

# How criminalizing hate speech in South Africa could unjustifiably censor religious views

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## Abstract

South Africa's Hate Speech Act includes broad definitions of "inciting harm" and "promoting or propagating hatred" and introduces significant ambiguity and subjectivity of statutory interpretation. Worryingly, the law comes in the wake of a trend of so-called hate speech laws across the world, including in national contexts and at the level of the United Nations, which have been intimately linked to the criminalization of speech relating to religious beliefs. The international legal framework for freedom of expression and opinion, and for freedom of religion or belief, provides a suitable basis by which to amend the law.

## Keywords

South Africa, hate speech, blasphemy, religious expression.

## 1. Introduction

On 6 May 2024, South African President Cyril Ramaphosa signed the Prevention and Combating of Hate Crimes and Hate Speech Act into law. The preamble states that the law aims to give effect to the country's constitutional and international obligations concerning racism, racial discrimination, xenophobia, and related intolerance and to criminalize hate crimes and hate speech. The rationale is to strengthen the country's laws governing racism in post-apartheid society, in addition to providing a more robust legal framework to tackle hateful speech and expressions.

The legislation was introduced in the wake of a spate of so-called hate speech laws across the world, which have been used in numerous countries to severely restrict a person's fundamental right not only to freedom of expression and opinion but also to freedom of religion or belief (FORB).

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This article does not focus on the historical underpinnings of the racial discrimination or speech laws that preceded the Hate Speech Act, or on the law's domestic compatibility with constitutional or case law.<sup>2</sup> Instead, it explores why the broad foundations of the legislation fail to align adequately with international legal standards and how the restrictions on expression could impact religiously motivated speech, mirroring some elements common to blasphemy laws in other countries, such as in Africa and Europe. To do this, section 2 considers the meaning of hate speech under the Act and makes comparisons to the threats to religious speech and expression contained in similarly construed global blasphemy laws. Section 3 outlines how the South African law is incompatible with the international and regional legal protections for freedom of speech. Section 4 discusses how the South African legislation might be amended to better safeguard freedom of speech.

Hate speech legislation not only threatens the speech rights and freedoms of religious minorities, but such laws are increasingly being used against members of religious majorities as well. The law must be restricted in scope to ensure that speech is criminalized only in the most extreme situations. Peaceful expressions of opinion that merely offend should not be considered worthy of criminal prosecution.

## 2. The Hate Speech Act

This section explains why the Hate Speech Act is overly expansive and vague and could restrict otherwise lawful speech. Considering that approximately 80 percent of people in South Africa identify as Christian and 5 percent follow other faiths (Statistics South Africa 2022), it is striking that religious or moral opinions could be unjustifiably restricted, censored, or criminalized under the law. The Department of Justice and Constitutional Development has announced that it intends to work towards ensuring greater international compliance with treaties and obligations (South African Government 2025); accordingly, legislators in South Africa should take note that similar laws from around the world often fall short of complying with the strict requirements of international human rights law.<sup>3</sup> The section then compares these laws with blasphemy laws.

2 See e.g. Winks (2023); Geldenhuys and Kelly-Louw (2020).

3 Section 233 of the South African Constitution provides, "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." Also notably, the Supreme Court of Appeals has turned to international jurisprudence when considering hate speech laws prior to the enactment of the Hate Speech Act. In *Qwelane v South Africa Human Rights Commission and Another* 2021:para. 78, the jurisprudence of the European Court of Human Rights, in *Vejdeland v Sweden*, no 1813/07, ECHR, 2012 and *Handyside v the United Kingdom*, no. 5493/72, ECHR, 1976, were referred to when the court reasoned, "Hate speech is the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy."

### 2.1. *The Hate Speech Act is overly broad and vague*

Under the legislation, the offence of hate speech is defined as expressions, communications, or private communications that “could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm, and promote or propagate hatred against a person based upon any defined grounds.” The speech can be via electronic communications to any member of the public or a specific person, and the Act requires intention or a reasonable construal of intention to commit the crime [section 4(1)]. The grounds include race, religion, sexual orientation, gender identity or expression, or sex characteristics. Criminal punishments range from a fine to a five-year term of imprisonment, or both [section 6(3)].

The wording of this offence is concerning in several ways. First, it lacks objective and clear definitions of key terms. Hate is not explicitly defined, and harm is defined broadly, spanning “substantial emotional, psychological, physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups.” These concepts are ambiguous, highly subjective, and heavily reliant on the lived experience of the victim. The “victim” is also not a singular definable person as it can be any “member of the public” [section 4(1)(b)], and their impact statement does not need to be written by them but can be written by a family member or group of persons who have supported them if they are deceased, or by an organization or institution with expert knowledge of the group to which they belong or are perceived to belong [sections 5(1), 5(2)(b)].

Second, there is no requirement that an accused person has a proven, specific intention to commit hate speech; it is sufficient that another person could “reasonably construe” a “clear intention to” commit a crime. The details of who should be given the task of reasonably construing this intention are not mentioned [section 4(1)(a)]. Instead, the legislation simply refers to the Director of Public Prosecutions, or any delegated person, authorizing any such prosecutions when a complaint has been made.<sup>4</sup> This paves the way for vexatious or frivolous claims and, ultimately, incorrect convictions based on an inconsistency in law enforcement.

Third, the grounds under which hate speech is defined as directed against persons are vague and potentially unknowable by the accused in advance of making the speech. These include “sexual orientation, gender identity or expression or sex characteristics,” categories that are themselves fluid. These grounds stray into religious morals and potentially encompass speech about sexual ethics. This

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4 Under section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“prohibition on hate speech”), the civil court may refer the matter of hate speech to the Director of Public Prosecutions, who has “jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation” (*Qwelane v South Africa Human Rights Commission and Another* 2021).

provision could catch members of the public making general statements about one of the grounds on the internet or in a magazine interview, for example.

Fourth, the legislation does not necessarily require a direct causal link between hate speech and a specific, identifiable recipient. The victim could theoretically be any member of the public who can access the speech or expression, or any family member of a person who aligns with a specific or perceived ground that the legislation lists [section 4(1)]. The scope of a potential victim is therefore very broad and could include people who have never met the accused. Similar legislation from Scotland has been used to categorize human rights activists who advocate for minority sexual or gender groups on social media as victims (Brooks 2024).

Fifth, while there is a religious freedom exemption in the text which says that the hate speech offence does not apply to anything “done in good faith in the course of engagement in any bona fide interpretation and proselytizing or espousing of any religious tenet, belief, teaching, doctrine or writings” [section 4(2)(d)], this is conditional upon the religious speech not constituting incitement to cause harm, including emotional or psychological harm. The clause is therefore narrowly defined and worded in a circular way, and it does not appear to consider the possibility of good-faith religious expression relating to some of the categories criminalized by the Act, such as sex, sexuality, or gender (for example, traditional Christian views on marriage). By comparison, a street preacher was found guilty by the English courts under the Public Order Act in 2015 for publicly citing the Bible while referring to homosexuality (Bingham 2015).

While it is premature to appreciate how the law will be interpreted by law enforcers, such vague and broad wording could significantly restrict and criminalize otherwise peaceful and legitimate expressions relating to deeply held beliefs. The subjectivity required to interpret the legislation could lead to vexatious claims of “hate speech” and “harm,” which, considering how other similarly worded laws are interpreted (such as in Europe), could be used to censor and penalize expressions that cause mere offence.

## **2.2. Hate speech laws globally**

At least 118 countries criminalize hate speech, including countries in Africa, Europe and Asia.<sup>5</sup> Hate speech laws have also been introduced in international institutions,<sup>6</sup> and many social media companies have adopted their own guidelines.<sup>7</sup> As a general trend, hate speech laws usually criminalize “offensive discourse tar-

5 Ninety countries criminalize hate speech under the criminal code; and the others either under the constitution or by separate legislation. See the analysis by The Future of Free Speech (2024).

6 Such institutions include the European Union, Council of Europe, and the United Nations in the UN Strategy and Plan of Action on Hate Speech.

7 Meta, X and Youtube all have hate speech policies (as of March 2025)

getting a group or an individual based on inherent characteristics and that may threaten social peace.”<sup>8</sup> Many countries have argued that these laws protect vulnerable people who have a specific minority characteristic, with the most common categories of hate speech being listed as based on race, religion, gender, or sexual orientation (USCIRF 2019).

However, the absence of an explicit definition of hate speech in international law has left South African legislators without any clear boundaries by which to frame the offence. Outside of the traditional categories of restrictions on speech, such as incitement to violence or defamation, legislators globally have not been able to clearly agree upon what constitutes hate speech. Consequently, a common characteristic of the laws around the world is that they usually impose criminal penalties on broad categories of expression without a clear definition of hate or boundaries on how the crime is to be committed. Referring to an attempted definition by the United Nations, one commentator assessed that hate speech could “encompass nearly everything every person says, does, or writes, no matter the venue or whether public or private” (Fischer 2021).

Globally, there are numerous examples of hate speech laws being used to suppress otherwise legitimate and peaceful speech. Some cases have involved religiously-motivated speech or expressions about sexuality or gender, particularly when another person finds the speech offensive. For example, in Finland, hate speech laws have been used to bring a Christian politician before the Supreme Court for posting an image of a Bible passage about marriage on social media (ADF International 2025). In Italy, hate speech legislation has resulted in censorship in the arts, including towards religious expression (Atalex 2013). In Scotland, after a law was passed to criminalize derogatory comments or stirring up hatred based on age, disability, religion, sexual orientation, transgender identity or being intersex, the police received almost 4,000 complaints by victims in the space of two days. A Scottish government minister admitted to national newspapers that the legislation was leading to people making “false and vexatious” claims (Bonner 2024).

There is also international precedent for the use of hate speech laws to limit traditional religious values or silence religious critique. In Ethiopia, a law introduced to combat divisive rhetoric and disinformation has suppressed religious content, such as on YouTube and Facebook (Asegidew et al. 2022). In Brazil, Christian leaders have been investigated under hate speech laws for expressing religious views from the pulpit about homosexual relationships (New Waves Ministry 2021).

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8 United Nations, What is hate speech?

### 2.3. *Blasphemy laws*

Blasphemy laws exist in over 70 countries (USCIRF 2019), with prominent examples in Iran, Nigeria and Pakistan (USCIRF 2024). They punish the expression or acts of individuals deemed to be insulting to religious feelings or showing a lack of reverence for a god or deities, or offending or denigrating religious doctrines or symbols (USCIRF 2017). The laws are vaguely worded, and punishments range from fines to death sentences. Blasphemy remains a common-law offence in South Africa, defined as unlawfully, intentionally and publicly acting contemptuously towards God.<sup>9</sup>

Across Africa, blasphemy laws are written in secular national legislation as well as in regional Sharia laws. In Nigeria, the Criminal Code provides a two-year punishment for the misdemeanour of religious insult,<sup>10</sup> and the addition of Sharia criminal law in some northern Nigerian states includes punishment by death (ADF International 2024).<sup>11</sup> In Egypt, ridiculing, insulting, or damaging the national unity of the “heavenly” religions is prohibited.<sup>12</sup> There have been an estimated 130 cases of blasphemy during the last 10 years in Egypt, 90 percent of which have been against Christians accused of insulting Islam (Minority Rights Group 2024). In Sudan, although flogging for blasphemy was abolished in 2020 (Global Legal Monitor 2024),<sup>13</sup> one can still face a 10-year prison sentence for saying religiously insulting things (USCIRF 2021). In Uganda, “wounding the [religious] feelings” of others is criminalized,<sup>14</sup> and two Christians were arrested under this law in December 2023 for street preaching (Morning Star News 2023). In Ethiopia, any public disapproval of religious “ceremony or office” is criminalized. “Blasphemous or scandalous utterances or attitudes” expressed in public are also subject to the criminal law.<sup>15</sup>

### 2.4. *The similarities between hate speech laws and blasphemy laws*

In 2017, the former UN Special Rapporteur on Freedom of Religion or Belief noted that as blasphemy laws have fallen out of favour in certain parts of the world,

<sup>9</sup> The last conviction for blasphemy in South Africa was in 1968 (End Blasphemy Laws 2020).

<sup>10</sup> Article 204 of the Criminal Code: “Any person who does an act which any class of persons consider as a public insult on their religion, with the intention that they should consider the act such an insult, and any person who does an unlawful act with the knowledge that any class of persons will consider it such an insult, is guilty of a misdemeanour and is liable to imprisonment for two years.”

<sup>11</sup> State law has been used to convict individuals such as Yahaya Sharif-Aminu, who was arrested based on a WhatsApp message. See Kano State Sharia Penal Code Law of 2000, Section 382(b): “Whoever by any means publicly insults by using word or expression in written or verbal by means of gesture which shows or demonstrate any form of contempt or abuse against the Holy Quran or any Prophet shall on conviction be liable to death.” Also, see Sections 114 and Section 382(b), as well as UN Human Rights Council (2024).

<sup>12</sup> Section 98(f) of the Law No. 58 01, 1937, Promulgating the Penal Code (Nigeria), punishable with up to a five-year prison sentence.

<sup>13</sup> See Miscellaneous Amendments Law of 2020 (Repeal or amend the provisions restricting freedoms) No. 12 of 2020. Flogging is still a valid penalty for “crimes of drinking alcohol, adultery committed by an unmarried person, and falsely accusing another person of committing adultery.” Criminal Act 1991, Articles 78(a), 146(b), 157 (c).

<sup>14</sup> Sections 118 and 122, Ugandan Penal Code, 1950.

<sup>15</sup> Articles 492 and 816 of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2005.

many countries have introduced hate speech laws as replacements, thus emphasizing the similarities in that both types of laws restrict freedom of expression and speech (Special Rapporteur 2017). Both types of laws can criminalize people for saying something perceived as critical or undermining towards religion, religious belief, personal belief or cultural values, even where there is no intention to insult, no identifiable victim, and no resulting tangible harm.

As for the similarities, both hate speech and blasphemy laws are constructed upon vague and overly broad texts, causing them to be interpreted to restrict and prevent religious expression and to suppress minority dissenting views, or even majority religious views, for “politically incorrect” speech. Clauses with words such as “insult to feelings” or “harm” are highly subjective and can encompass minority opinions that are merely disagreeable. Such vague texts risk violating the basic principles of the rule of law, which require objectivity, predictability and intelligibility.<sup>16</sup> This means that vaguely drafted laws are more prone to result in potential or actual discrimination in implementation (USCIRF 2019), with the blasphemy laws against Christians in Muslim-majority countries being the most prominent example.

Second, since they contain vague and ambiguous terms, hate speech laws rely on subjective interpretation that could facilitate arbitrary or malicious enforcement against political and religious minorities, akin to how blasphemy laws can be interpreted.<sup>17</sup> UN Special Rapporteurs have advised that, in addressing the dilemma, tighter or stricter definitions in combination with independent judiciaries should be advocated for (Special Rapporteur 2017). There are often no impartial arbiters to determine what constitutes hate, and in many cases, the arbiter is politically or religiously motivated against minorities (Fischer 2021).<sup>18</sup>

Third, statutory punishments are significant and arguably disproportionate in both types of laws. A handful of countries around the world retain the death penalty for blasphemy against Islam, and other countries maintain harsh prison sentences. While not including the prospect of capital punishment, hate speech laws nevertheless can punish individuals with imprisonment, even if no causal connection has been established between the speaker’s intent and the feelings

<sup>16</sup> Lecture delivered at the Centre for Public Law entitled “The Rule of Law”, Cambridge University, United Kingdom, by the Rt. Hon Lord Bingham of Cornhill KG, House of Lords (16 November 2006).

<sup>17</sup> These kinds of laws aim to combat speech that is offensive to religious groups or non-religious groups and are “tantamount to blasphemy laws” because they result in the same restrictions on the rights to free speech and to freedom of religion and belief. USCIRF has argued that laws restricting the media are “often used to prohibit hate speech on the basis of race, ethnicity, religion, and other factors, with the written intent to protect those individual identities; however, these laws are also often open to misuse for political purposes.”

<sup>18</sup> Ironically, an analysis of hate speech cases from around the world reveals that as with blasphemy laws, the support for the use of the law to shield minorities from harm could, in fact, cause minorities more harm as they are subjected to more arbitrarily applied, abusive legislation.

or experience of the recipient.<sup>19</sup> Notably, such harsh punishments have a chilling effect by deterring other individuals from freely expressing themselves for fear of reprisal from others in society or from the law itself.<sup>20</sup>

Fourth, both types of laws fail to mirror the narrow limitations on freedom of expression and speech that are outlined in international law. Freedom of expression is highly valued in international human rights discourse, and international experts have called for the abolition of blasphemy laws and the narrowing of hate speech laws. Although international law permits restricting speech in some situations, the criminalization of allegedly harmful speech because of the offence or insult that a victim feels seems unwarranted.

### 3. The compatibility of South Africa's Hate Speech Act with international human rights law

I now turn to the compatibility of the South African law with international standards of freedom of speech and religious expression. According to international human rights law, fundamental rights and freedoms should be restricted only in very narrow, proportionate, and limited circumstances. Vaguely worded hate speech and blasphemy laws fail to reach the threshold required for States to limit expression. Although the drafters of the Hate Speech Act considered various constitutional provisions and the International Convention on the Elimination of All Forms of Racial Discrimination, the text does not outline how the legislation aligns with international legal provisions on freedom of speech and religion or section 15 of the South African Constitution, which protects freedom of conscience, religion, thought, belief and opinion.<sup>21</sup>

#### 3.1. Freedom of expression and opinion

International law provides a robust basis for the protection and upholding of freedom of expression and opinion. Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which South Africa ratified in 1998, provides, "Everyone shall have the right to hold opinions without interference," and "Everyone shall have the

19 For example, the secular "religious insult" law in Nigeria carries a sentence of up to two years' imprisonment. See the Criminal Code of Nigeria, section 204.

20 The punishment can also be considered excessive in view of the guidance from the Rabat Plan of Action, where it is recommended, "Criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply" (OHCHR 2013:para 34).

21 The Preamble to the Hate Crimes Act outlines various provisions from the Constitution of the Republic of South Africa, 1996 – sections 7(2), 8(2), 9, 9(1), 9(3), 9(4), 10, and 16. It also refers to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, and the International Convention on the Elimination of All Forms of Racial Discrimination.

right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

According to the UN Human Rights Committee, freedom of opinion and expression are “indispensable...for the full development of the person,” “essential for any society, and “foundation stone[s] for every free and democratic society.”<sup>22</sup> A former UN Special Rapporteur has also affirmed that Article 19 of the ICCPR extends protections to people who express “a minority or even offensive interpretation of a religious tenet or historical event” (Kaye 2019).

Limitations on speech and expressions must be carefully applied. Article 19(3) of the ICCPR allows for certain restrictions only when legal, proportional, and necessary, such as for the protection of the “rights or reputations of others” and the protection of “national security, public order and public health or morals.” If a state wishes to restrict this right under Article 19(3), the burden falls on it to justify the restriction, not on the speaker to demonstrate that they had the right to the speech in the first place (UN Human Rights Committee 2011). Article 20 of the ICCPR also provides permissible limitations that States may impose on freedom of speech, but only in very defined circumstances. These are when restrictions are legitimate to prohibit propaganda to war and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” There is no obligation, though, on States to prohibit any advocacy of religious hatred. Moreover, Article 20(2) does not require that “incitement” should necessarily result in the criminalization of the act or speech. Former UN Special Rapporteurs have advised that criminalization should only be considered where the advocacy constitutes “serious and extreme instances of incitement,”<sup>23</sup> and that “expressions should only be prohibited under Article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group” (Jahangir 2006).<sup>24</sup>

By not considering the balance these texts require, the South African Hate Speech Act could unjustifiably restrict certain good-faith legitimate expressions

22 Since freedom of expression is fundamental to the enjoyment of other human rights, restrictions on it must be exceptional, subject to narrow conditions and strict oversight. The UN Human Rights Committee (2011:para 21) has emphasized that restrictions “may not put in jeopardy the right itself.”

23 Moreover, the United Nations Special Rapporteur on Freedom of Expression stated that people should “not be silenced under Article 20 [of the ICCPR] (or any other provision of human rights law). Such expression is to be protected by the State, even if the State disagrees with or is offended by the expression” (UN Human Rights Committee 2011).

24 Despite these narrow exceptions, international law nonetheless permits that certain speech made against the racial profile of an individual could potentially fall within the scope of permissible restrictions. Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination permits States to punish “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.”

that do not incite any imminent violence but merely offend a certain subset of the population, particularly those related to religious expression. In this manner, the right to freedom of religion or belief is closely linked to the right to free speech.

### **3.2. Freedom of religion or belief**

Article 18 of the ICCPR affirms the right to freedom of thought, conscience, and religion. The UN Human Rights Committee (1993) has advised that this right is far-reaching and profound; it encompasses freedom of thought on all matters, personal convictions, and the commitment to religion or belief, whether manifested individually or in the community. It also includes “a broad range of acts” including “produc[ing] ... religious literature” and “possessing ... religious books and other materials ...[which amounts to] a manifestation of one’s religion under Article 18(1)” (*Adyrkhayev v. Tajikistan* 2022).

Under Article 18(3) of the ICCPR, the manifestation of religion or belief, which could include religiously motivated speech, may only be subject “to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.” While this statement is fairly broad, the UN Human Rights Committee considers these components to be specific and strict, with restrictions being allowed only when proportionate to the severity of the threat of harm. The Committee has stressed that restrictions should not unjustifiably censor minority religious viewpoints, including religious morals such as beliefs about gender or sex. In *Malakhovsky and Pikul v. Belarus*, it emphasized the protection of religious expression, including religious teachings, unless such expression incites violence or is discriminatory, or conflicts with public safety, order or health. Moreover, in *Sister Immaculate Joseph v. Sri Lanka*, it affirmed the protection of a nun’s religious expression on issues of morality. Moreover, the Committee has noted that it is impermissible for prohibitions in domestic laws to be used to “prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith” (2011). This includes criticism of a country’s majority religion.

It is possible that law enforcers could interpret the South African Hate Speech Act to punish the manifestation of religious belief relating to one of the law’s stated grounds. The Act does not explicitly stipulate permissible limitations on religious expressions, thereby implying that expressions that do not meet the international threshold of infringing upon the broad concepts of public safety, order, health or morals, or the rights of others, could nevertheless lead to a criminal prosecution. The circular wording of, and the lack of robust guidelines around, the religious exemption clause [section 4(2)(d)] – combined with the inclusion of grounds that include sexual orientation and gender – indicate this possibility. This could result in the Act being used to discriminate against particular types of people.

### 3.3. *Regional human rights protection*

To complement the international bill of rights, the African Charter on Human and People's Rights (African Charter) protects freedom of religion or belief only in Africa (article 8). The African Court of Humans and Peoples Rights has interpreted this provision broadly, ruling that it requires signatories to fully guarantee the components of freedom of conscience, the profession and free practice of religion (*African Commission on Human and Peoples' Rights v. Republic of Kenya* 2017:para. 48). Article 9 of the African Charter, dedicated to freedom of expression and opinion, has been interpreted strictly so as to indicate that States may not limit fundamental freedoms.<sup>25</sup> This regional jurisprudence provides additional impetus for South Africa to amend the Hate Speech Act to align with human rights standards, or else to face a potential referral to these regional institutions.

Where States have restricted speech, the African Court and its Commission have used a proportionality test and ruled that the restriction must be “absolutely necessary for the advantages which follow” and must not render the right itself “illusory” (*Media Rights Agenda v. Nigeria* 1998). Furthermore, they have emphasized that “the [African] Charter contains no derogation clause” (*Constitutional Rights Project v. Nigeria* 1999).

The African Court has also condemned speech-restricting criminal sanctions, stating that if they are “disproportionate or excessive, they are incompatible with the Charter and other relevant human rights instruments.” Using a proportionality test, it advised that several questions should be asked, such as the following: “Are there sufficient reasons to justify the action? Is there a less restrictive solution? Does the action destroy the essence of the right guaranteed by the Charter?” (*Lohé Issa Konaté v. Burkina Faso* 2014:para. 125). It is unclear whether the Hate Speech Act drafters considered a proportionality test, as all drafts of the bill contained long prison sentences for the offence of hate speech. It is arguable that the criminalization of hate speech is not necessary, not least because it is already governed in South Africa by civil law.<sup>26</sup>

The Declaration of Principles of Freedom of Expression and Access to Information in Africa also provides principles relating to fundamental freedoms for African legislative systems. These principles, albeit not law, affirm that the criminalization of speech can only be a last resort and applied to the “most severe cases,” and that speech that merely lacks civility or offends or disturbs should not

<sup>25</sup> As for politically suppressed speech, the African Commission noted, “Freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country.” Communications 140/94, 141/94, 145/94 against Nigeria (1994).

<sup>26</sup> See section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.

be limited.<sup>27</sup> As the Hate Speech Act arguably encompasses speech that merely offends within its scope – which is evident through the inclusion of emotional harm and a broad meaning of “victim” within its definitions – it arguably does not align with this precedent. Religious beliefs relating to morals or lifestyles of the readers of public or private social media posts, for example, could be disturbed or offended by speech that is forbidden under the Act.

#### 4. How can South Africa better protect freedom of religious expression?

The Hate Speech Act has the potential to limit legitimate speech – including speech relating to religious beliefs and morals – even though this is not its stated aim. In this section, I will consider how legislators can better frame hate speech laws to prevent such overreach. If the law is used to prosecute individuals who express peaceful religious opinions or sentiments that are considered hateful or harmful towards a particular minority community, the law could mirror the broad and vague reach of blasphemy laws, which have been consistently condemned by international legal experts. For the law to better align with international standards and not be used as a tool to limit or censor minority religious expressions, certain terms in the text must align with international and regional human rights law.

First, the Police Service and prosecutors must have clarity on key terms underpinning the hate speech offence, including the word “hatred,” and how they could prevent investigations into vexatious claims. The sphere of communications should be explicitly limited to the public, and the grounds within the definitions section should be clarified – especially the nebulous phrase “gender identity or expression.” The concept of a victim needs to be clearly defined, and the notion of harm should be afforded an objective standard of meaning so that the ambiguous concepts of “emotional or psychological harm” and “social” harm are properly understood and that prosecutors only explore claims when there is a clear causal link between the speech and the harm. Furthermore, the concept of “economic detriment” should be removed and this matter should remain governed by civil law. The guidance and

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27 Principle 22 of the Declaration of Principles of Freedom of Expression and Access to Information in Africa concerns the issue of “Restrictions on Freedom of Expression.” It permits countries to prohibit such speech that calls for hatred and constitutes incitement to discrimination, hostility, and violence, but it affirms that criminalization of speech can only be a last resort and for the “most severe cases.” Principle 23(3) warns, “States shall not prohibit speech that merely lacks civility or which offends or disturbs.” This aligns with the European Court of Human Rights jurisprudence that freedom of expression may be limited for reasons such as public morality, provided the restrictions are “necessary in a democratic society.” Nonetheless, it also opined, “Freedom of expression ... is applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population” (*Handyside v. the United Kingdom* 1976:para. 49). Principle 22, moreover, reflects the general international landscape rule that sanctions against speech must meet the standards of being necessary, proportionate, and legally prescribed.

direction on the specifics of these terms should be more robust than what the “social context training” about hate speech under the Act describes [section 7(1)(b)].

As a second priority, prosecutorial guidelines, issued by the National Director of Public Prosecutions, should be developed, in addition to section 7 on “National Instructions and Directives,” to aid a consistent and clear interpretation of the international guidelines on when and how to limit speech. Only the most egregious expressions that actually and causally incite imminent violence should be included. Law enforcers should be warned about the potential for spurious or vexatious claims. Prosecutorial guidelines should affirm that freedom of speech, under the Constitution, must be afforded the highest possible protection; that any complaint related to speech needs to pass through robust, objective considerations under the law; and that only the most egregious types of public<sup>28</sup> speech – which does not include private or religious speech – can be included.

As a basis for the guidance, the framework document issued by the UN Office of the High Commissioner for Human Rights should be consulted. The Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence (OHCHR 2013) acknowledged that some national, racial, or religious hatred could lead to incitement to violence, hostility, or discrimination, as per Article 20 of the ICCPR. Yet prosecutions against speech need to be controlled so as not to lose sight of wider human rights principles, including freedom of expression.

Although the Rabat Plan’s drafters did not address the fundamental questions of what hate speech is or how to balance various competing interests, the document nevertheless provided six factors that a judge or prosecutor should consider in any case involving an alleged speech-related offence, to assess whether it meets the criteria for incitement. These are the social and political context of the speech; the speaker’s status in relation to the audience, the speaker’s specific intent; the provocative and direct content and form of the speech; the extent or reach of the expression; and the likelihood of incitement to violence, which includes its imminence. This means that “some degree of risk of harm must be identified,” including through the determination of a “reasonable probability that the speech would succeed in inciting actual action against the target group” (OHCHR 2013:para. 29). Importantly, the Rabat Plan urged that laws limiting hate speech should be defined narrowly, proportionate, and based on strict necessity, so as to prevent them from unnecessarily and unjustifiably suppressing free speech.<sup>29</sup>

28 In *Qwelane*, the judge addressed the problem with private communications falling within the definition of hate speech (*Qwelane v South Africa Human Rights Commission and Another* 2021:paras. 118-119).

29 A former UN expert summarized the baseline for limiting speech to be “incitement,” which refers to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups. See United Nations General Assembly

The religious exemption clause [section 4(2)(d)] should also be clarified in guidelines so that it will not lead to unjustified prosecutions against “interpretation and proselytising or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings” when the grounds of gender or gender identity, religion, sex (which includes intersex), and sexual orientation are referenced. Under the current, circular wording of the provision, there is no guarantee that merely offensive words about these grounds will be protected against an accusation of “advocating hatred that constitutes incitement to cause harm.” It should also be made clear that this exemption extends to members of the public, as well as religious ministers.

Guidelines are essential to prevent the application of the law from going beyond constitutional provisions or the Rabat Plan, and they would greatly assist the Police Service in swiftly dismissing complaints of offence based on legitimate expressions made in good faith which do not lead to the threat of imminent hostility or violence. It should be clarified that criminal law ordinarily should not respond to allegations of hate speech and that the police will only, in very specific and limited situations that are justified, respond to such allegations.

As a final note, South African civil law has established a precedent of limiting religiously-motivated speech in a case where the Equality Court imposed a fine upon a preacher whose comments on sexuality were deemed to fall outside his constitutional rights.<sup>30</sup> If this reasoning were used to prosecute individuals under the Hate Speech Act, the punishments could be significantly more severe. This case also shows that the civil law already responds adequately to certain expressions considered troublesome.

## 5. Summary

Freedom of speech, expression, and religion or belief are accorded a very high status in international law and are proclaimed by scholars, academics, and legal theorists as the cornerstone of any democratic society. Two former UN Special Rapporteurs, Frank La Rue (2008-2014) and David Kaye (2014-2020), have underscored this point (La Rue 2012; Kaye 2019). Moreover, regional jurisprudence in Africa has clearly affirmed the importance of these rights within the continent, indicating that they deserve robust protection. To comply with international and regional ob-

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(2012), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/67/357, at para. 46.

<sup>30</sup> In 2014, Oscar Bougardt was held by an Equality Court Order to be in violation of Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) for his comments, which were judged to constitute “the publication, propagation, or communication of words based on one or more of the prohibited grounds against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful, be harmful or to incite harm, or promote or propagate hatred.” Rev. Bougardt was further prosecuted for contempt of court in 2018 and 2023 for continuing to make similar comments (South African Human Rights Commission 2023).

ligations, criminal laws that intend to limit this right must be narrowly construed so as not to unjustifiably infringe upon a citizen's fundamental human rights. It is also critical that laws are written and enforced in a way that does not unintentionally create a culture of self-censorship, whereby citizens fear prosecution because of causing an unintended "offence" to other people despite the lack of any tangible harm. There has been a notable, troubling trend of States using hate speech laws to suppress peaceful expressions that are religiously motivated.

As one former UN Special Rapporteur on Freedom of Religion or Belief noted when he observed an overlap between hate speech and blasphemy laws:

Laws formulated in this way are often applied to reinforce the dominant political, social and moral narrative and opinions of a given society. ... In some cases, "hate speech" laws are even used to restrict minorities from promoting their culture and identity, or from expressing concern about discrimination against them by the majority. (Human Rights Committee 2019:para. 33)

This UN expert's predecessor similarly spoke out strongly against hate speech laws and the "misguided" efforts of governments that try to use them to combat vaguely defined hate speech while threatening strong penalties that end up suppressing legitimate speech. He noted that, for Article 20(2) of the ICCPR to be correctly interpreted, only "advocacy [of hatred] which constitutes incitement ... [leading to] discrimination, hostility or violence" can be included and, "as such, advocacy of hatred on the basis of national, racial or religious grounds is not an offence in itself." He advised that hate speech should, for the most part, not be criminalized but should be dealt with by civil law (La Rue 2012:paras. 33, 34).

If South Africa is to retain the hate speech offence under its criminal law, this provision must be objectively and consistently applied, while appropriately taking into account the importance of freedom of religion or belief. It should be clarified that only speech that passes the threshold of Article 20(2) of the ICCPR will be included within the criminal framework, and all ambiguous and broad words in the Act should be redefined. In the absence of these adjustments, legislators should acknowledge that civil law can already adequately deal with the issues the Act seeks to resolve.

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