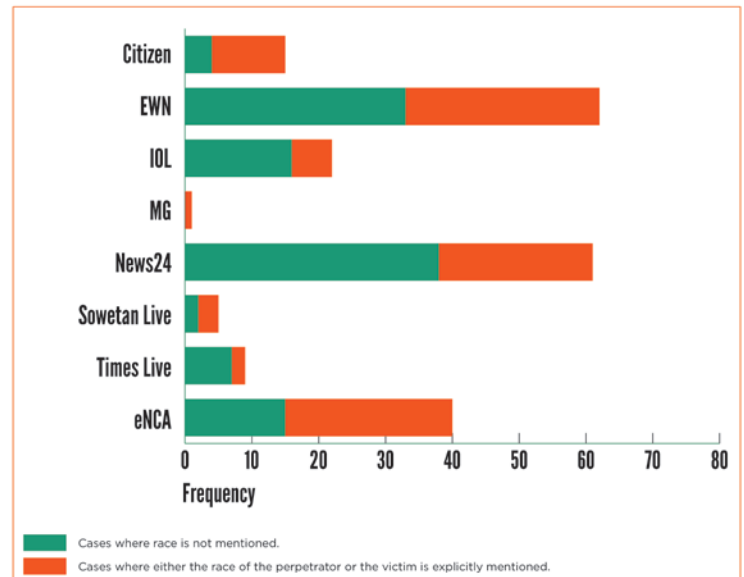
**Graph 2: Race mentioned per inter-racial crime category**



It is fair to conclude that white people are being vilified disproportionately in the media.

When categorising incidents where people of different races were involved, it can be seen that certain publications tend to mention the race of either the victim or the perpetrator more frequently than others. In the graph below, incidents where people of different races were involved is categorised according to a selected list of news publications, where articles in which the racial differences was particularly mentioned are indicated in red.

**Graph 3: Race mentioned per news source**



## Hate speech

The question of hate speech is dealt with in more detail in this report. As an introductory comment, it is important to note that the question of how hate speech should be defined should not be confused with how hate speech is in actual fact defined. There is a strong argument to be made that hate speech should be defined very narrowly, which is an argument that AfriForum supports from a perspective of natural law. From a legal positivistic perspective, however, the reality is that very particular guidelines exist on what constitutes hate speech (acknowledging, however, that there are challenges in reaching consensus on how these legal definitions should be interpreted).

AfriForum's approach to hate speech – and the approach of AfriForum's newly-established unit against racism and hate speech – is firstly to advocate for freedom of speech. That is why AfriForum is opposing the Prevention and Combating of Hate Crimes and Hate Speech Bill (the Hate Speech Bill) and is even prepared to go to court to challenge the severe limitations that this bill places on free speech.

On the other hand, AfriForum will continue to operate within the available legal guidelines in combatting racism and hate speech. If, for example, the Hate Speech Bill comes into law despite the fact that it criminalises the publication of offensive comments based on one's occupation, AfriForum will reserve the right to use this Act to hold accountable those who commit hate speech.

The most important point with regard to hate speech, however, remains the question of consistency. Any suggestion that there should be double standards and that hate speech against minority communities should be tolerated to a larger extent than hate speech against people who form part of the majority, will be opposed with the gravity that is required.

## Confronting racism

Susan Benesch of the World Policy Institute argues that dangerous speech should be confronted not with censorship, but with counterspeech. AfriForum believes that the marketplace of ideas, robust debate and constructive counterspeech provides the most effective way in which to confront racism. This is why AfriForum will actively participate in the battle of ideas and will actively campaign for the protection of free speech. That is also why AfriForum will continue to condemn all forms of racism in public. With regard to counterspeech, it is important to keep in mind that counterspeech is most effective when spoken from within the community from which the racist statement was published in the first place. Put differently, counterspeech against white racism is most effective when spoken from within the white community, while counterspeech against black racism is most effective when spoken by other black people.

In this regard, AfriForum as a minority rights organisation has a special role to play in confronting white racism, however acknowledging that AfriForum does not proclaim to be an advocate for white rights or to represent white people. AfriForum will condemn and confront white and black racism consistently, while acknowledging that AfriForum is in a particular position of influence to combat racism spoken or committed by people who form part of minority communities.

There is a balance that AfriForum will have to strike, however. Considering that AfriForum represents a minority community that is particularly targeted and even vilified, the organisation realises that it does not have the luxury of engaging exclusively in philosophical debates and in the battle of ideas, while its members are being targeted, not only with hate speech, but also with criminal acts that are encouraged based on race and ethnicity. That is why AfriForum will use any means at its disposal to combat racism, which include civil litigation, criminal prosecution and perhaps even private prosecution (in the event where the Prosecuting Authority refuses to prosecute).

## Plan of action

There are several ways in which AfriForum will take its fight against racism and hate speech to a new level. These include:

### 1. Participation in the battle of ideas

AfriForum believes in the marketplace of ideas and in the value of robust dialogue and counterspeech as a way to confront racism and hate speech. In this regard, AfriForum will engage in and encourage robust debate on the topic of racism and hate speech, and will primarily aim to combat racism by taking part in open and frank conversations about the underlying issues regarding racism and hate speech. These underlying factors may include political, economic, social, cultural, historical and other factors.

### 2. Consistent condemnation

AfriForum will consistently condemn racism, regardless of who the victims and who the perpetrators are. Having said this, it is important to mention that AfriForum has always attached more weight to cases of hate speech where the perpetrator is a person of political influence, as opposed to unknown individuals. While AfriForum will consistently condemn racism, regardless of the race of the people who are involved, there will be a difference in approach with regard to the level of influence that the perpetrators have. As a general rule, AfriForum will be hesitant to engage in civil litigation against individuals who do not have political influence, although this possibility is not ruled out completely.

### 3. Data analysis

AfriForum's unit against racism and hate speech will engage in continued data analysis with regard to incidents of racism and hate speech. This will include the frequency of incidents, the level of condemnation, the consequences for the perpetrator, media coverage and a list of other variables. The unit will publish reports on a regular basis.

Members of the public are encouraged to bring any information about racism or hate speech to our attention by emailing [rasklag@afriforum.co.za](mailto:rasklag@afriforum.co.za).



#### **4. Continued research**

AfriForum will engage in continued research into the topic of racism and hate speech. This will include a variety of research methods. The focus in this regard will not be on data analysis, but on qualitative research with the aim of contributing to the battle against racism and hate speech in a meaningful way.

#### **5. Civil litigation**

AfriForum has achieved substantial success in the Equality Court prior to the publication of this report and will continue to engage in civil litigation as a way of combatting racism and hate speech. In this regard, weight will be attached to the level of political influence that the respondent has in society.

#### **6. Criminal charges**

AfriForum has already filed criminal charges against more than a hundred people who have resorted to incitement of various crimes that are based on race. AfriForum will continue to file criminal charges against such individuals and will continue to put pressure on the South African Police Service (SAPS) to follow up on the investigations.

#### **7. Private prosecution**

In the event of a refusal to prosecute, AfriForum will consider engaging in private prosecution of individuals who encourage serious crimes such as murder and rape that are based on the colour of their skin. In the event that SAPS is not prepared to investigate the matter, AfriForum will consider hiring private detectives to track down the perpetrators in order to initiate private prosecution.

#### **8. International awareness**

AfriForum will engage in international awareness campaigns on racism and hate speech in South Africa. While all forms of racism will be dealt with consistently and – regardless of the races of the people involved – AfriForum will through its international campaigns place particular emphasis on the protection of minority rights in South Africa.

## DR. FRANS CRONJE

### Most South Africans respect each other across racial lines and want to work together to build a stable future

Credible opinion surveys indicate that racist incidents which routinely attract social media outrage and headline attention are not symptoms of a widening rift in South African society.

However, the results also suggest that racial scapegoating for ideological ends or to distract attention from policy and other failures may be undermining the country's otherwise sound race relations.

Even so, while bigots earn – and deserve – critical attention, the insulting or narrow-minded thinking revealed in isolated incidents of racism is not true of the bulk of South Africans, most of whom are free of racial animosity and more worried about jobs, improved services and better schools.

This much emerges from research commissioned by the South African Institute of Race Relations (SAIRR) to help South Africans cut through the racial rhetoric and conjecture and identify, through sound data, what fellow citizens truly think on race-related issues.

Drawing on field surveys, it is plain from the data elicited in face-to-face interviews across the country in the language of the respondents' choice that the views of the overwhelming majority of South Africans are very different from the damaging vitriol that often dominates the race debate.

Contrary to what many claim, a 2016 survey shows that some 72% of South Africans (71% of black people, 74% of white people) report no serious problem of racism in their daily lives. More than half (55%) believe race relations have improved since 1994, while only 13% think they have worsened.

Few South Africans regard racism as a serious unresolved problem, with just 3% of respondents identifying it in this way. An overwhelming majority of 84% agree that the different races need each other and that there should be full opportunities for people of all colours. Only 5% among black people, 3% among coloured people and 6% among both Indian and white people disagreed.

Asked, without prompting, to identify the two most serious problems that remain unresolved since 1994, 40% regarded unemployment as the most pressing problem, while 34% identified problems with service delivery (including a lack of water, electricity, roads and street lighting).

In total, 75% (73% of black people and 77% of white people) considered "more jobs and better education" as the best way to improve people's lives.

In contrast, some 6% identified racism, together with inequality and xenophobia, as a serious unresolved problem, with racism on its own being cited by only 3% of all respondents and 2% of black people.

Only 3% thought people's lives could best be improved through "more BEE and affirmative action in employment policies"; and a mere 1% thought this outcome could be achieved via "more land reform".

An overwhelming majority (82%) agreed that merit should be the dominant factor in job appointments, with 80% of black people endorsing this view.

Asked if they would prefer their children to be taught by a teacher of the same race as themselves, 89% said it did not matter to them.

Yet, telling shifts in attitudes in the narrower 2015–2016 time frame – including the decline in the proportion of people reporting no direct experience of racism from 80% to 72% – suggest, as the SAIRR puts it, that "(t)hough the fabric of race relations is still sound, it is now fraying".

Notably, the 2016 survey was conducted against the background of an environment polarised in the wake of the widely publicised Penny Sparrow scandal – triggered by Sparrow's hurtful and insulting comments equating black beachgoers in KwaZulu-Natal to "monkeys".

Such incidents no doubt foster a recriminatory atmosphere, but also underscore the risks of exploiting race to influence public perceptions.

This could be a factor in the variance between 2015 and 2016 on the view that better education and more jobs would in time end racial inequality; 82% (83% of black people) agreed in 2015, but the figure dropped to 71% (72% of black people) a year later. The 10% who were uncertain about this issue in 2015 had risen to 20% a year later.

The SAIRR notes that while the "current malaise" in growth, jobs and education may be undermining confidence in this route out of racial inequality, "there is also a more disturbing possible explanation; a constant stream of racial rhetoric, buttressed by repeated calls for massive redistribution as the best antidote to poverty".

A similar pattern is evident in the comparative responses to whether people agree or disagree that "all this talk about racism and colonialism is by politicians trying to find excuses for their own failures".

In 2015, 62% of all respondents agreed – but, a year later, the percentages had dropped to 49%.

The SAIRR remains concerned about the impact of politicians and other commentators seeking to foment racial divisions for political or ideological gain.

Yet, while there is no room for complacency either about the hurtful rhetoric of the few, or worrying shifts in public perceptions, it is clear that, despite worsening economic conditions, high unemployment, poor education and the very real inequalities that still bedevil South Africa, race relations remain generally sound.

This is a vital foundation for the country to build on.

**Dr Frans Cronje is CEO of and a scenario planner at the SAIRR – a think tank that promotes political and economic freedom.**

## MARK OPPENHEIMER

### Free speech, hate speech, and the South African law

*"Freedom is never more than one generation away from extinction. We didn't pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same."*

– Ronald Reagan<sup>1</sup>

*"We should be aware that hatred is not a natural and spontaneous sentiment—it is usually the outcome of propaganda and incitement to hatred, hostility and violence carried out at several levels, including social, political and media."*

– Navi Pillay, United Nations High Commissioner for Human Rights<sup>2</sup>

The drafters of our Constitution were clear when they excluded hate speech from constitutional protection, but determining where free speech ends and where hate speech begins is an arduous task. This paper is a humble attempt to shed light on the topic. It sets out the parameters of the law, provides contemporary examples of hate speech and ends with a proposal for legislation that would criminalise genuine hate speech without intruding on the right to free speech.

## Freedom of expression

### Section 16 of the Bill of Rights provides that:

1. Everyone has the right to freedom of expression, which includes:
2. Freedom of the press and other media;
3. Freedom to receive and impart information or ideas;
4. Freedom of artistic creativity; and
5. Academic freedom and freedom of scientific research.

Our courts describe freedom of expression as "the lifeblood of an open and democratic society cherished by our Constitution."<sup>3</sup> "It is the freedom upon which all the other freedoms depend; it is the freedom without which the others would not long endure."<sup>4</sup>

The free dissemination of ideas allows for intellectual, artistic, and scientific progress whilst provoking discussion and aiding the search for truth. By stifling beliefs that are different from our own we lose the opportunity to challenge, reconsider and perhaps reaffirm our own views.

Freedom of expression is the cornerstone of a democratic state. It exposes people to differing viewpoints so that they

can make informed decisions about their political and private lives.

When people are exposed to conflicting opinions on a subject they are given the opportunity to exercise their rational faculties, weigh up the arguments on both sides and form their own view on the matter.

The Constitutional Court reminds us that when we have "regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed."<sup>5</sup>

The eminent legal philosopher Ronald Dworkin wrote that "morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true or false in matters of justice and faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one — no official and no majority — has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it."<sup>6</sup>

In her seminal paper on the dangers of suppressing racist speech, Denise Meyerson wrote that "to drive an evil view underground can actually increase its strength; whereas to debate it out in the open is more likely to bring home its abhorrent nature. It is precisely those ... who, after all, believe there is a truth about the awfulness of racism, who should be optimistic about the power of debate and argument to demonstrate that truth. They came to their views by reason, and since they do not believe themselves to be intellectually superior, should trust in reason rather than the police force as the better weapon against falsehood. It is only too easy for censorship laws to be put to different uses from those originally intended and if we are happy for them to be deployed in one way, we make it much easier for them to be deployed in other, more frightening, ways later. And a final consideration here is that, to the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge. Forced, as we are, to weigh up evils here, we should therefore conclude that tolerance is more beneficial than costly."<sup>7</sup>

1. A Time for Choosing, speech delivered on 27 October 1964.

2. United Nations Human Rights Office of the High Commissioner, Xenophobia Factsheet, 2013.

3. Dikoko v Mokhatla 2006 (6) SA 235 (CC), at para 92.

4. Mandela v Faltati 1995 (1) SA 251 (W), at 259.

5. S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening) 2001 (3) SA 409 (CC), at para 37.

6. Ronald Dworkin, Freedom's Law: The Moral Reading of the America Constitution (1996), at 200.

7. D. Meyerson "'No Platform for Racists': What Should the View of Those on the Left Be?" (1990) 6 SAJHR 394 ('No Platform') at 397.

## Hate speech

### S16(2) The constitutional right to free speech in section 16 (1) does not extend to:

1. Propaganda for war;
2. Incitement of imminent violence; or
3. Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The Constitutional Court has held that “section 16(2)(c) is directed at what is commonly referred to as hate speech. What is not protected by the Constitution is expression or speech that amounts to ‘advocacy of hatred’ that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to ‘incitement to cause harm’. There is no doubt that the State has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality.”<sup>8</sup>

“It is indeed true that the appropriate regulation of broadcasting by the government and its organs, in the public interest, serves an important and legitimate purpose in a democratic society . . . This is because of the critical need, for the South African community, to promote and protect human dignity, equality, freedom, the healing of the divisions of the past and the building of a united society. South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear. Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and inequality. Left unregulated, such expression has the potential to perpetuate the negative aspects of our past and further divide our society.”<sup>9</sup>

Canada’s Supreme Court held that “a person’s sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. . . . The derision, hostility and abuse encouraged by hate propaganda therefore have a severe impact on the individual’s sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, amongst other things, respect for the many racial, religious and cultural groups in our society.”<sup>10</sup>

In their highly-regarded commentary the authors of the Constitutional Law of South Africa state that “hate speech can increase social tensions, and the risk of violence, discrimination and other anti-social behaviour both because the hateful message may persuade (or incite) people to hateful views and actions and because the targeted persons may react violently to the speech. Hate speech also undermines the values of pluralism and diversity, by communicating a message that some members of the community are less worthy than others merely by virtue of their membership of a particular group. In the South African context, hate speech thus undermines the pressing goals of overcoming our divisive past and pursuing the tasks of reconciliation and the building of a democratic society. As Neisser says, hate speech may weaken ‘the community-building necessary for democracy to be sustained’.”<sup>11</sup>

## Extreme political groups based on a racist platform

### #FeesMustFall and Black First Land First

The student movement #FeesMustFall was formed in October 2015. They originally called for a freeze on the increase in tertiary tuition fees. Over time their demands shifted to free tertiary education for all students. While this goal has noble features, the methods used by the organisation have been violent and racist.

Between October 2015 and November 2016, campuses across South Africa were closed down for weeks at time. Poor students withstood the worst of the shut downs since they were deprived of access to libraries and computer centres. Minimal access to other educational resources left them particularly vulnerable.

UCT fallist leader Masixole Mlandu stated:

*It must be known that we are prepared to push the boundaries of power, for us there is no turning back beside death. We will usher into this country an attitude of black rage, black liberation, an attitude that threatened the foundation of whiteness. We are clear South Africa by the end of this year will have to confess to its sins.*<sup>12</sup>

Slovo Magida, a UCT student protestor was seen wearing a shirt with the words “Kill All Whites.”<sup>13</sup> After Wits student leader Mcebo Dlamini was arrested for inciting violence on campus, protestors graffitied the words “Fuck the Jews” and “Kill a Jew” onto a university building.<sup>14</sup> Dlamini had previously stated: “What I love about Hitler is his charisma and his capabilities to organise people. We need more leaders of such calibre. I love Adolf Hitler.”<sup>15</sup> The anti-Semitic graffiti may have been linked to this statement.

8. Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC), at para 33.

9. Ibid, at paras 33 and 45.

10. R v Keegstra [1990] 3 SCR 697, (1990) 3 CRR (2d) 227-8.

11. D. Milo, G. Penfold & A. Stein ‘Freedom of Expression’ in S Woolman, T. Roux, J. Klaaren, A. Stein, M. Chaskalson & M. Bishop (eds). *Constitutional Law of South Africa* Chapter 42, at page 75-6.

12. <https://www.facebook.com/masixole.mlandu/posts/979557248839665>.

13. Hotz v UCT 2016 ZASCA 159.

14. <https://www.thedailyvox.co.za/allegations-anti-semitism-wits-graffiti-calling-kill-jew-found-campus/>.

15. <http://witsvuvuzela.com/2015/04/27/src-president-says-i-love-hitler/>.

These anti-Semitic slurs are consistent with the recent tweets from Black First Land First leader Andile Mngxitama:

*For those claiming the legacy of the holocaust is ONLY negative think about the lampshades and Jewish soap....the aroma of the burning flesh from the furnace of the holocaust may wet the appetite of the SA cannibals.<sup>16</sup>*

Nationwide shutdowns of universities were accompanied by buildings being attacked and destroyed. The North West University's Administration and Science buildings were burned.<sup>17</sup> The University of Johannesburg's main auditorium was torched at a loss of R100 Million (\$7,5 Million).<sup>18</sup> Books were burned at libraries at the University of KwaZulu-Natal<sup>19</sup> and the University of the Witwatersrand.<sup>20</sup> Artworks were burned at UCT.<sup>21</sup>

These acts of arson were performed against a backdrop of overtly racist speech from leaders in the fees must fall movement.

Lyndsay Maarsdorp, a fallist and the national spokesperson for Black First Land First stated:

*We can no longer talk of black pain as if it is not affecting black people. Neither can we talk of white privilege as if it is not benefiting white people. Black pain is because of white privilege. Black people are oppressed, because white people remain the oppressor. If we want to destroy white systems then we must too be prepared to destroy the ones those systems benefit. Its utter stupidity to think white people will allow us to destroy the thing that gives them privilege and us pain. We must now practice a degree of madness. Destroy the systems, capitalism, the neocolonial structure, burn the buildings, destroy the enemy!<sup>22</sup>*

*When will we kill them? ... South Africa. A country without a name. Just a location. A reminder to coloniser where the land mass is, which they stole... Fuck White People. ... I have aspirations to kill white people, and this must be achieved!<sup>23</sup>*

Fallist leader Ntokozo Qwabe was filmed assaulting a white law student. In response, he said that he wished he'd "whipped the white apartheid settler colonial entitlement out of the bastard." When asked by the *Sunday Times* whether #FeesMustFall had become anti-white racism, he retorted that "there can never be racism against white people."<sup>24</sup>

The claim is particularly galling, given that whites are an ethnic minority comprising less than 9% of the population.<sup>25</sup> Whites hold very few positions in Government. The President's cabinet comprises 35 ministers and 36 deputy ministers. Only one minister is white<sup>26</sup> and two deputy ministers are white.<sup>29</sup> Every court in South Africa is headed

by a judge President or chief justice. The chief justice of the Constitutional Court is black and there are no white judge presidents on the supreme court of appeal or any of the eight provincial high courts. The only court headed by a white judge president is the specialist competition appeal court.<sup>28</sup>

University of Cape Town (UCT) lecturer Dr Lwazi Lushaba addressed a group of protesting students saying, "we're happy to coexist with white people, but they need to know, primarily these institutions belong to us."<sup>29</sup>

Max Price, the UCT Vice Chancellor stated: "what we have pursued is an appeasement policy in the last year."<sup>30</sup> UCT, protestors were granted clemency and despite their violent and racist behaviour they have been allowed to continue their studies without sanction.<sup>31</sup>

## Grave statements and racist propaganda by elected officials

Member of parliament and leader of the Economic Freedom Fighters (EFF) Julius Malema has used overtly racist speech to mobilise support and garner votes. After being charged with breaching the Riotous Assemblies Act for inciting his followers to invade land he spoke to a rally of supporters outside of court. He stated the following:

*I am here to disturb the white man's peace. They are right, the white man has been too comfortable for too long. We are here unashamedly to disturb the white man's peace. Because we have never known peace. We don't know what peace looks like. They have been living peacefully. They have been swimming in a pool of privilege. They have been enjoying themselves because they always owned our land. We, the rightful owners, our peace was disturbed by white man's arrival here. They committed a black genocide. They killed our people during land dispossession. Today, we are told don't disturb them, even when they disturbed our peace. They found peaceful Africans here. They killed them! They slaughtered them, like animals! We are not calling for the slaughtering of white people, at least for now.*

*We will not chase white people into the sea. We will give them portion... That is where you stay. And you can't own bigger than us. You are a visitor. Visitors must behave. They must know the land belongs to the people of South Africa, the indigenous people of South Africa. [...] For as long as the land is not in the hands of black people we remain a conquered nation! We are conquered! We are defeated! 1994 means NOTHING without the land! Victory will only be victory if the land is restored in the hands of rightful owners. And*

16. <https://www.timeslive.co.za/politics/2017-09-05-sajbd-takes-bl-f-leader-andile-mnxgitama-to-equality-court-over-anti-semitic-remarks/>.

17. <https://mg.co.za/article/2016-02-25-nwu-closes-mafikeng-campus-indefinitely>.

18. <https://www.dailymaverick.co.za/article/2016-05-17-uj-arson-university-gets-interdict-while-no-aggrieved-parties-claim-responsibility/>.

19. <http://www.enca.com/south-africa/fire-breaks-out-at-ukzn-howard-college-law-library>.

20. <http://www.news24.com/SouthAfrica/News/100-books-destroyed-in-wits-library-fire-20161020>.

21. <http://www.iol.co.za/capetimes/news/paintings-set-alight-at-uct-1985428>.

22. <https://twitter.com/LindsayMaasdorp/status/780484461880311809>.

23. <http://www.politicsweb.co.za/documents/raceballs-4>.

24. <http://www.timeslive.co.za/sundaytimes/opinion/2017/01/15/So-Many-Questions-On-FeesMustFall-in-2017>.

25. South African 2011 Census.

26. <https://www.parliament.gov.za/ministers>.

27. <https://www.parliament.gov.za/deputy-ministers>.

28. <http://www.judiciary.org.za/heads-of-superior-courts.html>.

29. <http://www.news24.com/SouthAfrica/News/uct-lecturers-must-refuse-to-teach-student-activist-20161005>.

30. <https://martinplaut.wordpress.com/2017/01/09/university-of-cape-town-the-zombies-have-taken-over-the-institution/>.

31. [https://www.uct.ac.za/usr/downloads/2016-11-07\\_UCT\\_resolution.pdf](https://www.uct.ac.za/usr/downloads/2016-11-07_UCT_resolution.pdf).



*rightful owners unashamedly is black people. No white person is a rightful owner of the land here in South Africa and in the whole of the African continent. This is our continent, it belongs to us.*<sup>32</sup>

EFF spokesperson Mbuyiseni Ndlozi speaking to a crowd outside the Middelburg Magistrate's Court said the following about Malema's speech:

*They say Commander in Chief is inciting violence. Commander in Chief says to them "You slaughtered Black People in order to take this country. We should be slaughtering you! We should also be calling for white genocide. We should be calling for white massacre. We should be arming all of you! That you go and take revenge! But we are not doing that!" Nobody has called for a white massacre. Nobody has called – none of the African leadership – has said to our people "Go and take revenge!" We are not saying that! We are not saying that! You will not find any of our leaders asking for revenge. Yet when we say "Bring back the land!" they say we are inciting violence...*<sup>33</sup>

The editor of *Politicsweb* James Myburgh drew parallels with the words used by the EFF and the tactics used by NAZI propagandist Joseph Goebbels:

*The propaganda of Goebbels' (and others) aggressively accused the Jews of having done what the National Socialists proceeded to do to them. Thus, the expulsion of the Jews from state employment and the professions was justified by propaganda claiming the Jews had unfairly seized the best jobs for themselves; the dispossession of the Jews by propaganda that they had stolen their wealth from honest Germans; the murder of the Jews by propaganda that they were murderers of Germans; the war on the Jews by the claim that the Jews had declared war on Germany; and so on. The language used [by Malema] ("White People," "they," "them") combines all white individuals – the young and old, the long dead and the yet to be born – into a single group. Highly negative attributes (murder, criminality, genocide, viewing black people as "animals" etc.) are then ascribed to each member of this entity. This is done by taking crimes committed or allegedly committed by members of this group – recently or hundreds of years ago – and then attributing guilt to the group as a whole. The suggestion is then made that "White People" deserve to be punished, but because of the great powers of patience and forgiveness of "Black People" they have not (yet) been. However, if "they" continue with their crimes and "racism"*

*against Black People, and refuse to return that which they stole, all bets are off the table.*<sup>34</sup>

## Alleging racism as a diversionary tactic

On 30 March 2017, President Zuma fired Minister of Finance Pravin Gordhan. South Africans of all races and political affiliation took to the streets to demonstrate. Protestors marched outside Parliament, the Union Buildings and in city centres across the nation calling for President Zuma to resign.<sup>35</sup>

President Zuma responded to the marches against him by saying:

*There is a resurgence of racism in our country. It is also clear that racists have become more emboldened. The marches that took place last week demonstrated that racism is real and exists in our country. Many placards and posters displayed beliefs that we thought had been buried in 1994, with some posters depicting black people as baboons. It is clear that some of our white compatriots regard black people as being lesser human beings or sub-human. The racist onslaught has become more direct and is no longer hidden as was the case in the early years of our constitutional democratic order. Racists no longer fear being caught or exposed. In the fight to combat racism, we should look beyond only overt racist utterances and public displays that we saw during the marches last week. We should also look at the ideological and institutional machinations that continue to give racism more traction.*<sup>36</sup>

The President received explicit support from Black First Land First. Members of the organisation attended anti-Zuma marches sang "Zuma My President" and chanted "One Settler One Bullet" while holding placards that read "#HandsOffZuma".<sup>37</sup>

## Media bias

*"Propaganda is the first step to hell. Propaganda is always done by bringing the attention of the people to one side and taking the attention from the other side."*

– Hans Fritzsche, senior official in Goebbels' Propaganda Ministry<sup>38</sup>

Solidarity produced an extensive report outlining selective reporting on racism in South Africa. The report shows that

32. <http://www.politicsweb.co.za/news-and-analysis/we-arent-calling-for-the-slaughtering-of-white-peo>.

33. <http://www.politicsweb.co.za/documents/raceballs-8-special-race-hate-edition>.

34. <http://www.politicsweb.co.za/opinion/malema-goebbels-and-the-art-of-racial-propaganda>.

35. <http://ewn.co.za/2017/04/07/thousands-join-anti-zuma-march-at-union-buildings>.

36. <https://www.dailymaverick.co.za/article/2017-04-10-trainpotter-abuse-inc-zuma-uses-hani-memorial-to-stage-counterattack/>.

37. <https://mg.co.za/article/2017-04-07-zuptamustfall-protest-gets-tense-outside-gupta-mansion-in-saxonwold>.

38. Leon Goldensohn, *The Nuremberg Interviews: Conversations with the Defendants and Witnesses*, at 59.



racist statements made by white people received 1 286 media mentions on average, while racist statements by black people received only 66 mentions on average.<sup>39</sup> This demonstrates that there is an overwhelming tendency in the press to ignore anti-white racism. James Myburgh notes that:

*By contrast, every physical or verbal assault, or insult, or act of racial impertinence, directed by a white person against black people receives huge coverage and sets off wave after wave of condemnation. Demands are then made for the severest of punishments, no matter how disproportionate to the actual offence, and for ever more stringent measures to stamp out the scourge of (anti-black) "racism" once and for all. When media loses its sense of balance and proportion in this way – and becomes fixated on the wrongdoing of individuals from a particular minority – it has turned away from journalism towards racial propaganda.<sup>40</sup>*

On 4 January 2016, a Facebook post from Penny Sparrow, an estate agent in a small coastal town became national news. With the following statement, she racistly compared black beachgoers to monkeys:

*These monkeys that are allowed to be released on New Year's eve and New Year's day on to public beaches towns etc. obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others. I'm sorry to say that I was among the revellers and all I saw were black on black skins what a shame. I do know some wonderful and thoughtful black people. This lot of monkeys just don't want to even try. But think they can voice opinions about statute and get their way oh dear. From now I shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same, pick drop and litter.<sup>41</sup>*

Ms Sparrow was found guilty of hate speech by an equality court and received a large fine. The story received 4 501 media reports and drew significant attention away from President Zuma.<sup>42</sup>

Velaphi Khumalo, a member of the African National Congress (ANC) and government official responded to Sparrow with the following:

*I want to cleans this country of all white people. we must act as Hitler did to the Jews. I don't believe any more that there is a large number of not so racist white people. I'm starting to be sceptical even of those within our Movement the ANC. I will from today unfriend all white people I have as friends from today u must be put under the same*

*blanket as any other racist white because secretly u all are a bunch of racist fuck heads. as we have already seen*  
[all sic].

Khumalo's comment only received 136 media reports and was largely forgotten.<sup>43</sup>

It is commonplace for anti-white statements to be expressed in the press. On 17 March 2017, the publication *Black Opinion* published an article by Xola Skosana stating that:

*Helen Zille [former leader of the Democratic Alliance] can spew all the tripe she likes, she is safe for as long as we have Black liberals who sing, "Not All Whites Are The Same". The script should be one, whites came, whites stole, whites raped, whites killed and whites must pay!<sup>44</sup>*

On 16 January 2017, *Foreign Policy* published a story about the civil rights organisation AfriForum. The following quote from Panashe Chigumadzi was included in the article:

*I believe all white people are structurally racist... I don't believe white South Africans are Africans. They remain settlers as long as they have not returned land to black people. I say white people should leave with what they came on ships with.<sup>45</sup>*

## A history of violence

In May 2008, South Africa was plagued by an outbreak of xenophobic violence. Sixty-two people lost their lives because of escalating hatred, which was left unchecked. A Mozambiquen man named Ernesto Nhamuave made international headlines after he was beaten, stabbed and ultimately burned alive.<sup>47</sup>

The Human Sciences Research Council produced a report on the attacks. The following quote is from a respondent who was interviewed:

*We were against these people from the onset that's when terms like "makwerekwere" (derogatory term for foreigners) came about, we were against them in a light manner but now people are getting angry that is why they beat them up, their numbers are growing and some have babies this side it's as if this is their hometown; this violence happened because people are getting angry, this thing has always been there but it wasn't as strong as it is now. We never said we are happy to live with them but it was a light thing so people resorted to violence because of the realisation that the situation is getting serious.*

39. Dr E. Brink and C. Mulder, *Racism, hate speech and double standards: not a simple black and white matter*, 2017.

40. <http://www.politicsweb.co.za/opinion/malema-goebbels-and-the-art-of-racial-propaganda>.

41. <http://city-press.news24.com/News/penny-sparrow-back-in-court-on-criminal-charges-for-racist-comments-20160912>.

42. Dr E. Brink and C. Mulder, *Racism, hate speech and double standards: not a simple black and white matter*, 2017.

43. Dr E. Brink and C. Mulder, *Racism, hate speech and double standards: not a simple black and white matter*, 2017.

44. <http://blackopinion.co.za/2017/03/17/beware-black-liberals-like-ferial-haffajee/>.

45. <http://foreignpolicy.com/2017/01/16/the-last-white-africans/>.

46. L.B. Landau (ed), *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa*, 2011.

47. <http://www.dailymail.co.uk/news/article-1024858/The-tale-flaming-man-picture-woke-world-South-Africas-xenophobia.html>.

The rhetoric used against white people mirrors much of the hatred that was expressed against foreigners. It is vital that action is taken before the onset of further tragedy.

## Proposed offence of hate speech

Vulnerable groups are entitled to protection from people who incite harm and violence against them by means of hateful language. The following draft legislation would combat genuine hate speech while protecting free speech.

*Any person who unlawfully and intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that –*

1. *incites imminent violence against any person or group of persons for any reason, including reasons based on race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, individual identity, albinism or occupation or trade, in cases where such person or group of persons actually suffers violence, is guilty of the offence of hate speech; or*
2. *advocates hatred towards any other person or group of persons based on race, ethnicity, gender, or religion, and that constitutes incitement to harm, in cases where such person or group of persons actually suffers harm, is guilty of the offence of hate speech.*

*It shall not be an offense to communicate words uttered by a person that has committed the offense of hate speech, if such communication constitutes fair and accurate reporting or commentary on those words, which includes but is not limited to, satire, opinion, or critique.*

*When determining the sentence for any person convicted of an offence referred to, a court may impose one or more of the following penalties by requiring the offender to:*

- a. *make an unconditional apology,*
- b. *perform acts of community service,*
- c. *pay to the victim or an organisation that represents the victimised group-*
  - iv. *an amount not exceeding R100 000 in the case of a first conviction; or*
  - v. *an amount not exceeding R500 000 in the case of any subsequent conviction.*

## Conclusion

This paper recognises the importance of freedom of expression by demonstrating its role in a functioning democracy, the search for truth and the personal development of citizens.

Hate speech is the antithesis of democratic values and must be combatted to protect vulnerable citizens from harm and violence.

**Mark Oppenheimer**

## DR. LLEWELYN CURLEWIS

### RACIAL HATRED IN SA: A legal perspective

The study of crime perpetration has rapidly increased in significance over the past few years. Just as the community itself, criminal elements within the community are also becoming more sophisticated. The reason for crime, as well as the methods that criminals use and the punishment that perpetrators receive, have become much more complex. The multidisciplinary approach that is now generally accepted as necessary in the study of criminology is a very important development. Many ideas that were previously held in terms of crime and crime prevention now seem to be myths which are now not only irrelevant, but which can also hamper the growth of policy directions that are aimed at the sensible protection and development of a healthy society.

The remarks included here are obviously very cryptic and due to the restriction on the length of the article I want to unequivocally state that one can most probably write volumes on the variety of aspects touched upon herein to afford proper justification to its importance. Nevertheless, I will limit this essay to mainly two aspects, namely a broad, general background on possible approaches to crime prevention in cases of racial hatred or racism in South Africa, and obviously appropriate remedies in these cases.

## Introduction

Can racism be combatted? If so, which remedies are available? For the purpose of answering these questions, the author accepts that the reader is familiar with the extremely complex, alternatively comprehensive definitions which are often attributed to concepts such as "racism", "racial hatred" and so forth. Even the concept "remedy" often means different things to different people. I limit myself in this regard to the generally-accepted meaning of these concepts as reflected in the description thereof by my colleagues who will address the conference in detail in this regard.

Racism per se has not yet been classified as a crime, but it can lead to criminal actions such as incitement to murder, vandalism, assault, *crimen injuria*, criminal defamation and other crimes. On the other hand, racist behaviour can lead to delictual accountability or a violation of the Equality Law and possibly other laws. There are therefore criminal as well as civil options. Then there are the Chapter 9 institutions that can possibly play a role.

### PERHAPS FIRSTLY A VERY BRIEF BREAKDOWN OF THE LAW AS BACKGROUND

The law is traditionally divided into two main categories, namely public and private law. In principle, the former mainly entails the relationship between the state and its subjects

and between states, while the latter regulates relations between individuals. Each of these spheres are in turn further subdivide. Private law are for example subdivided into company law, law of succession and so forth. In the case of public law, for example constitutional law, administrative law and criminal law.

The law is sometimes subdivided in a different way, however, by distinguishing between substantive and formal law. The former regulates the rules around the state's or a subject's rights and responsibilities, while the latter embodies the procedural aspects according to which substantive or material law is enforced. This means that public law as well as private law form part of the substantive law, while formal or process law can once again be subdivided into law of criminal procedure, law of civil procedure and law of evidence. The law of criminal procedure regulates the procedures to be followed when alleged criminals are brought before the court to be judged on alleged crimes as embodied in criminal law.

Although there are many similarities between crimes and delicts, there are also fundamental differences. Both can be described as unlawful, blameworthy acts or omissions. Broadly-speaking, a delict is an unlawful, blameworthy act or omission that causes damage to another for which the aggrieved party can claim damages. The aggrieved may, should s/he choose to, institute action against the perpetrator for damages suffered. A crime, on the other hand, is an unlawful, blameworthy action punishable by the state. One and the same actions may sometimes constitute a crime as well as a delict. If X assaults Y, Y may claim damages from X on the grounds of a delict. Y can also lay charges at the Police, which can further lead to the conviction of and judgement against X for the crime of assault.

Not all delicts are at the same time crimes, for example the negligent cause of damages and seduction. The opposite is also true, namely that many crimes such as high treason, perjury, bigamy and so forth do not constitute delicts. A crime is detrimental to public interest (the interest of the state or the community), while a delict only harms an individual's interests.

### Snyman (2008:4) sums it up as follows

*It is not for the person who has suffered harm or injury as a result of the commission of a crime to decide whether the offender should be criminally charged or not. The police may decide to proceed with a criminal charge even if the complainant begs them not to do so. In the case of a delict, on the other hand, it is up to the person who has suffered damage to decide whether to sue the wrongdoer*

for damages or not.

*Perhaps the most important difference between a crime and a delict lies in the nature of the sanctions which follow on their commission. Where a delict has been committed the guilty party is ordered to pay compensation to the complainant, the purpose of which is to put the complainant in the same position he would have been in had the delict not been committed. Where someone is convicted of a crime, on the other hand, a punishment is imposed on him, with a view to retribution, the prevention of crime, deterrence or the rehabilitation of the offender. Generally speaking, a convicted person will suffer some form of pain or misfortune such as imprisonment or a fine. Furthermore, it is as a rule the state which prosecutes in a criminal case. Although provision is made in the Criminal Procedure Act for private prosecutions, these are extremely rare in South Africa; the right to prosecute privately is really nothing more than a "safety valve" left open to the aggrieved individual where the state refuses to prosecute.*

*If a person is charged in a court with having committed a crime, the trial is governed by the rules of criminal procedure. But if someone claims damages on the ground of delict, the trial is governed by the rules of civil procedure.*

*Prima facie*, the very first starting point is obviously to involve the SAPS, but very often it seems as if the Police or the Prosecuting Authority are slow to prosecute in these circumstances for various reasons. A possible private prosecution is then the appropriate solution from the perspective of criminal law and law of criminal procedure, PROVIDED THAT all the prerequisites embodied in Articles 7–17 of the Criminal Procedure Act, 1977 (Act No 51 of 1977) are adhered to. In the past, I have raised my opinion on various occasions and media platforms and will not repeat myself here, on the one hand because it is sometimes very technical while, on the other hand, it would make this essay very bulky. Also, the author presupposes once again that the reader/audience is familiar with the definitions, elements, authority and so forth of these potential crimes that I referred to above, as each of these can and should be the theme of a conference, lecture or essay in its own right in order to understand the complete implication of each.

From a civil rights perspective, compensation in hard cash is obviously available to any disadvantaged person or entity. Once again there exists a myriad of pitfalls as is evident from a proper study of the rules, legislation, authority and practice embodied in the civil procedure law of South Africa. Each of the disciplines that I have already referred to is complicated, extensive and distinctive. Legal experts spend years training

to become acquainted with the law in this regard (as well as the great number of exceptions that apply to general rules).

It is against this background that I want to make a few comments. The content is aimed at the layman reader and does not pretend to offer a comprehensive overview of the complete and extensive interdisciplinary field and question. My limited aim contained herein speaks for itself, therefore.

## When it has been established that racism lead to crime in one or other way

Allow me to make extensive use of Naude & Stevens's textbook on criminology to practically illustrate the above remarks. I give them complete recognition.

Crime is one of the most complicated problems that society has to cope with and there is no country or community that does not have a crime problem. Notwithstanding the fact that crime is a universal problem, the types of actions that are defined as crimes are determined by law and criminal behaviour therefore differs greatly between countries and between times. Crime can be defined briefly and simply as an act or neglect that is prohibited by law or common law and is punishable by the legal authority.

According to the legal definition of crime, a criminal is a person who was arrested, prosecuted and found guilty. This results in many criminals who have committed crimes not being typified as criminals. Such a narrow approach means that only a highly selected group of perpetrators become the subject of criminological studies, with very detrimental consequences regarding the description, explanation, prediction and prevention of crime.

In the case of youths, legislation in most countries make provision for interventions before criminal law and criminal procedure law can properly intervene. South Africa is no exception, and most youths, through methods of diversion, escape the punitive nature and penalisation for which criminal law makes provision. Where youths therefore commit racism and the latter leads to a crime, chances are small for the victim(s) to rely on criminal law to see retribution. Once again, it is not fitting to criticise or justify the pros and cons of current South African legislation underlying justice in terms of youths in this essay as a result of the extensive nature thereof.

It is accepted that negative behavioural patterns such as uncontrollability and non-attendance at school are signs of maladjustment as a result of individual, political and social problems that can give rise to criminal behaviour. The point of departure here is that the timeous treatment may possibly prevent criminal behaviour. It is also a fact that most crimes are never reported, as is evident from a comprehensive crime survey as long ago as 1981 (Heal &

Laycock 1985:379). The survey showed that very few crimes were officially reported.

South Africa is no exception in this regard; ample research should confirm this, provided that it incorporates trustworthy research. In my humble opinion, the current South African public is sceptical to report crime, especially incited by racism, as a result of a legion of reasons, among which the lack of understanding and support from the authorities (who should be the primary protector), reactive retribution, political targeting and so forth. This obviously goes hand in hand with valuable time and wasted money, leading to the inevitable question: Is it worth all the trouble?

It was found in the 1980s that only about 48,7 crimes were reported to the Police (Strijdom & Boshoff 1980:5). This tendency is also evident in different population groups, with a few variations. I am convinced that trustworthy statistics would have indicated that the same statistics would have been alarmingly worse in 2017 – without even mentioning the eventual successful prosecution statistics if such crimes were to serve in court. In fact, I challenge any institution to prove the opposite.

It is clear that officially processed criminals may give a skewed image or view of criminals, for example the stereotypical perception that most criminals come from socially disorganised environments, have low educational or occupational qualifications and a variety of personal and psychological problems (Partridge 1984:3). Modern criminologists therefore have many reservations in this regard and are not inclined to only make official crime statistics or criminals the subjects of scientific studies where the declaration or prevention is concerned. Different data collection techniques are therefore employed in investigations into criminal phenomena.

Examples include

- Official crime statistics in terms of transgressions reported to the Police, the number of prosecutions implemented and the judgements passed;
- Victim studies in terms of information obtained from crime victims; and
- Self-reporting studies in terms of information obtained from the transgressors themselves.

Prevention or management of crime remains the first price, as a crime, once committed, harms the quality of life of most individuals and communities. Crime causes extreme disruption and damage in that it often includes loss of life, as well as major financial losses for individuals and institutions. It costs the state (and therefore the tax-payer) millions of rand annually to combat crime. I once again challenge the Ministers of Justice and Constitutional Development and Correctional Services (and other role-players) to reveal the true annual costs relating to the finding, trial, punishment and treatment of criminals in South Africa. In other words,

this amount will only include those criminals who are indeed charged and do not escape the criminal procedural administration of justice in one or another alternative way. Possibly, the costs of racism-related criminals will then also be calculable.

Victims of especially crime with racist undertones are further exposed to enormous trauma after such a criminal experience. Most victims suffer from tremendous shock, rage, anxiety, uncertainty, fear, outrage and relevant emotional problems that the justice system cannot (even with all its remedies) compensate for. The prevention of racism-related crimes is therefore an important priority of an orderly society.

Strategies to prevent crime are very seldom planned in isolation, and it is generally based on specific theories or approaches as regards the causes of and explanations for a crime. A theory can be defined in short as a system of postulates or viewpoints that attempt to explain a phenomenon, in this case crime, or to explain the association or interaction between phenomena such as crime and social factors (Cromwell et al. 1978:1).

According to Shoemaker (1984:6) the following criteria are important to determine the relation between two factors

- There must be an association or relation between contributing or causal factors and crime;
- The relation must be such that the causal factor, for example poor discipline, always presents before the result (crime); and
- The original relation between crime and the causal factors should not disappear if the influence of another or third factor is considered.

It goes without saying that a great number of complex factors can influence individuals' behaviour, including those which incite crime, and that these factors are very difficult to manage. No single theory can explain crime properly.

Most crime prevention strategies are generally based on theories or explanations of factors that may possibly contribute to criminal behaviour. The terms "contributing or risk factors" are more appropriate than a causal connection.

Various schools of thought or directions have been identified throughout the centuries to establish specific approaches or points of departure regarding the causes of crime, for example the classical and neoclassical approaches, to name a few.

The current point of departure is that a very close relationship exists between the biophysical, psychological and social factors that can influence behaviour. Most criminologists support this multifactorial approach regarding the causes, treatment and prevention of crime. Examples of biophysical factors include intelligence, heredity and so forth.

As a result of the close interaction between these three factors it isn't always sensible or possible to make an



absolute distinction between them. Although a human being is born with specific biological features in a determined socio-cultural and group context on the grounds of which certain universal behavioural forms can be observed and investigated, one should never lose sight of the fact that humans are psychological beings who may react to these biosocial factors in different ways.

## The concept of crime (racism) prevention

Crime prevention is a comprehensive and somewhat vague concept over which there seems not always to be unanimity. Edelman and Rowe (1983:391) are of the opinion that a broad description of crime prevention, such that it entails any activity that hampers one or more criminal activity, is too extensive to be of any value. According to them, there should be a distinction between crime prevention and crime control. Crime prevention entails taking steps before a criminal actions is committed, whereas crime control entails taken steps after a criminal action has been committed. Trojanowicz (1978:214) cites Lejins who also points to the divergent definitions of crime prevention that complicate meaningful discussion of the problem.

A typological description/classification of crime prevention that functions on different levels is more applicable, however. Once again, many different typological classifications exist and I therefore quote from Prof. Naude's meaningful analysis and summary (1998:1–29) (translated):

1. *Faust (Edelman & Rowe 1983:392) describes the phases of crime prevention as follows:*
  - *Primary crime prevention, which identifies conditions in the physical and social environment that create opportunities for criminal activities. In this case, intervention aims to change circumstances to such an extent that crime is not committed;*
  - *Secondary crime prevention, which identifies potential perpetrators timeously to prevent future criminal behaviour; and*
  - *Tertiary crime prevention, which concentrates on real perpetrators with the aim of preventing further criminal behaviour.*
2. *(ii) Lejins (Rykers 1973:67 onwards) makes the following division of crime prevention strategies. This model has also been accepted by the National Crime Prevention Institute in the USA:*
  - *Punitive prevention, which relates to the fear of punishment that keeps a person from committing a crime;*

- *Corrective prevention, which refers to treatment applied after an individual has been identified as a perpetrator or potential perpetrator;*
- *Mechanical prevention, which aims to change the physical environment to prevent the committing of a crime.*

3. *The following division of a work group of the British Home Office given by Bennett and Wright (1984:19):*

- *Reduction in the opportunities for committing a crime;*
- *Social prevention which is aimed at the improvement of the social environment; and*
- *Judicial prevention relating to legal sanctions and punishment as method to curb crime.*

*It is interesting to note that biological and psychological factors are not mentioned at all.*

4. *A very comprehensive crime prevention model is that of Edelman and Rowe (1983:395 onwards). They divide crime prevention activities into five levels:*

- **LEVEL 0**  
*The general improvement of physical and social circumstances. These entail indirect crime prevention activities such as effective prenatal care, spiritual wellbeing, day-care for children, sufficient housing and recreational facilities. No distinction is made between potential and true perpetrators, and the prevention of crime is not the main object, but only social improvement. This level is also known as pre-criminal prevention.*
- **LEVEL 1**  
*This entails the prevention of crime by eliminating criminogenic factors in the physical and social environment, as well through the creation of awareness of laws and crime. Social responsibility and law-abiding attitudes and behavioural patterns, as well as the reduction of victimisation are encouraged. Potential perpetrators and victims are not identified at this level, while programmes at this level focus on knowledge of the law and general protection.*
- **LEVEL 2**  
*This relates to the identification of high-risk factors which may promote crime, as well as individuals and groups who are at risk of succumbing to crime or become victims of crime. The focus is on intervention strategies for potential perpetrators,*



such as youth and family counselling and guidance, as well as prevention strategies to protect potential victims. The aim is to change the attitudes and behavioural patterns of potential perpetrators and victims.

- **LEVEL 3**

Identification of first and minor perpetrators, as well as victims and the place or environment where the crime was committed. The aim is to prevent the perpetrator from further contact with the criminal justice system and to support the victim. A distinction between crime prevention and crime control can also be made here.

A crime has been committed although no charge was laid, or the charge was dropped and the alleged perpetrator have agreed to one or other diversion measurement. Programmes in this regard encompass street work, diversion programmes, counselling and guidance. Programmes focused on the victim concentrate on restitution (compensation), victim service delivery and victim-perpetrator reconciliation. Environmental programmes focus on observation and reporting, while victim programmes are aimed at better safety measurements.

- **LEVEL 4**

The focus here is on crime control and the prevention of recidivism after intervention by the criminal justice system and sentencing. Programmes focusing on the perpetrator are aimed at rehabilitation, while victim programmes entail restitution, compensation for injury and psychological counselling.

*This crime prevention programme is currently applied by British Columbia in Surrey, Richmond and Coquitlam (Edelman & Rowe 1983:397).*

*Whichever crime prevention description is accepted, it is nonetheless clear that crime prevention entails a wide range of activities aimed at perpetrators as well victims, as well as the social and physical environment. This can take effect before or after the crime is committed. Various disciplines are further involved in crime prevention activities.*

## Crime prevention models or strategies

Crime prevention can basically be divided into:

- Programmes that are aimed at the perpetrator as

an individual (also known as individually-directed or individualistic approaches). Treatment and prevention centre around biological, psychological and social factors, as well as legal sanctions and punishment as restraining measures; and

- Programmes that are aimed at the crime situation. The aim here is to limit or prevent the opportunity for committing crime in the physical environment (also known as physical or environmental crime prevention).

Crime prevention models or strategies refer to specific or intentional methods of planning and action to prevent or control crime.

Various factors determine if individuals and institutions will get involved in crime prevention activities, namely:

- Fear of crime that creates feelings of helplessness. In this case, control can be gained by becoming actively involved in crime prevention;
- The crime risk, which is influenced by factors such as home, workplace, activities and lifestyle. Property and people in a high-crime area are at a greater risk of becoming the target of criminals;
- Cost-effectiveness, which relates to the costs of security measures. These should not be disproportionate to the true benefits that it provides;
- Lifestyle and aesthetics – security measures should fit in with the lifestyle and activities of the people concerned. It should not encroach too much on normal activities and privacy and should be aesthetically pleasing.

## Legal sanctions and punishment as crime prevention model

It has been greatly emphasised since the onset of the classical school that legal sanctions and the fear of punishment are important methods to keep individuals and the community from committing crimes. Determent is described by Ball (in Gibbs 1975:29) as the preventative effect that the real punishment or punishment threat of perpetrators have on potential perpetrators. The general point of departure is that the majority of individuals will direct their behaviour after thorough and rational consideration (free, conscious decision) of the cost (risk) and benefits (reward) which it may bring about. The withholding approach therefore suggests that behaviour is determined by its consequences (Conklin 1981:392). The surety and severity of the punishment will then deter potential perpetrators and prevent crime.

Different elements of determent can be identified. Reid (1982:483 onwards) as well as Bartol and Bartol (1986:285)

refer to individual and general determent.

- Individual or specific determent:  
This relates to a specific individual who is being punished for his transgression, which then results in that person withholding himself from further transgressions.
- General determent:  
The punishment of a specific individual deters other members of the community who witness the punishment from criminal behaviour.

True punishment and the fear of punishment can therefore deter individuals from committing crimes. There are many different opinions on the deterrent value of legal sanctions and punishment as a method of deterring individuals from committing crimes.

Bartol and Bartol (1986:286) argue that the fear of punishment do in fact have a general deterrent value as it keeps some individuals from legal transgressions.

Punishment is viewed by many psychologists as a very ineffective way to control behaviour or to socialise people (Bartol & Bartol 1986:287). Wilson and Herrnstein (1985:494) refer to punishment as a form of moral learning by way of classical conditioning. It is through punishment that the individual is taught to avoid certain behavioural patterns (crime). The unacceptable (criminal) behaviour is therefore controlled by the fear of punishment. Crime is not only controlled by the objective risk for punishment, however, but especially by the subjective acceptance by a person that a specific behavioural pattern is unacceptable. The moral acceptance or internalisation of a specific action as acceptable or unacceptable would much rather result in the person withholding himself from criminal behaviour than punishment sanctions on its own would. As soon as a person accepts the morally correctness of a specific behavioural pattern internally (internalisation), he will comply with these behavioural prescriptions without any external control measures (punishment) being necessary. Many vehicle drivers stop at red traffic lights in the evening, even in the absence of other traffic or law enforcement officers.

Conklin (1981:395) also doubts the deterring value of legal sanctions and punishment as he is of the opinion that people do not always act logically and rationally and are often not aware of the legal sanctions or punishment for a specific transgression. The deterring or fear value is also influenced by among other the personality composition, attitude towards life and social status, as well as by the type of crime. The deterring effect of punishment is seemingly very complicated and can be influenced by various factors.

Fear of punishment can only deter the individual from committing a crime if he has knowledge of the functions of the criminal legal system as well as which punishments are applied (Conklin 1981:395).

Individuals who can postpone need satisfaction are

seemingly easier deterred from committing a crime, compared to those who desire the immediate satisfaction of their needs. People who like risks are far less likely to be deterred from crime as a result of fear for punishment. The personality development phase also seems to have an influence on determent. Individuals with a low level of intellectual development and teenagers are not always able to relate the consequences of their deeds to punishment. Van den Haag (in Reid 1982:489) also says that people with low social status and few material possessions are also not deterred from crime as a result of punishment sanctions, as they have nothing to lose in any case.

It seems as if certain forms of criminal behaviour are not easily prevented through legal sanctions or punishment. In this regard, Bartol and Bartol (1986:287) indicate that violent crimes, especially murder, are committed under highly emotional circumstances without considering the long-term consequences of the deed at all.

Legal sanctions and punishment will also not deter professional criminals and drug abusers from committing crimes, according to Chambliss (Conklin 1981:397).

It is also important that laws and the criminal justice system are considered to be fair – if not, the community will not respect and maintain it.

In this regard, Bartol and Bartol (1986:288) point out that the effectiveness of the punishment also rests on factors such as when, how often, how and why. If a person feels that the punishment is permissible and fair, it would most probably change his behaviour differently than would be the case if he feels that the punishment is unfair. An alternative, acceptable behavioural response should also be available before the person will change his initial behavioural form. A professional criminal who focuses on a criminal career for an income will, despite heavy forms of punishment, not readily accept an alternative, legal method of earning an income if it materially means less money. This is one of the reasons why occupational training is offered to criminals in jail with poor or little training.

The ferocity and surety of punishment is another important determinant for effective crime determent, according to Reid (1982:488). The conditioning theory suggests that punishment should be consistent and follow the unacceptable behaviour as soon as possible (Bartol & Bartol 1986:289). If punishment is irregularly and inconsistently applied, no connection is formed between the deed (crime) and its consequences (punishment). It is a fact, however, that punishment for illegal behaviour is not applied in this manner; on the contrary, it is applied arbitrary and irregularly, while in most cases punishment follows the crime long after it was committed. It is not uncommon for punishment of a criminal offence to be carried out months or even years afterwards. This is caused by congested court rolls and the time that it takes to investigate and prepare the case for prosecution. Moreover, many criminals are never found or punished.

Questions that should be asked include: What is the number or percentage of serious crimes with racist undertones that were reported to the Police? How many of these have led to arrest? How many of those who had been arrested were eventually sentenced? And if so, what sentences were imposed?

I question the deterring effect of punishment as it is currently applied by our justice system. Fair criticism can be brought against more or less every sphere of the current justice system. To improve this will require a drastic investigation into the effectiveness of the system in its entirety.

Crime is a complex phenomenon that results from multiple causes, and a multifaceted approach should therefore be followed in managing and preventing it. A variety of disciplines as well as the community itself have a role to play in this regard.

The South African criminal justice system is currently experiencing a crisis and can even be described as dysfunctional. Crime statistics have increased since the 1990's like never before in the country's history. Isn't it shameful that neither the Constitution with its Human Rights Manifest as part of our new regime, nor the abolition of, for example, the death penalty could succeed in curbing the escalation of crime and/or security to ensure citizens' safety?

When the current rules regarding sentencing are evaluated, diverse and various theories apply on which I do not want to unnecessarily elaborate here. The importance that a specific country attaches to each of these theories at a specific time naturally depends on the particular circumstances in that country at a specific time. The most important rules applied by our courts date from as far back as before the 1980's. Maybe the time is ripe for a re-evaluation of these rules in light of the unacceptably high current statistics.

In the words of Prof. C.R. Snyman (2008:20–21):

*The triad of considerations mentioned in Zinn, namely the crime, the criminal and the interests of society, is in any event outdated and incomplete since it makes no provision for a consideration of the particular interests of the victim of the crime.*

*It is submitted that, in the light of the particular circumstances in South Africa, retribution (just desert) ought to have a higher priority than was until recently the case. Considerations pertaining to the individual interests and circumstances of the accused ought to receive less weight than in previous times. It is time that the combatting of crime and the protection of society receive the highest priority. More emphasis ought to be placed on retribution in order to express society's justified condemnation of crime.*

*The legislature has already taken a significant step towards the implementation of sentences to protect society when it enacted section 51 of the Criminal Law Amendment Act 105 of 1997. This section provides for certain minimum periods of imprisonment, including even mandatory life imprisonment in certain cases, unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence. The introduction of mandatory minimum sentences by the legislature should be welcomed. Although it fetters judicial discretion relating to the measure of punishment, it is a necessary step in the light of the crisis in which the administration of criminal justice finds itself in this country.*

The learned author later remarks as follows:

*Although considerations relating to the rehabilitation of the individual offender should not be discarded completely, the reformatory theory must necessarily have a lower priority in this country. Reformation of offenders is costly. South Africa does not have the financial means to realise the reformatory ideals. There is not even enough money to build enough prisons to house the full prison population of the country. In 2004 the prison population was 187 640 and the available accommodation 114 787, which represented an overcrowding of 63%. If the state cannot meet even the most basic of its prisoners' needs, namely ensuring that there is no overcrowding, then where is the money to come from to finance the additional expensive rehabilitation programmes?*

*Apart from this, experience in countries with far more financial resources, such as the USA and Britain, has shown that the emphasis placed on rehabilitation has not produced the desired results. In both these countries the emphasis has shifted from rehabilitation back to retribution. This has meant that the relatively wide discretion relating to the measure of punishment which judicial officers enjoyed previously was replaced by more determinate sentencing policies.*

I cannot but wholeheartedly agree with this learned author.

**Dr L.G. Curlewis**  
**September 2017**

A full list of sources is available on request from the author.



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