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DOI: https://dx.doi.org/10.18820/24150517/JJS42.v2.2

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2017 42(2):25-64
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A constitutional perspective on the *Sparrow* judgements

Abstract

The cases of *ANC v Penny Sparrow* and *State v Penny Sparrow*, respectively in the Equality Court and the magistrate's court, concerned a Facebook entry posted by Penny Sparrow, a white estate agent. The Equality Court found that Sparrow's words constituted hate speech in terms of sec. 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 ("the *Equality Act*"); in the magistrate's court, she was found guilty of *crimen iniuria*. This contribution considers whether the judgements in these matters comply with the constitutional approach in dealing with hurtful or harmful expression related to group characteristics, in particular race, broadly referred to as hate speech, which approach is crucial for the protection as well as the transformation of South African society. Both these aims are put at risk by an indiscriminate comprehension and application of the wide-ranging phrase "hate speech". This observation is corroborated by the fact that international agreements concluded in the aftermath of the atrocities of World War II set out on the quest for the narrowest restriction of free speech, reserving criminalisation for extreme forms of expression only. In line with this approach, the *Constitution of the Republic of South Africa*, 1996, clearly distinguishes between expression under its sec. 16(2), in particular sec. 16(2)(c), which warrants no protection, and expression that falls outside this ambit, which does enjoy constitutional protection, although subject to limitation. This distinction is particularly relevant in the application of sec. 10 of the *Equality Act*, which is primarily aimed at transformation instead of punishment. The article first argues that the Equality Court in the matter of *ANC v Penny Sparrow* disregarded the distinction above, and consequently failed to further the transformative aims of the *Equality Act*. It also failed to consider the cyber context within which the Sparrow comments were made. It is contended, in this regard, that the characteristics of internet communication increase the risks of extreme hate speech, on the one hand, and have the potential to generate sincere transformation through social pressure when it comes to expression that falls outside the ambit of sec. 16(2), on the other. In the same vein, the article argues that the common law offence of *crimen iniuria*, construed as to extend to a verbal attack, not against an individual, but against a group of which he/she is a member, is not in keeping with international law or the *Constitution*, and negates the purposively drafted provisions of the *Equality Act.*

1. Introduction

1.1 Background

The cases of *ANC v Penny Sparrow*[1] and *State v Penny Sparrow*,[2] respectively in the Equality Court and the magistrate's court, concerned a Facebook entry posted by Penny Sparrow, a white estate agent. On 3 January 2016, Sparrow made the following utterances online:

> These monkeys that are allowed to be released on New Year's Eve and onto public beaches towns etc. obviously have no education whatsoever. So to allow them loose is inviting huge dirt and troubles and discomfort to others. I'm sorry to say I was among the revellers and all I saw were black on black skins what a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don't want to even try. But think they can voice opinions about statute and their way. Dear 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.[3]

The incident occurred at a time when racism was a particularly heated topic in the societal marketplace of ideas, especially in the social media.[4] Commenting on the launch of an investigation by the South African Human Rights Commission (SAHRC) into the matter, a spokesperson of the Commission stated that utterances that incite and promote racism have gone viral and anger many people: "They open the wounds of millions who were formerly oppressed by the apartheid government."[5] In July 2016, South Africa joined China and Russia in voting against a United Nations (UN) resolution on the "promotion, protection and enjoyment of human rights on the internet". One of the factors that was relied on to substantiate the decision was that South Africa was "trying to overcome a flood of racist hate speech on the internet".[6]

Recent incidents included blatant xenophobic statements by influential politicians, opinions on freedom of expression shared on social media by a media personality and a businessman, both generally known for their liberal approach, and undeniably racist remarks by prominent individuals,

1 *ANC v Penny Sparrow* (01/16) [2016] ZAEQC 1. http://www.saflii.org/za/cases/ZAEQC/2016/1.pdf (accessed on 13 May 2017).
2 *State v Penelope Dora Sparrow* 708/2016 (unreported case in the Scottburgh Magistrate's Court).
3 *ANC v Penny Sparrow*:33.
4 Cassim 2015:304-305, 329.
5 See "SAHRC to probe racist social media comments", http://www.news24.com/SouthAfrica/News/hrc-to-probe-racist-social-media-comments-20160104 (accessed on 13 May 2017).
6 "Why SA voted against internet freedoms at the UN", http://www.fin24.com/Tech/News/why-sa-voted-against-internet-freedoms-at-the-un-20160705 (accessed on 13 May 2017).

including a judge.[7] The extensive debates that ensued included extremely

7 For purposes of contextual awareness, this unusually lengthy footnote aims to paint a diverse, wide-ranging reality picture of "hate speech" in society. It contains examples of recently reported incidents of alleged hate speech that evoked wide-ranging media response.
In May 2015, King Goodwill Zwelithini, at a moral regeneration event in Pongola, KwaZulu-Natal, reportedly told foreigners to pack their bags and go back to their home countries. See News24Wire "SAHRC's report King Zwelithini delayed", http://www.polity.org.za/article/sahrcs-report-on-king-zwelithini-delayed-2016-05-05 (accessed on 27 October 2016).
In November 2015, the Pietermaritzburg High Court confirmed an interdict against Phumlani Mfeka, a former member of the so-called Mazibuye African Forum, preventing him from advocating hate speech and inciting violence, particularly against the Indian community. See Peters "Court victory in war against racism", http://www.iol.co.za/news/crime-courts/court-victory-in-war-against-racism-1940609 (accessed on 27 October 2016).
Shortly after the Sparrow post went viral, a well-known radio personality and judge on the M-Net show *Idols South Africa*, Gareth Cliff, responded in a post that was again met with outrage. M-Net ultimately severed their relationship with Cliff for the 2016 *Idols* season. The following extract from the judgement in the ensuing urgent application, in which the contractual relationship between the parties was temporarily reinstated, takes the event further:

> The genesis of the breakdown in relations between Cliff and M-Net was a racist and derogatory statement by one Penny Sparrow on her Facebook page, in which she referred to black people as monkeys. This was met with widespread anger and outrage and immediately sparked a public outcry, particularly on social media. After she posted her statement on 2 January 2016, Penny Sparrow became a household name. Racism became a burning topic of debate. On 4 January 2016, Cliff posted a tweet: 'People really don't understand free speech at all'. This, too, was met with outrage and a barrage of criticism on social media, with some members of the public equating this statement not as support for freedom of speech, but as support for Sparrow's views. This led to accusations of Cliff himself being racist. It is this tweet that M-Net allege was detrimental to their brand and necessitated the termination of Cliff's role as brand ambassador in his capacity as an *Idols* judge. Cliff states in his replying affidavit that the tweet was not a direct response to the Sparrow tweet, but rather in response to a website known as South African Daily Poll, in which topical issues are raised for debate on twitter. On that particular day, the topic was whether or not hate speech should be criminalised. It was in response to this poll that Cliff says he posted the offending tweet. Nonetheless, whether directly or indirectly, it is common cause that the tweet was a response to Sparrow's racist statement. On 5 January 2016, Cliff apologized and made it clear that he was not supporting Sparrow's statement and that his education on hate speech and free speech continues … On 8 January 2016, representatives of M-Net met with Cliff and his manager, where they told him that the public backlash from his tweet had the effect of detracting from the M-Net brand. He was informed that he would not be included as a judge in the upcoming season and was offered the opportunity to issue a joint statement with M-Net. This he declined. The same night, M-Net issued a media statement that Cliff would not be an *Idols* judge for

> the 2016 season. The following day, they issued a media statement in which they stated that they did not believe that Cliff was a racist, but he showed a lack of empathy for the country's history. They stressed the importance of differentiating between hate speech and freedom of speech. They further referred to having implemented a policy of zero tolerance for social media posts after two other *Idols* judges had placed unfortunate comments on social media.

Cliff v Electronic Media Network (Pty) Ltd 2016 2 All SA 102 (GJ):paras 8-12.
In January 2016, a prominent economist, Chris Hart, was suspended and ultimately resigned from the employ of Standard Bank Wealth and Investment over a controversial tweet, which read: "More than 25 years after Apartheid ended, the victims are increasing along with a sense of entitlement and hatred towards minorities …". Hart later apologised, stating that his tweet was meant to be read in the context of slow economic growth. See ANA Report "Chris Hart quits Standard Bank after tweet row", http://www.iol.co.za/news/politics/chris-hart-quits-standard-bank-after-tweet-row-1997698 (accessed on 27 October 2016).
Some of the social media responses to the aforementioned posts exceeded the most offensive interpretation that can conceivably be given to the original posts. Velaphi Khumalo, an employee of the Gauteng Sport Department, posted the following comments on Facebook:

> I want to cleans [*sic*] this country of all white people. we [*sic*] must act as Hitler did to the Jews. I don't believe any more that the [*sic*] is a large number of not so racist whit [sic] 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 f** heads. as we have already seen [*sic*].

The SAHRC is taking Khumalo to the Equality Court on a hate speech charge. See Connect "Update: Was Gareth Cliff really fired for his SparrowGate tweet?", http://connect.citizen.co.za/39388/sa-reacts-to-gareth-cliff-being-voted-off-as-idols-judge/ (accessed on 27 October 2016); News24 "SAHRC taking Velaphi Khumalo to Equality Court on hate speech charge", http://www.politicsweb.co.za/news-and-analysis/sahrc-taking-velaphi-khumalo-to-equality-court-on- (accessed on 10 November 2016).
The following extract from a media statement issued by the SAHRC concerns a Facebook post on 2 May 2016 by a Western Cape resident, Matthew Theunissen:

> On the 2nd May, Theunissen wrote on Facebook: "So no more sporting events for South Africa. I've never been more proud that to say our government are a bunch of KAFFIRS … yes I said it so go fuck yourselves you black fucking cunts." This was in reaction to the announcement by the Minister of Sports that certain national sporting codes will be suspended from participating internationally due to a failure to meet some transformations targets. Realising the outrage and hurt caused by his post, Theunissen responded immediately to the SAHRC attempts to contact him. Prior to meeting with the Commission, he issued a public apology. Following an initial meeting with Theunissen, an additional statement and unconditional apology was tendered to the SAHRC's request for his response to the allegations. The parties agreed to convene a conciliation

> meeting that was held on Tuesday 7 June, where Theunissen offered additional assurances and agreed to particular remedial conduct in response to his offence. These were recorded and memorialised in a settlement agreement. As part of the settlement, beyond the unconditional apology, which the Commission deemed acceptable and sincere, the parties agreed that Theunissen would embark on community service for a period of 3 to 6 months in a currently poor disadvantaged area of Cape Town Metropole in the area of sports development. This experience is meant to sensitize Theunissen to the need for transformation and challenges facing poor disadvantaged communities in Cape Town. Theunissen will also undertake a research on anti-racism, diversity, transformation and tolerance in general, and specifically within the area of sport in order to achieve a greater understanding of transformation issues, and the hurt caused by his post. This process asks Theunissen to specifically explore, reflect and understand what hate speech and racism are, why hate speech is destructive to South Africa's transformation process, and how white privilege functions in South African society. The respondent will also undergo anger management therapy, which at the date of this agreement, he had already undergone sessions with a registered and approved medical practitioner. All the remedial action undertaken by Theunissen is voluntary, without remuneration, and at his own cost. The parties agreed that Theunissen would undertake [*sic*] no longer publish or communicate any further discriminatory or hurtful language, and will refrain from engaging on any social network platform for 12 months while undergoing rehabilitation. Theunissen has an obligation to report back to the SAHRC on his community work and anti-racism research after a 3-month period and it was agreed that SAHRC could engage in spot checks to monitor progress during the period. The resolution of this matter was facilitated by Mr. Theunissen's willingness to acknowledge his wrongdoing, cooperate with the SAHRC, and engage in rehabilitative conduct directed at understanding the consequences of his actions. The mediation of disputes in this manner must be understood as more consistent with the principles of restorative justice, than with punitive retributive justice sanctions, which can be meted out by the criminal justice system. The guardianship of human rights under such circumstances required an approach that sought to recognize wrongdoing, promote understanding and embark on remedial conduct such that a settlement of this matter could be concluded. The Parties signed a settlement agreement on the 07th June 2016, and the agreement represents the finalization of the SAHRC's investigated complaint against Theunissen.

See SAHRC "Media Statement: Matthew Theunissen apologises for racist remarks", http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/386-media-statement-matthew-theunissen-apologises-for-racist-remarks (accessed on 27 October 2016).

In May 2016, a high court judge, Mabel Jansen, came under fire after her remarks in a Facebook conversation were made public. Jansen stated, *inter alia*:

> Gillian do you believe that I am even propositioned by my black colleagues who tell me that they will be in hotel X and expect me to

racist responses, but overwhelmingly consisted of sincere disapproval and condemnation in the social and other media. Moreover, dismissals, adjudication and quests for the criminalisation and prosecution of what is liberally described as "hate speech" followed, in my view, often with strikingly little concern for conceptual accuracy and distinction, and for the implications for freedom of expression.

Against this background, political interest undoubtedly had a part to play in pursuing the Sparrow actions. In the Equality Court case, the pleadings of the African National Congress (ANC), a political party, included an allegation that the respondent was, at all material times, a member of another political party, the Democratic Alliance (DA).[8] The DA later went on to lay the *crimen iniuria* charge.

In the Equality Court, Penny Sparrow was found guilty of hate speech as defined in sec. 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act*[9] ("the *Equality Act*"). She was ordered to pay damages of R150 000,00 to the Oliver and Adelaide Tambo Foundation, which promotes non-racialism, tolerance and socio-economic upliftment in South Africa.

> report there at a specific time? I am shell-shocked. In their culture, a woman is there to pleasure them. Period. It is seen as an absolute right and a woman's consent is not required. … I still have to meet a black girl who was not raped at about 12. … Mothers are so brain washed that they tell the children that it is the fathers' birth right to be the first. I must hand you – 10, 20, 30, 40 files and you will adopt a completely different attitude. The white people have a lot to account for, but this? I feel like vomiting … So no – the black people are by far no angels. Their conduct is despicable. … Murder is also not a biggy. And gang rapes of baby, daughter and mother a pleasurable pass time. That, in reality, is the flip side of the coin. They are simply now in a position to branch out and include white woman. No Gillian – the true facts are most definitely not that espoused by the liberals …

Jansen reportedly claimed that her comments had been confidentially stated to someone in a position to help, and were taken out of context, as she referred specifically to rape cases, over which she had presided, and that, instead of labelling her a racist, the country should address what she calls the real issue of protecting vulnerable women and children. See Eyewitness News "High court judge under fire for black rape culture comments", http://ewn.co.za/2016/05/09/High-court-judge-under-fire-after-black-rape-culture-comments (accessed on 27 October 2016). In April 2017, the Judicial Service Commission (JSC) decided that Jansen's comments amounted to impeachable conduct. On 4 May 2017, the Department of Justice and Constitutional Development confirmed that she had resigned with immediate effect. "Mabel Jansen resigns as judge", https://mg.co.za/article/2017-05-04-mabel-jansen-resigns-as-judge (accessed on 13 May 2017).

8 *ANC v Penny Sparrow*:32.

9 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

In the criminal court, after pleading guilty to a charge of *crimen iniuria* and entering into a plea agreement in terms of sec. 105A(1)(a)(i) of the *Criminal Procedure Act*,[10] she was convicted and sentenced to a fine of R5 000,00 or 12 months' imprisonment. In addition, she was sentenced to two years' imprisonment, wholly suspended for five years, during which time she must not be convicted of *crimen iniuria*. She was also ordered to make a public apology for her remarks on Facebook. It transpired that, having lost her job as a result of the incident, she was living on a monthly pension of R1 500,00.

1.2 The focal points of the article

The Sparrow judgements in the Equality Court and in the Criminal Court will be discussed separately. In both discussions, the tension associated with the constitutional right to freedom of expression will be recognised. It will be emphasised that this tension not only manifests in the relation of the right to freedom of expression with competing constitutional rights, but is also intrinsic in the values that inform its protection. The following dicta underscore that free expression is an essential attribute of the constitutional democracy and is instrumental to the protection of all constitutional rights.

In *S v Mamabolo* (*E TV, Business Day and the Freedom of Expression Institute Intervening*),[11] it was stated that

> [f]reedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having 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.[12]

The same approach was articulated as follows in *South African National Defence Union v Minister of Defence and Another*:[13]

10 *Criminal Procedure Act* 51/1977.

11 *S v Mamabolo* (*E TV, Business Day and the Freedom of Expression Institute Intervening*) 2001 3 SA 409(CC).

12 *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)*:par. 37. See also *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 5 BCLR 433:par. 24.

13 *South African National Defence Union v Minister of Defence and Another* 1999 4 SA 469 (CC):par. 7.

> Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

However, it is a reality that some extreme forms of expression may infringe human dignity, equality and freedom to the extent that the democracy is imperilled. Clearly, the democracy should be protected against threats of this nature. Within the constitutional framework, freedom of expression may also be limited to promote competing interests, in particular "the very real need to protect dignity, equality and the development of national unity".[14] Yet, as stated by Justice O'Regan in the Constitutional Court case of *NM and Others v Smith and Others,*[15] freedom of expression also enhances human dignity and autonomy by enabling individuals to form and share opinions.[16] Evidently, the boundaries and nature of restriction should be carefully designed to strictly and effectively serve the legitimate aims of the restriction. This contribution emphasises that the said tensions require context-sensitive legislation and adjudication that a) impose an appropriate sanction on those who engage in speech, which delegitimises the democracy, as is contemplated by sec. 16(2), in particular sec. 16(2) (c) of the *Constitution*,[17] and b) with the exception of constitutionally compliant specialised regulation in fields of law that may be applicable, for instance the law of defamation and criminal law, regulate hateful utterances outside this ambit by means that will "facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability".[18]

Considering that, as stated in the Preamble of the *Equality Act*, "systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy", facilitation should be aimed at changing the hearts and minds of ordinary South Africans, filled with misconceptions,

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14 *Islamic Unity Convention v Independent Broadcasting Authority and Others*:par. 49.

15 *NM and Others v Smith and Others* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC). Van Wyk *et al.* 1994:267-268.

16 *NM and Others v Smith and Others*:par. 45. See also *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and others*:par. 27, where the Court recognised both the instrumental and intrinsic value of communicative interaction; Van Wyk *et al.* 1994:267-268.

17 The right in subsection (1) does not extend to
a. propaganda for war;
b. incitement of imminent violence, or
c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

18 *Equality Act*:sec. 2(c); Preamble.

distrust, hostility and even hatred borne from past and systemic atrocities, injustices and separation. Branding people as criminals will hardly promote this aim, while the potential to reinforce prejudice and hostility is evident. As citizens, those treated so harshly will impede rather than further the society envisaged by our *Constitution*. The challenge is to correctly define and distinguish the different forms of speech that incites, hurts or harms related to group characteristics, in order to apply the appropriate measures. This article will substantiate the view that this challenge was not met in the *Sparrow* cases.

I would like to conclude this paragraph with reference to an electronic news report of Deputy Chief Justice Dikgang Moseneke's response to the Sparrow post, not in the Constitutional Court this time, but addressing congregants at the Glen Methodist Church in Pretoria. He reportedly urged South Africans to stop giving too much attention to those who make racist remarks on social media, stating: "I'm not a monkey and I don't look like one. That's the end of it. These current discussions on race are triggered by such unnecessary remarks." Furthermore, according to the report,

> (h)e told congregants that comments by the likes of Penny Sparrow were simply inflaming wounds that were about to heal. While the right to free speech and expression was quite vital and contested, he said, it was crucial in a democratic society, and without it, the nation would suffocate. However, he said the law did not allow for incitement of imminent violence through statements such as 'kill the farmer, kill the Boer' or 'all black people should be killed' and 'white people should be thrown into the sea.'[19]

Whether or not one agrees with Justice Moseneke's valuation of the impact of the Sparrow utterance and similar expression, his reasoning illustrates a contextualised balancing of interrelated constitutional values and guaranteed rights of equality, human dignity, freedom (in particular, freedom of expression) and democracy so that every one of these freedoms and rights will optimally realise in our society. This nuanced reasoning is lacking in the judgements under discussion.

1.2.1 The Equality Court judgement in Sparrow

Although the Equality Court's finding that Sparrow's words fell within the ambit of sec. 10 of the *Equality Act* is not challenged, I will contend that the judgement disappoints in its conceptual and contextual analyses. Instead of making the essential distinction between the limitation of constitutionally protected expression in terms of sec. 16(1) and unprotected expression contemplated in sec. 16(2) – more particularly, sec. 16(2)(c) – of the *Constitution*, the judgement confuses the issue. Rather than viewing discriminatory expression within the ambit of sec. 10 of the *Equality Act* as

19 Tlhabye "Stop fixating on media slurs – judge", http://www.iol.co.za/news/crime-courts/stop-fixating-on-social-media-slurs---judge-1981203 (accessed on 14 October 2016).

intrinsically unfair, it seemingly denounces a fairness standard. In addition, the court's analysis gives little if any consideration to the positive impact of response to discriminatory expression that constitutes hate speech, in particular in the South African social-media context. I will argue that the South African society's condemning response in word and deed to, in particular, racist remarks in the social media warrants recognition for contributing to the facilitation of the equal society contemplated by the *Equality Act*, a contribution that may be annulled by the chilling effect of a generalised, unqualified labelling of all forms of hurtful speech related to group characteristics, as "hate speech", and an ensuing unnuanced regulation of expression within this broad ambit.

1.2.2 The criminal case

I will further contend that the common law offence of *crimen iniuria*, construed so as to embrace general utterances against groups on the societal plane, disregards the quest for the narrowest restriction of free speech that informed the formulation of international instruments and declarations regulating free expression. It ignores the narrow boundaries of particularly sec. 16(2)(c) of the *Constitution*, which closely resembles sec. 20 of the International Covenant on Civil and Political Rights (ICCPR),[20] adopted by the United Nations General Assembly in 1976 after much controversy.[21] It furthermore negates the reformative approach taken by the *Equality Act*, instead opting for categorical criminalisation of hurtful or harmful expression related to group characteristics. Ultimately, this approach renders the carefully designed hate speech provisions of the *Equality Act*, which are aimed at the healing of our injured society, redundant.[22]

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20 Office of the High Commissioner for Human Rights "International Covenant on Civil and Political Rights", http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (accessed on 21 September 2016). The interpretative relevance of the convention was recognised in *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* 1996 3 SA 617; 1996 5 BCLR:par. 29.

21 In a study prepared for the regional expert meeting of art. 19, it was contended that only expression under this article should be criminalised. See Bukovska *et al.* "Towards an interpretation of article 20 of the prohibition of incitement to hatred. Work in progress", http://www.ohchr.org/Documents/Issues/ Expression/ICCPR/Vienna/CRP7Callamard.pdf (accessed on 15 October 2016).

22 See Marais 2015:472-475, 477-478. The article calls for legislation to criminalise hate speech that falls under sec. 16(2)(c) of the *Constitution*, but is not criminalised in terms of existing legislation or the common law. Various efforts to do this have been undertaken. The *Prevention and Combating of Hate Crimes and Hate Speech Bill* was published for comment in 2016. However, as a result of substantial criticism of the terms of the *Bill*, the intended legislation has not yet been finalised.

2. The Equality Court judgement in *Sparrow*

2.1 The application for postponement[23]

This issue is particularly relevant to this article's analysis of the *Equality Act's* approach to hate speech outside the ambit of sec. 16(2) of the *Constitution*.

The respondent's daughter attended court seeking a postponement of the hearing, but failed to satisfy the court that there were compelling reasons to postpone the matter. The court took into account that the respondent had elected not to file any opposition or contest the case in court, and directed that the proceedings continue in the absence of the respondent in terms of reg. 12(4)(a)(11) under the *Equality Act*.

The rationale for addressing this aspect in this contribution is not to consider whether the facts indeed substantiated a refusal to postpone.[24] The concern is the court's stated approach that, while in the majority of other matters in law the relevant consideration in reaching a decision to grant or refuse a postponement is whether a postponement will be in the interest of justice, the test for postponement is more stringent in Equality Court matters where "a greater degree of satisfaction" based on compelling reasons or circumstances is required.[25]

The principles that apply to applications for postponement in civil litigation were clearly established in *National Police Services Union v Minister of Safety and Security*.[26] A party who applies for postponement applies for an indulgence and must, therefore, show good cause for the interference with the other party's procedural right to proceed and the general interests of justice in having matters finalised.[27] The application must be made timeously and *bona fide*. However, fundamental fairness and justice may justify a postponement in a particular case, even though the application was not timeously made or the applicant is otherwise to blame.

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23 *ANC v Penny Sparrow*:2-18.

24 *ANC v Penny Sparrow*:15-17. The Court summed up the basis for the application for postponement as that the respondent was fearful for her life, that she has been unable to secure legal representation, that she would like to apologise and that she, or her daughter, was asked to be present, failing which a warrant for her arrest would be authorised. On the other hand, the Court took into account that there were several attempts to serve the institution of the application on the respondent, that she was aware of the hearing, that she had four and a half months to either obtain legal representation, to contact the complainant's legal representatives, or, for that matter, even the Clerk of the Equality Court to communicate her difficulties which, apparently, she has not done.

25 *ANC v Penny Sparrow*:13.

26 *National Police Services Union v Minister of Safety and Security* 2001 8 BCLR 775 (CC).

27 *National Police Service Union v Minister of Safety and Security*:par. 4.

> What is in the interests of justice will in turn be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay.[28]

The court, in its discretion, may direct the applicant to pay the respondent's wasted costs.[29]

This approach is particularly relevant in the context of Equality Court litigation, as is reflected by the guiding principles for adjudication of proceedings instituted under sec. 4 of the *Equality Act*, which reads as follows:

> (1) In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:
>
> (a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings;
>
> ...
>
> (c) the use of rules of procedure in terms of section 19 and criteria to facilitate participation;
>
> (d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature; ...

Reg. 10 of the regulations promulgated under the *Equality Act*[30] provides as follows:

> (1) The inquiry must be conducted in an expeditious and informal manner which facilitates and promotes participation by the parties.
>
> (2) The regulations regulating the proceedings of the inquiry must, as far as possible, be interpreted in a manner that gives effect to the guiding principles contemplated in section 4 of the Act.
>
> (3) The proceedings should, where possible and appropriate, be conducted in an environment conducive to participation by the parties.
>
> ...
>
> (7) Save as is otherwise provided for in these regulations, the law of evidence, including the law relating to competency and

28 *National Police Services Union v Minister of Safety and Security*:par. 5.

29 *Insurance & Baking Staff Association v SA Mutual Life Assurance Society* 2000 2 ILJ 386 (LC):par. 44.

30 *Regulations relating to the Promotion of Equality and Prevention of Unfair Discrimination Act*, 2000, GN R764/2003.

> compellability, as applicable in civil proceedings, applies in respect of an inquiry: Provided that in the application of the law of evidence, fairness, the right to equality and the interests of justice should, as far as possible, prevail over mere technicalities.
>
> ...
>
> (12) The presiding officer may in compelling circumstances postpone an inquiry.

Reg. 12(4)(a) provides for a cost order against the respondent if the respondent fails to attend without offering a reasonable excuse.

In my view, Equality Court postponements, like postponements in civil courts, require compelling reasons and consideration of the public interest. In terms of the *Equality Act*, the need to facilitate participation by all parties relates to the vision of advancing the equal society envisaged by the *Constitution*, instead of simply punishing and alienating those who still have not freed themselves from the chains of racism and other discriminatory prejudices, and should weigh in favour of granting a postponement. Participation is essential to achieve full utilisation of the innovative corrective, restorative and preventative measures provided by the *Equality Act*. These measures include an order for an unconditional apology to be made,[31] and an explicit provision that the court may, during or after an inquiry, refer any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.[32]

The respondent in the *Sparrow* matter was defamed by the indignation and wrath of those she had humiliated, and of others dedicated to the ideals of our constitutional society. Many came to view her as a symbol of the racism that continues to taint our society. Many with like views realised society's general stance on racism. The court stated that "[a]s best it is known, no public apology has been forthcoming from the Respondent following this incident", and expressed the view that "this serves to aggravate her conduct and adds insult to the grave hurt caused".[33] Agreeing to a postponement and granting her an opportunity to address the court might have enabled the court to ascertain whether she had grown in understanding and was feeling any regret – whether she had made the paradigm shift that the *Constitution* requires of those who cherish racist ideas. If she did, the Court would have the opportunity to make an appropriate order in all the relevant circumstances, an order that would give positive momentum to the strive for the truly equal society. In this light – also considering that a postponement would have hardly caused any prejudice to the ANC that could not have been dealt with by means of a cost order – granting postponement could well have been the more appropriate route to go in this instance.

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31 *Equality Act*:sec. 21(2)(j).
32 *Equality Act*:sec. 21(4)(b).
33 *ANC v Penny Sparrow*:49.

2.2 The constitutional framework

2.2.1 The Equality Court's approach to the right to freedom of expression

Having acknowledged the relevant constitutional rights to equality, human dignity, freedom of opinion and freedom of expression, the judgement reflects on the inevitable tension between the right to freedom of expression and the right to human dignity.[34] In this regard, it quotes the following dictum from the Constitutional Court judgement in *SADF v Minister of Defence*:[35]

> [F]reedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial ...[36]

This dictum is then compared to what the court describes as "a more balanced approach [that] appears to have been adopted [in] the further development of jurisprudence around the right to freedom of expression". In this regard, the court refers to *S v Mamabolo*,[37] where it was held that freedom of expression is not a pre-eminent right ranking above all others and automatically trumping the right to human dignity.[38] This perspective is then followed up with a focus on human dignity as a "core fundamental human right which constitutes the moral justification for many other universally accepted fundamental rights."[39] Note, however, that the statement in *Mamabola* was made in comparing the First Amendment of the American Constitution to the corresponding provision in the South African *Constitution*, namely sec. 16(1),[40] and that the judgement in *SADF* did not view freedom of expression as a pre-eminent right, but merely stated the

34 *ANC v Penny Sparrow*:38-40.

35 *SADF v Minister of Defence* 1999 6 BCLR 615 (CC). The question under consideration was whether it is constitutional to prohibit members of the armed forces from participating in public protest action and joining trade unions.

36 *ANC v Penny Sparrow*:39-40.

37 *ANC v Penny Sparrow*:40. The *S v Mamabolo* 2001(5) BCLR 449 (CC) case concerned the constitutionality of the crime of scandalising the court.

38 *S v Mamabola*:par. 41.

39 *ANC v Penny Sparrow*:40.

40 *S v Mamabola*:par. 41.

interrelated values that informed its protection, also recognising that it may be limited subject to justification under sec. 36.[41]

It seems, therefore, that the Equality Court in *Sparrow* misinterpreted the *SADF* judgement, which may have caused it to disregard the obligation to promote the freedom-of-expression guarantee by generalising its approach to "hate speech" that falls under sec. 16(2)(c) of the *Constitution* and "hate speech" under the extended ambit of sec. 10 of the *Equality Act*.[42] This approach negates that, while the unprotected expression under sec. 16(2) of the *Constitution* is intrinsically irreconcilable with the foundational values of our democratic society and as such may be categorically prohibited without need for further consideration, the limitation of constitutionally protected expression has to be justified. In the case of conditional limitations of protected expression, this entails the case-by-case determination of constitutionality by means of a proportionality analysis.[43] On the other hand, the terms of categorical prohibitions of protected expression, in this instance sec. 10 of the *Equality Act*, should intrinsically capture the relevant proportionality considerations. A purposive interpretation and application of sec. 10 should reflect this essential principle.[44]

I will indicate in this contribution how the Equality Court failed to make the said distinction. In fact, in its application of the elements of sec. 10 to the Sparrow post, the court diluted the elements of sec. 16(2)(c) of the *Constitution* and ultimately concluded that these elements were all present. I will argue that its findings are not in accordance with the relevant definitions of "advocacy", "hatred", and "incitement". I will further contend that the court's approach, in fact, jeopardises the protection of our society against expression contemplated by sec. 16(2)(c), as well as the healing of our wounds as contemplated by the *Equality Act*. While expression under sec. 16(2)(c) does fall within the ambit of sec. 10 of the *Equality Act*, the transformative nature of the *Act* primarily provides measures to deal with expression outside the scope of sec. 16(2)(c) of the *Constitution*. Expression that constitutes incitement, as contemplated by sec. 16(2)(c), will hardly be adequately addressed by the sanctions available to the Equality Court. Sec. 10(2) thus provides that the court may, where appropriate, without prejudice to any remedies of a civil nature under the *Act*, refer a hate speech matter as contemplated in subsec. (1), for the institution of criminal proceedings in terms of the common law or relevant legislation.[45]

41 See *Islamic Unity Convention v Independent Broadcasting Authority*:paras 24-28.

42 There is a strong consensus that the ambit of sec. 10 with respect to the nature of the expression that is covered is considerably broader than that of sec. 16(2)(c) of the *Constitution*. See the description of these relevant aspects of sec. 10 in 2.3.1 below.

43 See *Equality Act*:sec. 14.

44 Marais & Pretorius 2015:901-905.

45 See Marais 2015:472-475, 477-478. The article calls for legislation to criminalise hate speech that falls under sec. 16(2)(c) of the *Constitution*, but is not criminalised in terms of existing legislation or the common law.

My central contention is that the Equality Court, in its conceptual interpretation as related to the relevant facts of the matter, underplayed the constitutional guarantee of freedom of expression and failed to duly distinguish the different forms of hate speech within the scope of sec. 10 of the *Equality Act*, namely hate speech that also falls under sec. 16(2)(c) of the *Constitution* and, therefore, enjoys no constitutional protection, and hate speech outside the ambit of sec. 16(2)(c), which may only be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, including freedom of expression.

2.2.2 International law

In accordance with sec. 39 of the *Constitution*, the Equality Court considered international law instruments that explicitly reflect the right to dignity as a fundamental human right. The judgement reiterates that the preamble to the Universal Declaration of Human Rights (UDHR) "begins with the assertion that the inherent human dignity and the equal and alienable rights of all persons is the foundation of freedom, justice and peace".[46] However, no mention is made of international agreements that protect the right to freedom of expression, in particular art. 19 of the International Covenant on Civil and Political Rights (ICCPR).[47] Significantly, these agreements were not only informed by the right to freedom of expression, but also involve the protection of both human dignity and democracy. In terms of human dignity, the *Constitution* includes in its concept of human dignity not only self-esteem and an entitlement to respect from others, but also autonomy and self-fulfilment – values that are central to the freedom-of-expression guarantee. In terms of democracy, in the words of Judge Kriegler in *S v Mamabola*,

> access to the marketplace of ideas and equal opportunity to participate in the public discourse are of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having 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.[48]

46 *ANC v Penny Sparrow*:41. The relevant phrase in the UDHR reads: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, …".

47 Office of the High Commissioner for Human Rights "International Covenant on Civil and Political Rights", http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (accessed on 20 October 2016).

48 *S v Mamabolo*:par. 37. See also *Islamic Unity Convention v Independent Broadcasting Authority*:par. 24; *South African National Defence Union v Minister of Defence* 1999 ZACC 7; 1999 6 BCLR 615 (CC); 1999 4 SA 469 (CC):par. 7.

2.2.3 Sec. 16(2)(c) of the Constitution

In its analysis to determine whether the words posted by the respondent constituted "hate speech", the Equality Court considered the defining elements of sec. 16(2)(c).[49]

Sec. 16(2) of the *Constitution* explicitly stipulates and defines forms of expression that fall outside the protective ambit of sec. 16(1). These forms of expression do not warrant protection, because they have no potential to promote any of the values that inform the constitutional guarantee of the right to freedom of expression, but, instead, constitute an imminent threat to these values and, ultimately, to the right to freedom of expression itself.[50]

The first two exclusions in terms of secs 16(2)(a) and (b) relate to extremist expression that threatens democracy by inciting war or violence. The hate speech contemplated by sec. 16(2)(c) poses the same threat, denying those who are targeted the right to exercise their constitutional rights, including the right to freedom of expression. The section specifically excludes from the right to freedom of expression in sec. 16(1) "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".[51] The deviation from the general approach to broadly interpret constitutional rights and subject their limitation to justification in terms of sec. 36 of the *Constitution* reflects the extremity of the expression envisaged in this instance, and calls for a narrow interpretation.[52]

In this light, it is clear that sec. 16(2)(c) is not so much concerned with outlawing the expression or promotion of hurtful or offensive unfairly discriminatory views, but rather with preserving the foundational values of the *Constitution*, including the right to freedom of expression. It is about the proven risk to human rights posed by incitement through the advocacy of hatred, which should not be addressed by any lesser means than criminalisation. Art. 18 of the German Basic Law, by acknowledging that, in order to sustain itself, a free democracy needs to restrict the very fundamental freedoms that define it, including freedom of expression, reflects the same approach. It provides that whoever abuses freedom of opinion, in particular freedom of the press, as well as other stipulated rights to attack the free, democratic basic order forfeits these basic rights.[53] Yet, it should be reiterated that even restrictions on activist speech should be cautiously viewed, bearing in mind that, in the words of Nadine Gordimer, "the regime of racism in South Africa was maintained not only by brutality

49 Specific references will be provided in the course of this discussion.
50 Marais 2015:460.
51 Marais 2015:458; Rosenfeld 2002-2003:1549, with reference to art. 18 of the German Basic Law.
52 Marais 2015:457.
53 Krotoszynski 2004:1590.

– guns, violence, restrictive laws. It was upheld by elaborately extensive silencing of freedom of expression".[54]

With respect to the element of advocacy, the judgement states:

> The words posted by the respondent directly evokes (*sic*) enmity and ill-will towards black people simply because they belong to a particular race or ethnic origin or colour. As such that must amount to the advocacy of hatred based on a prohibited ground.[55]

However, the term "advocacy" seems to be more concerned with a particular manner of, and intention with expressing words. *Black's Law Dictionary* defines advocacy as "the act of pleading for or actively supporting a cause or proposal". Milo and colleagues state that, in practising advocacy, a speaker promotes hatred, or attempts to instil hatred in others.[56] According to principle 12(1) of the so-called Camden Principles on Freedom of Expression and Equality,[57] the term should be understood as "requiring an intention to promote hatred publicly towards the target group". Human rights organisation ARTICLE 19,[58] in turn, considers advocacy to be present when the expression conveys a specific and unambiguous call for violence, hostility, or discrimination.[59]

The *Sparrow* judgement goes on to state that the harm contemplated in sec. 16(2)(c) is not limited to physical harm.[60] This statement should be qualified. In the context of sec. 16(2)(c), the infliction of harm originates from intense hatred. Milo and colleagues point to the implication that, for the harm to be capable of being incited, it must be "concrete". Such harm may include hateful statements at a neighbourhood meeting that call for the lynching of blacks, for harassing phone calls to be made to black neighbours, or for the conclusion of agreements not to sell houses in the neighbourhood to black persons. It may indeed include both physical and psychological harm, but does not extend to expression that merely stirs up feelings of hatred in the audience, even though the expression may be experienced as extremely hurtful by the target group.[61]

In *Sparrow*, the respondent's words are then related to the definition of hatred found in the Canadian case *R v Andrews*,[62] in which the appellants belonged to the Nationalist Party of Canada, a white nationalist political organisation. They were convicted under sec. 319(2) of the Canadian

54 Gordimer 2012, https://www.nybooks.com/articles/2012/05/24/south-africa-new-threat-freedom/ (accessed on 30 June 2017).
55 *ANC v Penny Sparrow*:46.
56 Milo *et al.* 2008:42-80.
57 ARTICLE 19 2009.
58 ARTICLE 19 is an international organisation that promotes freedom of expression. For more information on its status and work, see http://www.article19.org/pages/en/what-we-do.html.
59 Bukovska *et al.* 2010:13.
60 *ANC v Penny Sparrow*:43.
61 Milo *et al.* 2008:42-83.
62 *ANC v Penny Sparrow*:46; *R v Andrews* 1990 3 SCR 870.

Criminal Code,[63] which criminalises the wilful promotion of hatred against any identifiable group. Included in the publications that formed the subject matter of the prosecution were copies of the *Nationalist Reporter*, letters written by subscribers, subscription lists and mimeographed sticker cards containing messages such as "Nigger go home", "Hoax on the Holocaust", "Israel stinks", and "Hitler was right. Communism is Jewish". Counsel for the appellants summarised the ideology expressed by the material as follows:

> [T]he material argues that God bestowed his greatest gifts only on the "white people"; that if it were God's plan to create one "coffee-coloured race of 'humanity' it would have been created from Genesis"; and that therefore all those who urge a homogeneous "race-mixed planet" are, in fact, working against God's will. In forwarding the opinion that members of minority groups are responsible for increases in the violent crime rate, it is said that violent crime is increasing almost in proportion to the increase of minority immigrants coming into Canada. A high proportion of violent crimes are committed by blacks. America is being "swamped by coloureds who do not believe in democracy and harbour a hatred for white people". The best way to end racial strife, an excerpt opines, is by a separation of the races "through a repatriation of non-whites to their own lands where their own race is the majority ...". The "Nationalist Reporter" also promulgated the thesis that Zionists had fabricated the "Holocaust Hoax" and that because Zionists dominate financial life and resources, the nation cannot remain in good health because the "alien community's interests" are not those of the majority of the citizens either culturally or economically.[64]

Leave to appeal to the Supreme Court of Canada was granted, not on the merits of the case, but with respect to constitutional questions, including the constitutionality of what is now sec. 319(2) of the Criminal Code. Chief Justice Dickson concluded that the infringement of the right to freedom of

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63 The section reads as follows:
Wilful promotion of hatred
(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.
Defences
(3) No person shall be convicted of an offence under subsection (2)
(a) if he establishes that the statements communicated were true;
(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

64 *R v Andrews*:I.

expression in terms of sec. 319(2) could be justified.[65] With respect to the element of hatred, he used his own definition of hatred formulated in *R v Keegstra*, which, *inter alia*, reads:

> Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.[66]

In my view, Sparrow's post, unacceptable as it was, can hardly be compared to the form of harmful speech reflected in the *Keegstra* definition and the *Andrews* case. The post contained no call for the infliction of harm on the target group, nor did it threaten the target group with violent action.

The final aspect that the Equality Court considered to determine whether the Sparrow post constituted hate speech, apparently was whether the Sparrow post constituted incitement to harm.

Under the heading "Consequences", the judgement mentions that Sparrow's words were highly inflammatory; that there was a huge public outcry, and that members of the community were deeply hurt, offended and enraged. In addition, the judgement states:

> We would do well as a nation in transition to remember that words are powerful weapons which, if used indiscriminator[il]y, can lead to extreme and unacceptable action. Retaliation by members of affected groups could possibly be violent, resulting in racial conflict, strife and general chaos on a national scale in South Africa.[67]

Do these considerations substantiate a conclusion that the Sparrow post constituted incitement as contemplated by sec. 16(2)(c) of the *Constitution*?

In answering this question, it should be noted that sec. 16(2)(c) is not primarily concerned with the direct hurt and harm that the expression caused the target group, but with whether or not people other than those targeted were incited by the advocacy of hatred to inflict harm on the target group.[68]

ARTICLE 19 designed a threshold test to provide courts with a framework for explaining the distinction between incitement under art. 20 of the ICCPR, which resembles sec. 16(2)(c) of the *Constitution* and warrants criminal sanction, and other expression, which can be sanctioned by means of civil law.[69] As a point of departure, hatred is viewed as the most severe and deeply felt form of opprobrium. Advocacy, they say, must be understood as intentional action. An unambiguous call, in a provocative

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65 *R v Andrews*:IV. No restriction as in sec. 16(2)(c).
66 *R v Keegstra*:par. D(iii)a.
67 *ANC v Penny Sparrow*:48.
68 Milo *et al.* 2008:42-83.
69 Bukovska *et al.* 2010:13-15.

tone, for violence, hostility or discrimination would suggest the possible presence of incitement. The level of the speaker's authority or influence over the audience is also relevant, as is the degree to which the audience is already conditioned to take their lead from the inciter. The courts will have to determine that there was a reasonable probability that the speech would succeed in inciting real action, recognising that such causation should be rather direct.[70] The criteria for assessing such probability on a case-by-case basis are as follows:

> Was the speech understood by its audience as a call to acts of discrimination, violence or hostility?
>
> Was the speaker able to influence the audience?
>
> Was the audience able to commit the acts?
>
> Had the targeted group suffered or recently been the target of discrimination, violence or hostility?[71]

As mentioned earlier, Sparrow's post did not call for harmful action to be taken against black people. It could also not reasonably be understood to do so. Even if a textual interpretation possibly substantiated some implied call of this nature, the respondent was by no means an influential leader, and the addressees did not comprise a group of people susceptible to mobilisation by her and her views. Examples of incited actions that would satisfy the requirement of incitement would be if white people, in response to the post, would gather on beaches to keep black people out by whichever means, or if white people visiting beaches would start barring black people from using facilities on the beaches, or put up notices that black people were not welcome, or if members of municipalities, inspired by hatred, would call meetings to take decisions that would effectively deny black people access to beaches. These or similar actions would not foreseeably be caused by Sparrow's post. The reality is that many members of our society maintain racist, sexist, homophobic, xenophobic and other discriminatory views. When an ordinary member of society expresses these views, it will certainly hurt and harm; it might reinforce these views, but it will generally not incite as contemplated by sec. 16(2), in particular sec. 16(2)(c), of the *Constitution*. In Sparrow's case, the content of the expression as well as the speaker as an individual were met with overwhelming condemnation among black and white South Africans. The expression evidently did not threaten democracy by victimising those targeted, along with their supporters, to the extent that they were denied their constitutional rights, including the right to freedom of expression. As

70 Milo *et al.* submit that, for purposes of sec. 16(2)(b), "'incitement' involves actively encouraging, calling for or pressurising others to engage in acts of violence where the threat of the violence occurring is imminent". The speaker should subjectively intend to incite imminent violence, and it should be objectively likely that such violence will result from the expression.

71 Bukovska *et al.* 2010:13-15.

stated in *Islamic Unity Convention v Independent Broadcasting Authority and Others*:

> Not every expression or speech that is likely to prejudice relations between sections of the population would be "propaganda for war," or "incitement of imminent violence" or "advocacy of hatred" that is not only based on race, ethnicity, gender or religion, but that also "constitutes incitement to cause harm".[72]

Hence, even expression that intends to incite harm, when it is unlikely that the addressees will indeed be incited as intended, will be restricted in terms of sec. 10 of *the Equality Act* not as unprotected expression, but as protected expression that sufficiently complies with the essential requirements of the prohibition.

Accordingly, in my view, the Sparrow post, for the various reasons indicated earlier, fell outside the ambit of unprotected expression contemplated in terms of sec. 16(2)(c) of the *Constitution*; hence, its prohibition in terms of sec. 10 of the *Equality Act* is not informed by the implicit and unfettered obligation on the state to enact legislation to eliminate expression within the ambit of sec. 16(2) of the *Constitution*. But sec. 10 extends to the prohibition of protected expression. In my view, the categorical limitation in terms of sec. 10 of the *Equality Act* that exceeds sec. 16(2) of the *Constitution* is related to the constitutional values and principles of equality and human dignity. This relation, and its implications for the protection of the right to freedom of expression, will be discussed next.

2.2.4 Secs 9(3) and (4) of the Constitution

Secs 9(3) and (4) of the *Constitution* prohibit unfair discrimination and require the enactment of legislation that prevents and prohibits unfair discrimination. The *Equality Act* aims to give effect to this requirement and its provisions, including the prohibition of unfairly discriminatory expression in terms of sec. 10, should be understood in this light.[73]

72 *Islamic Unity Convention v Independent Broadcasting Authority and Others*:par. 34.

73 Marais & Pretorius 2015:904-905.

2.3 Sec. 10 of the Equality Act

2.3.1 The primary aim of the prohibition

There is a strong consensus that the ambit of sec. 10 of the *Equality Act* with respect to the nature of the expression that is covered is considerably broader than that of sec. 16(2)(c) of the *Constitution* in the following respects:

> Firstly, the provision 'could reasonably be construed to demonstrate a clear intention … to incite harm' exceeds section 16(2)(c) on the basis that section 16(2)(c), in contrast to section 10, requires actual constitution of incitement, which implies a likelihood that the intended aims of the expression will be realised. Secondly, section 16(2)(c) restricts the mode of expression to the advocacy of hatred, in contrast to the much less restricted modes of expression in terms of section 10. Thirdly, in contrast to the four grounds for 'hate speech' in terms of section 16(2)(c), all the prohibited grounds in terms of the *Equality Act* are included in section 10. Fourthly, section 10 not only involves expression that incites to cause harm, but also expression that directly harms or hurts.[74]

I have concluded above that the Sparrow post should have been considered as protected expression that could potentially be restricted in terms of the broader scope of sec. 10. Yet the Equality Court in *Sparrow* confined its consideration of the broader ambit of sec. 10 of the *Equality Act* to a recognition of the inclusion of the prohibited grounds in terms of sec. 1 of the *Act*,[75] a statement that sec. 10 prohibits "not only the publication of but also the propagation, advocation and communication of hate speech"[76] and a brief comment that "(t)he proviso in section 12 of the *Equality Act* relating to expression which does not attract liability" is clearly not applicable in the case. Rather than strictly applying the definitional elements of hate speech under sec. 16(2)(c), concluding that the Sparrow post did not comply, and then considering whether it nonetheless fell under the broader scope of sec. 10, as indicated above, it diluted the elements of sec. 16(2)(c) of the *Constitution* to substantiate its finding of compliance with sec. 10. In so doing, the court negated the constitutional aims that underlie the limitation of the right to freedom of expression in terms of sec. 10 of the *Equality Act.*

The broader scope and the primary aim of sec. 10, together with other provisions of the *Equality Act* – particularly the prohibition on unfair discrimination in terms of sec. 6 –, should be directly related to the requirement in terms of secs 9(3) and (4) of the *Constitution* to enact legislation that prevents and prohibits unfair discrimination.[77] The

74 Marais 2014:355-356.

75 *ANC v Penny Sparrow*:42.

76 *ANC v Penny Sparrow*:47. It should be noted that the statement does not reflect "propagation, advocation and communication" as elements of the "hate speech" that is prohibited.

77 Marais & Pretorius 2015:901-905.

Equality Act recognises in its preamble that a history of colonialism, apartheid and patriarchy is deeply embedded in the social structures, practices and attitudes that generate the systemic inequalities and unfair discrimination that undermine the aspirations of our constitutional democracy. Therefore, the *Act* endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom. To this end, its specific goals with respect to hate speech are:

> ...
>
> c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;
>
> ...
>
> e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;
>
> (f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed.[78]

Clearly, the facilitation, conciliation and promotion of mutual understanding envisaged by these provisions of the *Act* do not relate to criminal law processes and do not supply sufficient means to protect society against the threats of expression contemplated by sec. 16(2)(c) of the *Constitution*. It follows, then, that the *Act* aims to give effect to the constitutional values of human dignity and equality outside the judicial realm of the punishment of crime or delictual liability for the violation of personality rights. Therefore, although sec. 10 inevitably covers the extreme hate speech contemplated by sec. 16(2)(c) of the *Constitution*, additional legislative measures should be in place and employed to deal with expression of this nature appropriately.

2.3.2 The question of fairness

In terms of the *Constitution*, discrimination is unconstitutional when it is unfair.[79] Sec. 6 of the *Equality Act* prohibits unfair discrimination. Secs 7, 8 and 9 of the *Act* provide examples of unfair discrimination. These prohibitions of the *Equality Act* are subject to a fairness analysis in terms of sec. 14 of the *Act*. The examples provided by secs 7(a) and (b) are specifically concerned with discrimination based on race, constituted by expression. Sec. 7(a) provides as follows:

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78 *Equality Act*:sec. 2.

79 Secs 9(3) and (4) of the *Constitution* prohibit unfair discrimination.

> Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including … the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence.

So-called hate speech, whether narrowly or broadly defined, essentially concerns expression causing hurt or harm related to group characteristics. Hence, per definition, it is a form of discrimination.

In *Islamic Unity Convention v Independent Broadcasting Authority and Others*, the court stated that, where the state extends the scope of regulation beyond expression envisaged in sec. 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in sec. 36(1) of the *Constitution*.[80] Since its enactment, the *Equality Act*'s fairness standard provides the required opportunity for justification.[81] Therefore, when hate speech outside the ambit of sec. 16(2)(c) is categorically prohibited without provision for a fairness assessment, it should be inferred that unfairness is intrinsic to the definition of the prohibited expression. (The categorical prohibition of hate speech contemplated by sec. 16(2)(c) of the *Constitution* requires no such consideration. It does not enjoy constitutional protection, for other reasons than its unfairness *per se*.) Context is, of course, relevant in determining a balanced outcome where the interrelated and integrated values of freedom of expression, human dignity and democracy compete. Therefore, categorical regulation of expression outside the ambit of expression that is explicitly excluded from constitutional protection, will not be constitutionally compliant if it is not narrowly defined to strictly cover expression that has no potential to promote rather than jeopardise these values.[82]

As a result of the categorical prohibitive nature as well as the specific requirements of sec. 10 of the *Equality Act*, the following distinctions between secs 6 and 7, and sec. 10 of the *Act* can be drawn. A complainant under sec. 6, read with sec. 7(a), will not need to establish any form of intention, but will need to prove disadvantage.[83] Unfairness will be determined in terms of sec. 14 of the *Act*. In this analysis, the impact and purpose of the dissemination on the target group will be considered. This conditional approach acknowledges that the proportional value of free expression may render even hurtful or harmful discriminatory expression fair and constitutional.[84] By contrast, the complainant, in terms of sec. 10 of the *Act*, will need to establish that a clear intention to be hurtful,

80 *Islamic Unity Convention v Independent Broadcasting Authority and Others*:par. 32.

81 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC):par. 70.

82 *Khumalo v Holomisa* 2002 8 BCLR:771.

83 Intention is not generally a requirement of either direct or indirect discrimination in South African and comparative law. See Albertyn *et al.* 2001:58.

84 Marais & Pretorius 2015:914-915.

harmful or to incite harm or promote or propagate hatred related to a prohibited ground was demonstrated. If so established, disadvantage and unfairness will be assumed. The proviso in sec. 12 of the *Act*[85] reaffirms and illuminates that the sec. 10 prohibition only involves expression that falls within the ambit of sec. 16(1) of the *Constitution*, and which is not *bona fide* (in contrast to expression that reflects the intention described in terms of sec. 10).[86] (Obviously expression under sec. 16(2) of the *Constitution* has no prospect of being *bona fide* as contemplated by the proviso.)

Against this background, the Equality Court's statement that "[t]he question of fairness does not apply to hate speech in terms of section 15 of the Equality Act [and] [a]ccordingly, a determination of fairness or unfairness of the words posted by the respondent is of no relevance"[87] calls for the following comment.

Sec. 15 of the *Equality Act* indeed provides that, in cases of hate speech and harassment, the determination of fairness or unfairness in terms of sec. 14 does not apply. However, instead of excluding fairness as an essential element of hate speech under sec. 10 or, for that matter, harassment under sec. 11, the categorical nature of the sec. 10 and 11 prohibitions implies that unfairness is intrinsic in the terms of the provisions. In my view, had sec. 10 not been specifically included in the *Act*, alleged incidents of hate speech would have been justiciable under sec. 6, subject to the fairness assessment set out in sec. 14.[88] Having said that, it is comprehensible why the legislature, in terms of sec. 10 of the *Equality Act*, opted for a separate and categorical prohibition of discriminatory expression that is primarily and demonstrably aimed at hurting and harming related to group characteristics.[89] First, the explicit statement of zero tolerance signals a positive commitment to the healing contemplated in the preamble to the *Constitution*. It alerts South Africans to the dignity-impairing consequences of expression of this nature.[90] Secondly, sec. 10

85 The proviso reads as follows: "Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or, for example, Pretorius 2015: ude.visible way (please revise this section of the footnote) publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section."

86 The proviso explicitly indicates that it only applies to expression under sec. 16(1) of the *Constitution*.

87 *ANC v Penny Sparrow*:47.

88 Harassment similarly constitutes unfair discrimination and is prohibited in sec. 11 of the *Equality Act*.

89 Expression will reflect the intention required in terms of sec. 10 (will be *mala fide*) when it is primarily aimed, not at practising art, at communicating an opinion or information, or at other expressive conduct contemplated by sec. 16(1) of the *Constitution* and by the proviso, but at hurting or harming others related to their constitutionally protected characteristics.

90 A number of forums provide for mediation processes, to which a presiding officer of the Equality Court may refer a matter. These include the Human Rights Commission and the Commission on Gender Equality. See *Equality Act*:sec. 20(3)(a).

alleviates the burden on the complainant to make out a *prima facie* case of discrimination,[91] which, in terms of the *Act*'s definition of discrimination in sec. 1, includes the establishment of an element of disadvantage. The damage ensuing from hate speech under sec. 10 often relates to the broader effect of hate speech on society. To require proof of this effect on a case-by-case basis will constitute an overwhelming burden, which will put marginalised groups at a particular disadvantage. Overall, the prohibition ensures a better likelihood of effectively achieving the reformative societal goals, particularly the preventative goals, of the *Equality Act* than what would have been possible through a case-by-case development that is complaints driven, retrospective and requires evidence of the detrimental effects of an incident of discriminatory expression.[92]

It may be worthwhile to employ practical scenarios involving other prohibited grounds than race to illustrate my contention in this regard. A policy decision taken by a company that only males will be considered for appointment in a vacant position constitutes discrimination, the fairness of which to be determined in terms of the relevant constitutional principles and applicable legislation. If, for instance, it is established in terms of sec. 14 of the *Equality Act* that the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned, the discrimination will be fair. The expression of a *bona fide* view by a board member that it is not advisable to elect female board members who have children, because, in the view of the speaker, their children, and not their work, will always be their first priority, will only verifiably constitute discrimination once this view takes the form of a policy or manifests in unequal treatment to the disadvantage of women. The fairness of such discrimination will similarly be determined in terms of sec. 14 of the *Act*. In this instance, the stereotypical basis for the unequal treatment will undoubtedly weigh against a conclusion of fairness. By contrast, an articulation that females were created to bear children and should not be trusted with anything that requires thinking will squarely fall within the ambit of sec. 10. Rather than primarily conveying a *bona fide* point of view, this utterance can reasonably be construed to be intentionally employed as a tool to hurt or harm, as contemplated by sec. 10.

It is significant to note that societal context is relevant in determining *mala fides*. It can be assumed that South Africans are aware that using certain terms or epithets or likenesses will inevitably hurt and harm those who are targeted, and/or will promote hatred or even incite harm. No one can still be oblivious of the wounds that were inflicted to thousands of our fellow South Africans. Yet, empathy is a scarce virtue and sometimes closed eyes need to be opened to face the reality of others' pain. *Ubuntu*, in my humble understanding of such a virtuous concept, requires us to always put the wellbeing of our troubled society first, even if it requires tolerance, tireless persuasion, in particular by means of communication

91 *Equality Act*:sec. 13.
92 Kok 2008:128; Marais & Pretorius 2015:905.

and response, facilitation and, ultimately forgiveness of those who grow in understanding, feel remorse and join the quest for the equal society envisaged by our *Constitution*.[93]

Had Penny Sparrow *bona fide* observed a situation on the beach that she regarded as unacceptable, her properly voiced concerns might have drawn attention to the need for proper facilities to accommodate South Africans who have to travel vast distances to visit the country's beaches on public holidays. Care should be taken that the chilling effect of hate-speech regulation will not silence observations of this nature.

By contrast, however, her post contained racist comments that did not constitute expression contemplated by sec. 16(2)(c) of the *Constitution*, but can reasonably be construed to demonstrate a clear intention to cause hurt and harm on the basis of race, a result that Sparrow must have foreseen and could avoid without limiting her protected right to express a *bona fide* opinion. Ultimately, her statements were of little proportional value in promoting the ideals of the *Constitution*, in general, and freedom of speech, in particular. This brought the post well within the ambit of the prohibition of hate speech in terms of sec. 10 of the *Equality Act*, and, for that matter, outside that of the proviso in terms of sec. 12 of the *Act*.

Sparrow's absence from court frustrated reconciliation. Nonetheless, apart from that, the judgement missed an opportunity to draw a clear distinction between the extreme nature of the threat posed by expression contemplated by sec. 16(2) of the *Constitution* and the harsh measures that should be employed to protect society against its realisation, and expression that abuses freedom of speech to hurt and harm others or to promote hatred outside this ambit, that should be addressed, to the extent that it will be appropriate, by means aimed at transformation. The discussion of the court's generalised remarks with respect to the criminalisation of hate speech which will follow, will reflect the undesired consequences of an indiscriminate approach.

2.4 Criminalisation

In my view, the contention by the court in *Sparrow* that "[s]ections of society that are painfully slow to change or that refuse to, given our disgraceful history, should perhaps be compelled to do so under the threat of criminal sanction"[94] is simply too broad and its foreseeable effect when broadly applied to protected expression, too chilling, in particular when prohibition is categorical. Branding members of society as criminals, only because

93 In *S v Makwanyane* 1995 3 SA 391 (CC):par. 307, Mokgoro J stated that: "(w)hile (ubuntu) envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation". For a comprehensive discussion of the concept, see Himonga *et al.* 2013:370-374.

94 *ANC v Penny Sparrow*:51.

they still entertain racist, sexist, homophobic or xenophobic views, will sterilise the sincere commitment in the preamble to the *Constitution* to "heal the divisions of the past", and will frustrate the *Equality Act*'s objective to achieve this by facilitating the eradication of unfair discrimination, hate speech and harassment, as well as educating and raising awareness among the public on the importance of promoting equality.[95]

Moreover, arguably, if expression that hurts or harms related to group characteristics is generally criminalised, all forms of unfair discrimination should be criminalised. It goes without saying that this is not feasible, particularly in a wounded society undergoing transformation.

In response to generalised analogies between hate speech (excluding incitement and other forms of constitutionally unprotected speech) and assault, Bhardwaj and Winks[96] contend that different considerations are at stake, stating that, while "to wield fists and firearms" can claim no constitutional protection, freedom of expression "is constitutionally enshrined and encouraged, as the lifeblood of democracy". In particular, the "chilling effect" of the criminalisation of expression could "cow courageous journalists", and consequently deprive citizens of their right to be informed. They go on to say:

> Even if the state does not discharge its onerous burden of proof, the very existence of the crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal.[97]

Criminal liability "stains every sphere" of the convicted person's life. He/she "becomes a criminal, and must disclose that every time he applies for a job, a visa or even a bank account". Clearly, the same public disapproval that the criminal law casts on murderers, rapists and thieves "precisely for its deterrent potency" does not apply to injurious speech.[98]

In line with this approach, the African Commission on Human and Peoples' Rights (ACHPR) adopted a resolution on repealing criminal defamation laws in Africa. It provides as follows:

> [C]riminal defamation laws constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners to practice (*sic*) their profession without fear and in good faith.[99]

This is particularly so when less restrictive remedies are available in the form of civil defamation and the right of reply.[100]

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95 *Equality Act*:Preamble, sec. 2.
96 Bhardwaj & Winks 2013.
97 Bhardwaj & Winks 2013.
98 Bhardwaj & Winks 2013.
99 African Commission on Human and Peoples' Rights 2010.
100 Bhardwaj & Winks 2013.

Certainly, the thought of, like Penny Sparrow, being on the receiving end of society's wrath, becoming a pawn in political games, or losing one's job or business support also has a deterring effect, without the permanent legal effects of criminalisation. Criminalisation represents institutionalised state action that irretrievably labels transgressors and reduces the potential of inconsiderate speakers ever truly growing in insight and commitment to the society envisaged by the *Constitution* once they realise the effect of their words on those they have disrespected. When society overreacts, as, in my view, for instance, in the case of Gareth Cliff's remark that people do not understand freedom of speech,[101] institutions such as the South African Human Rights Commission (SAHRC) and the Equality Court can and should set the tone with principled reasoning and innovative measures designed to reconcile, while strongly confirming the right to freedom of expression as an essential attribute of a democracy based on freedom, human dignity, and equality.[102]

2.5 The cyber context

The Equality Court in *Sparrow* failed to consider the effects of the cyberspace context, in general, and in South African society, in particular. The following contentions are central to this discussion.

A UNESCO study on countering online hate speech found that, while hate speech online is not intrinsically different from similar expression offline, online content and its regulation do pose certain unique challenges relating to its permanence, itinerancy, anonymity and cross-jurisdictional character.[103] The study confirms the importance of differentiating between three types of expression, namely

i. expression constituting an offence under international law, which can be prosecuted criminally;

ii. expression not criminally punishable, but which may justify restriction and a civil suit, and

iii. expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others.

While the law has a role to play in respect of type (i), state-initiated legal measures are not a sufficient response to the full spectrum of speech that can contribute to a climate for hate crimes. Instead, the study places particular emphasis on civil society and social steps, including an online community that mobilises to counter and marginalise hateful messages.[104] Correspondingly, Cassim submits that countries should use educational and public awareness campaigns to raise consciousness about the scope

101 See fn. 4.
102 See for example, the Theunissen matter in fn. 4.
103 Gagliardone *et al.* 2015:13-15.
104 Gagliardone *et al.* 2015:16.

and impact of online hate speech and to foster tolerance and respect for diversity.[105]

In fact, distinguishing valueless from valued expression is perhaps more compelling in the cyber context, for two reasons. On the one hand, the features of online expression increase the intrinsic danger of incitement as well as fundamentalist and often emotional and irrational threats. Such extreme hate speech cannot be addressed by counter-speech, and facilitation offers little if any likelihood of creating any good for society. The risk, in this instance, calls for swift and strict response, including the criminalisation of the hate speech concerned. On the other hand, in a democratic society, where most of the citizens strive towards peace and mutual respect, the cyber context can also contribute to the achievement of an equal society. The internet gives marginalised groups a voice to respond on an equal footing to those who make hurtful discriminatory remarks. An overwhelming online condemnation of unfair discrimination in accordance with the values of the *Constitution* has a huge capacity to reaffirm not only every person's right to be respected by others, but also the autonomy of a democratic society. It puts positive pressure on empowered members of society to clearly adopt, develop and display a culture of fairness and take legitimate action against perpetrators. On the online platform, employers, businesspeople, political leaders and social groups can demonstrate unity in a very visible way, whether based on inherent conviction or economic, political or societal sensibility, thereby exerting societal pressure, which has a much better likelihood of bringing about a change in thinking and attitude than criminal punishment.

The magistrate in *Sparrow* observed:

> The words published by the Respondent received unprecedented coverage nationally and internationally. With it came a great deal of hurt, suffering, shame, embarrassment and anger for South Africans of all races.[106]
>
> ...
>
> The words published by the Respondent are also highly inflammatory. There must have been a realization on the part of the Respondent that members of society would be enraged at the comments posted ... There was, not surprisingly, a huge public outcry and members of the community were deeply hurt, offended and enraged.[107]

Importantly, neither violence nor an imminent violent response is mentioned anywhere. Society responded by overwhelmingly rejecting Sparrow as an individual and as representative of those South Africans whose conduct still reflects a "reluctance to change".[108] Ignorant white South Africans

105 Cassim 2015:312.
106 *ANC v Penny Sparrow*:47.
107 *ANC v Penny Sparrow*:48.
108 *ANC v Penny Sparrow*:42.

were confronted with the painful reasons for black people's resentment of being likened to monkeys. Therefore, this collective online response had the potential to generate sincere transformation through social pressure.

Bronstein anticipates that, as South African society transforms, expression with negative racial connotations may be experienced as less wounding.[109] As we evolve, more members of the target group, along with those passionate about the values of equality across the dividing lines that still prevail in our society, will collectively condemn discriminatory views. The marketplace of ideas that social media have become is a perfect platform to promote and achieve this mind shift. This also applies to the internet publication of the imposition of a remedy in terms of sec. 21 of the *Equality Act*, *inter alia* a declaratory order, an order making a settlement between the parties to the proceedings an order of court, an order for the payment of damages in the form of an award to an appropriate body or organisation, an order that an unconditional apology be made or an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question. The impact on society in promoting the aims of the *Act* will be particularly substantial when the relevant matter has drawn society's attention.

2.6 The award

The appropriate award in *Sparrow* was, *inter alia*, determined by comparing the matter to other matters that the magistrate regarded as less serious. In *Strydom v NG Gemeente Moreletta Park*, for instance, an amount of R75 000 was awarded to an individual applicant as redress for the impairment of his dignity as well as his emotional and psychological suffering when his employment contract was terminated when it became known that he was in a homosexual relationship. In *Sonke Gender Justice Network v Malema*,[110] the respondent was held to have transgressed both the hate speech (sec. 10) and harassment (sec. 11) provisions of the *Equality Act*. It was taken into account that, when he made the remarks in question, Malema was a prominent political leader wielding significant social and political influence over young people, in particular.[111] The order to pay R50 000.00 to People Opposed to Women Abuse (POWA), coupled with an order to issue a public apology within two weeks from the date of the judgement in the form of a press release, pertained to both transgressions. In *Nomasomi Gloria Kente v Andre van Deventer*,[112] the court accepted evidence that the respondent, who was the boyfriend of the employer of the complainant, a domestic worker, grabbed the complainant by her pyjamas, spat in her

109 Bronstein 2006:18.
110 *Sonke Gender Justice Network v Malema* 2010 7 BCLR 729 (EqC).
111 *Sonke Gender Justice Network v Malema*:par. 17(b).
112 *Nomasomi Gloria Kente v Andre van Deventer* (EqC), unreported case no EC 9/13, 24-10-2014, Cape Town Magistrates Court.

face and told her that she was a "pathetic Kaffir", that "Kaffirs had stolen our land", that he hated "Kaffirs", and that he hated her. The respondent was found to have committed hate speech and harassment, and the court awarded R50 000 in damages, and ordered the respondent to make a public apology. What makes these matters rather different from *Sparrow*, however, is that they either did not involve hate speech at all, or involved other transgressions in addition to hate speech. They all entailed distinct aggravating circumstances.

A more directly comparable judgement, which the magistrate failed to consider, is that of the Equality Court in *Afri-Forum v Malema*, where it was held that Malema had published and communicated words that could have reasonably been construed to demonstrate an intention to be hurtful, to incite harm, and to promote hatred against the white Afrikaans-speaking community, including the farmers who belonged to that group.[113] The contextual circumstances appear from the following dictum:[114]

> The important point is that at a time prior to the singing of the song, on 22 March 2010 and 26 March 2010, there was a public uproar about Malema singing the song. The public had interpreted the words which he sang as being an attack upon a sector of the community namely the Boer/farmer who were loosely translated as being the Afrikaans-speaking sector of the community. That sector of the community was angered about the use of words which they saw as an incitement to people who heard the words to attack them. It is also apparent, and this is the evidence before me, that at that time farmers and white Afrikaans-speaking members of society who lived in isolated areas (on plots and farms) felt themselves at threat. [There is no evidence that anyone … suffered physical consequence as a result of the song being sung].

However, note that, in contrast to the *Sparrow* matter, the element of fear was clearly present in the *Malema* case. Moreover, while there was a real risk that a threat levelled by a political leader of Malema's standing could incite violence and harm to others, one would expect an unknown estate agent's insulting words to be treated with the condemnation and resentment it deserved and, in fact, received.[115] Viewed in this context, the large disparity between the order in *Sparrow* to pay damages to the amount of R150 000 as well as costs, and the order in *Malema* to pay the claimants' costs limited to a three-day hearing, seems unfounded.[116]

3. The *crimen iniuria* case

In addition to the trial in the Equality Court, Penny Sparrow was, on 12 September 2016, charged with *crimen iniuria* for having unlawfully and intentionally injured, assaulted and impaired the dignity of five named

113 *Afri-Forum v Malema*:par. 108.
114 *Afri-Forum v Malema*:par. 78.
115 See the examples of incited action on p. 45 above.
116 *Afri-Forum v Malema*:par. 120.

individuals by posting her message. She submitted a plea of, and was found guilty. The basis of her plea was that, on the relevant date, she and friends observed that the local streets and beach were laden with refuse and litter, presumably from the revellers who had taken part in the New Year's celebrations. She later posted the comment in question in response to other Facebook comments on the littering. She did not realise the gravity of her comments at the time. However, upon realising the error of her inconsiderate remarks, grasping that several people had taken offence and felt aggrieved by her statements, she immediately posted various apologies.[117]

According to Snyman, *crimen iniuria* is "the unlawful, intentional and serious violation of the dignity or privacy of another".[118] Burchell states that, as a general rule, the victim of *crimen iniuria* must have been subjectively aware of the insulting or disrespectful conduct; otherwise, there can be no claim for damages or a criminal prosecution. If the victim, on becoming aware of the conduct, does not feel his/her dignity impaired, it would generally seem that *crimen iniuria* was not committed, even though, objectively, the conduct was insulting.[119]

Burchell provides the following summary of the general test for impairment of dignity under the common law, as laid down by the Supreme Court of Appeal in *Delange v Costa*:[120]

> (a) The plaintiff's self-esteem must have been actually impaired and (b) a person of ordinary sensibilities would have regarded the conduct as offensive, tested by the general criterion of unlawfulness, namely objective unreasonableness.

The courts have established that expressive conduct "of an insulting, humiliating or vulgar nature, or those with racial overtones" can potentially have this effect.[121] While it is usually assumed that conduct that will offend a reasonable person will subjectively offend every person, this is not necessarily the case.[122] For this reason, the conduct complained of needs to be tested "against the prevailing values and norms of society",[123] as established in terms of the *Constitution*.[124]

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117 *State v Penelope Dora Sparrow* 708/2016 (unreported case in the Scottburgh Magistrate's Court).

118 Snyman 2014:461; Milton 1996:492. See in particular, Snyman's explanation for including both dignity and privacy in the definition, while, traditionally, the interests protected by this crime were designated by the Latin term *dignitas*. With respect to the term *dignitas*, see also Bhamjee & Hoctor 2006:670.

119 Burchell 2014:258.

120 *Delange v Costa* (433/87) 1989 ZASCA 6; 1989 2 All SA 267 (A):paras 15-17; Burchell & Milton 2005:749; *S v Mostert* 2006 1 SACR 560 (N).

121 Bhamjee & Hoctor 2006:671.

122 Snyman 2008:471-472.

123 Burchell & Milton 2005:749; *S* v *Bugwandeen*:796A-C; *S* v *Steenberg*:596e-f.

124 *Carmichele v Minister of Safety and Security*:par. 56.

In *Van der Merwe v S*, a plea of guilty on the basis of *dolus eventualis* was accepted. The court described the case as "a very rare iniurious matter", remarking that the lack of direct intention distinguished it from the vast majority of classic cases of *crimen iniuria*.[125]

Already at this stage of the discussion, it is clear that Sparrow's plea of guilty should not have been accepted. It did not state the existence of a subjective intention at the time of the offence, nor is it clear that the self-esteem of each of the individual complainants was actually impaired.

This conclusion still leaves for consideration the legal issues of whether the common law offence of *crimen iniuria* extends to discriminatory utterances against groups, and if so, whether the offence is constitutional. An in depth discussion of the first issue falls outside the scope of this article.[126] As far as the second issue is concerned, the following considerations are relevant.

Burchell,[127] Snyman,[128] Van der Berg[129] and Milton[130] all contend that a criminal sanction for defamatory words may be too drastic a means of regulating free speech. Their supporting arguments include the existence of a relatively well-developed civil law remedy, the small number of prosecutions, the limited redress available to a victim through a criminal

125 *Van der Merwe v S* (A366/10) 2011 ZAFSHC 88; 2011 2 SACR 509 (FB):par. 66.

126 I could not find any precedent in text book examples or case law where an attack of such nature constituted the offence. (*S v M* 1979 2 SA 25 (A); *S v Bugwandeen* 1987 1 SA 787 (N), *S v Steenberg* 1999 1 SACR 59(N); *Ryan v Petrus* 2010 1 SACR 274 (ECG); *S v Henning*; *S v Steyn* (A480/2011) 2012 ZAWCHC 106; *Pistorius v The State* (253/13) 2014 ZASCA 47 are examples of direct verbal attacks on individuals.) Snyman 2014:463 states: "An attack, not against Y himself, but against some group to which he is affiliated (for example his language group, his religion, race or nationality) will normally not constitute a violation of his dignitas, unless there are special circumstances from which an attack on his self-respect can be deduced. Milton 1996:493 states: "The crime of *crimen injuria* in principle protects the interest of human dignity. Dignity is that aspect of human personality that is not embraced by the concepts of *corpus* and *fama*…The prevailing view is that that dignity is a composite concept embracing the human claim to respect for the individual's sense of self-respect, mental tranquillity and privacy…Self-respect and tranquillity are violated by insult (contumelia) addressed to the individual and which affects his or her subjective sense of self-respect or personal esteem." On the other hand, it cannot be denied that the dignity of an individual can be violated by an insult against the group to which he/she belongs. An in-depth analysis to determine whether or not the common law offence requires that the relevant insult must be directed at an individual rather than a group is vital, but falls outside the scope of this article.

127 Burchell & Milton 2005:325.

128 Snyman 2008:476.

129 Van der Berg 1989:289-290.

130 Milton 1996:520.

prosecution,[131] and trends in other jurisdictions.[132] Botha[133] also raises red flags in using dignity as a way to resolve constitutional conflicts. These include that:

> constitutional dignity may be uncritically conflated with individual honour; personality rights may be privileged over countervailing interests like freedom of expression, which are just as vital to the dignity and autonomy of the human person; and classical-liberal assumptions about individual choice and consent may find their way back into the deliberations of a Court which has publicly disavowed these beliefs.

He then points to the following irony:

> [D]ignity may become so saturated with meaning that it would simply replicate the tensions it is supposed to mediate. It may thus turn into a mechanism for leafing over, rather than engaging constitutional value conflicts.[134]

Considering the implications of criminalisation and its chilling effect on freedom of expression, the offence of *crimen iniuria* construed so as to criminalise on an exceptionally broad basis general discriminatory utterances against groups that may fall significantly far outside the ambits of section 16(2)(c) of the Constitution and art. 20 of the ICCPR, categorically determines the constitutional tension between the rights to freedom of expression and dignity without due consideration of the disproportional

131 In *S v Henning* (ECJ 2004/008) 2004 ZAECHC 14, it was common cause that the appellant, a white male, swore at the complainant, a black male, by, *inter alia*, calling him a "kaffir". The Eastern Cape High Court described this as a serious incident of *crimen iniuria*, but nevertheless regarded the sentence of four months' imprisonment imposed by the court *a quo* as inappropriate. It was stipulated that no high court case record, including records of unreported decisions as far back as 1998, could be found in which an effective term of imprisonment was imposed or confirmed on review or appeal in a case of *crimen iniuria* of a similar nature. Taking into account the sentences imposed in recently decided, similar matters, as well as the fact that the *Henning* matter, as a result of its circumstances, warranted a heavier sentence, the court set aside the sentence and substituted it with a fine of R3 000 or six months' imprisonment, of which R1 500 or three months' imprisonment was conditionally suspended for five years.

132 *S v Hoho* 2009 1 SACR 276 (SCA):par. 32. Sec. 319(2) of the Canadian Criminal Code prohibits expression that "promotes hatred against any identifiable group". This does not apply to private speech, and proof of the subjective impairment of individual complainants' dignity is, therefore, not required. Sec. 185 of the German Criminal Code, in turn, generally criminalises insult. In the *Soldiers Are Murderers* decision, BVerfGE 93, 266-312I, the court held that the larger the collective to which a disparaging statement refers, the weaker the extent to which an individual member can be personally affected. The court also distinguished between a speaker's views of the demerits of a group and violating the personal honour of an individual member of the group.

133 Botha 2009:201.

134 Botha 2009:201.

impact of the restriction on free discourse. This entails disregard for international agreements and guidelines that call for the criminalisation of expression only under extreme and strictly defined circumstances. It also practically nullifies the carefully designed, transformative hate speech provisions and remedies of the *Equality Act*.

Clearly, then, in light of the *Constitution,* if the criminal law offence of *crimen iniuria* by means of expression does not narrowly apply to insult directed at a particular individual, but extends to general discriminatory utterances against groups to which the individual is affiliated, it does not pass constitutional muster.

4. Conclusion

In my view, the Sparrow debacle demonstrated the growing maturity of the South African democracy, particularly in respect of exercising the right to freedom of expression. Instead of responding to group insult by violent means, society effectively used its powers of rejection. This power was enhanced by the internet as medium of communication. On a less favourable note, however, the judgements failed to reflect that, while it remains necessary to use rigorous state power to abolish extreme hate speech that constitutes incitement to harm, especially online, hateful expression that falls outside this ambit but within the broader ambit of sec. 10 of the *Equality Act* calls for remedies aimed at healing in our convalescent society. Lastly, it is in violation of the right to freedom of expression to invoke the common law offence of *crimen iniuria* to deal with hate speech not directed at an individual, but against a group to which he/she is affiliated.

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