

45<sup>th</sup> Alfred and Winifred Hoernlé Memorial Lecture

# **Should hate speech be against the law?**

**Mark Oppenheimer**

"I can't define pornography, but I know it when I see it."

Many people have a similar feeling about hate speech. One view is that hate speech is simply speech that I hate. The danger with defining it this way is that it's incredibly personal. We feel a strong sensation within ourselves that there are certain things we despise, and we want to ban them. If we can label speech as hate speech, we can then use the power of the state or society to say, "This speech must be silenced."

If we are to regulate speech, if we're going to impose criminal or civil sanctions, we should know precisely what constitutes hate speech. But before we get there it is crucial to recognise the value of free speech.

We are fortunate to live in a country that enshrines this value in its Constitution. South Africa has one of the more liberal Constitutions in the world, in part because we come from a time when free speech was not respected, a time of extensive censorship under Apartheid.

I often think about what was on banned lists. The book *Black Beauty* was banned—not because it was about a horse, but because it suggested that black people could be beautiful. Certain vinyl records had parts scratched out so they couldn't be played on public radio. There were long lists of ideas suppressed, and images banned. It's astonishing to reflect on that history of thought control and censorship, and it's partly why our constitution values free speech so highly.

Everyone in South Africa has the right to free speech, and there is special mention of a free press. At times, newspapers have played a crucial role in uncovering terrible truths about the government, whether during Apartheid or now. It's important to protect this freedom.

Academic freedom, particularly scientific inquiry, is specifically safeguarded. The idea of the university is that it's a place where people can explore ideas that may seem strange or unacceptable elsewhere, giving them a safe space to do so.

Artistic freedom is also explicitly protected, as is the artistic process itself—not just the end product, but the journey that the artist embarks on. These protections are clearly enumerated in our constitution.

Why should free speech be protected? There are several traditional reasons, one of which is that it's an effective way to discover the truth. By allowing people to express falsehoods, the truth has a chance to emerge in the ensuing clash of ideas. Sometimes, a false idea may persist for a while before it topples, or a true idea may vanish temporarily before we rediscover it. When people are free to speak, we are more likely to find the truth, not only in moral matters but also in understanding the world around us.

Some of you may have seen the TV series *Chernobyl*. It's partly about a nuclear disaster, but it's also about the consequences of a culture of fear, where people don't feel free to speak their minds. Those Soviet scientists were so afraid of telling the truth; that admitting there was a problem became unthinkable. In the opening scene, someone insists that a reactor explosion is impossible. People stare reality in the face, but the consequences of acknowledging the truth are so severe that they deny it, and people die as a result.

Throughout history, people have been victimised for speaking the truth. If you suggested that the Earth was not at the centre of the universe, or that interracial or gay couples should have the right to marry you could have been persecuted. These ideas were once considered unutterable. Free speech allowed these ideas to spread, leading to changes in public opinion.

If we value ourselves as human beings with agency, it is important to engage in independent deliberation. Access to information and open discussion enable us to determine whether something is a good or bad idea.

If everything sent to you is filtered by the state, your friends, or family, it's hard to say that you lead a life of dignity. You're not able to make genuine choices if things are hidden from you. To be a free human being and to lead a life filled with agency and dignity, it's essential to have access to information, to speak your mind, and to hear what others have to say.

Similarly, democracy itself depends on free speech. We need to know the views of those running for political office. What do different political parties believe? Are they the kinds of views we should support? Often, we hear things said by politicians that shock us. We find them incredibly offensive, and some of us might even feel they shouldn't be allowed to say such things. But it provides important information. One way to ensure that those politicians never rise to total power is to hear them out and choose not to vote for them. Democracy truly flourishes in sunlight, when dangerous and despicable ideas can be exposed.

There's also a need for a culture of tolerance. Often, people speak about tolerance as if we only tolerate things we like. But we don't tolerate sunsets, butterflies, and unicorns. We tolerate things we dislike. I might really dislike your taste in music, but I tolerate it. I believe you should be allowed to listen to your own music. However, over time, there has been a narrowing of what we're willing to tolerate. The range of ideas people feel free to express publicly has shifted dramatically. Things that were perfectly acceptable to say ten years ago might now be considered beyond the pale.

We see this especially in the last 15 years, as people have led their lives partly online. There's a public record of what they've said on Twitter, Facebook, or YouTube, and some of those things have resurfaced years later. What was acceptable 15 years ago is

sometimes now viewed as utterly despicable. So, there might have been a culture of tolerance then, but not now.

Why should we tolerate some of the horrible things being said? Partly because it's free information. For example, in South Africa, we don't have a rule against waving a swastika. Now, I think if you wave a swastika, you're doing something truly despicable. My grandparents escaped Nazi Germany; they lived under the yoke of Nazism before they fled to South Africa and were able to lead free lives here. But we almost never see it. And when we do, it's free information. We know there's a problem. We recognise this as an issue that needs to be addressed.

On the rare occasions that a swastika is scrawled on a wall or a university campus, the community can respond, recognising the need for more education. Mcebo Dlamini, who was the SRC president at WITS, once said he was a "friend of Hitler." The response was, "Maybe you don't understand the weight of what you're saying. Maybe you don't have a sense of history." The Johannesburg Holocaust and Genocide Centre invited him to learn what that meant and to engage with the horrors of the Holocaust. He changed his mind, and he publicly acknowledged his change of view. Allowing people to say terrible things can sometimes be useful for understanding the risks and for combating them through dialogue.

I've outlined why free speech matters. However, our constitution does set limits. It lists three areas where you do not have a right to free speech. The first is propaganda for war, the second is incitement of imminent violence, and the third is hate speech, defined as the advocacy of hatred based on race, gender, ethnicity, or religion that incites harm.

Let's unpack this. Consider propaganda for war; here, you're dealing with catastrophic harm. War involves extreme violence, a clash of civilisations—something we want to avoid. Then there's incitement of imminent violence, which means calling on someone to act in a way that will lead to immediate violence. John Stuart Mill, the famous liberal philosopher, describes the following scenario: you're standing in front of an angry mob that has surrounded a corn dealer's house. They're carrying pitchforks and lanterns, and you say, "You need to rise up against the corn dealer who is oppressing you. Do whatever it takes to get justice." There's a very good chance that, in this moment, they'll use those pitchforks to kill the corn dealer and burn down his stock. Mill argues that there's a reason to prohibit that speech in that specific moment.

However, he says that if you were to publish an identical statement in a newspaper, where readers are separated, perhaps enjoying breakfast, there's no immediate risk of violence. Therefore, that type of speech could be protected.

Now we come to the hate speech clause, where you'll note that it involves the advocacy of hatred. It calls on people to target those four limited groups and incite harm against

them. It doesn't necessarily have to incite violence or occur immediately, but it must incite harm.

This gives us an idea of the constitutional framework. Many non-lawyers see the Constitution as both a foundational, sacred document and the ultimate authority—and they're half right. It is the foundational document, and all law must be tested against it. But the actual law regulating free speech and hate speech is the Equality Act. This is an unusual piece of legislation, described as *sui generis*, meaning it's neither solely criminal nor civil. You cannot be incarcerated under the Equality Act for hate speech, discrimination, or harassment, but you can be fined, lose a license, or be ordered to apologise.

For a long time, there was considerable ambiguity about what the law actually required. I think the first time most people heard of the Equality Act was in the Penny Sparrow case. Penny Sparrow made an undeniably racist comment, comparing Black people to monkeys on a beach. This happened just after the country had rallied against Jacob Zuma for firing our finance minister, with protests and significant press coverage. Then, suddenly, a real estate agent from the middle of nowhere became front-page news.

The threshold that held her liable was quite different from that in the Constitution. She was found liable for hurtful speech, which was deemed hate speech. The Equality Act had defined hate speech as including the incitement of harm, harmful speech, and hurtful speech, but it was unclear whether all these elements had to be present or if any one of them was sufficient. The court ruled that a single element would be sufficient thus setting a low threshold for hate speech as merely hurtful speech.

I was later briefed in a case against Velaphi Khumalo. Velaphi had responded to Penny Sparrow by saying "we should do to white people what Hitler did to the Jews, that they should be burned alive, hacked to death, and their children used as garden fertilizer because they were all a bunch of racist fuck heads."

A complaint was raised against Velaphi which was an opportunity to clarify the law. Was it merely hurtful speech, or did it require something more? And, of course, to hold Velaphi liable for his statement, which clearly met the high constitutional threshold, as it was a call for mass violence based on race.

A further issue that arose was the principle of non-racialism, something the Institute of Race Relations champions strongly. This value, found in Section 1 of our Constitution, is often overlooked. It means that, regardless of the race of the speaker or the race of the targeted group, the law should be applied equally. In the Khumalo case, Judge Sutherland established that all are equal before the law. It does not matter whether someone

belongs to a majority or minority group; the law applies equally. He also ruled that interpreting the Equality Act as considering merely hurtful speech to be hate speech would conflict with the value of free speech. Therefore, he interpreted it conjunctively: the speech must be hurtful, harmful, and inciting of harm. Mr Khumalo was held liable under this high standard.

I later appeared in a case that is now regarded as the *locus classicus* in hate speech cases: the *Qwelane case*. Some of you may know Jon Qwelane as an anti-apartheid journalist who was also deeply religious. In 2008, he wrote an article about gay marriage. It's worth considering the context of the time. In 2006, South Africa became the fifth nation in the world to grant gay people the right to marry. This was a significant liberal victory, as our Constitution prohibits discrimination based on sexual orientation. However, it was a highly debated topic. Although the Constitutional Court opened the way for gay marriage, it acknowledged that people had strong feelings about it—secular and religious individuals alike might oppose it. For some, it was not only immoral for gay people to marry; it was inconceivable, as they believed that the institution of marriage inherently required a man and a woman.

So, the Constitutional Court instructed the legislature to address the issue, giving them two years to hold public hearings and gather public opinion. Ultimately, it was decided that gay people should be allowed to marry. Around this time, Qwelane wrote his article. He said, *"I do pray that some day a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the Constitution of this country, to excise those sections which give licence to men 'marrying' other men, and ditto women. Otherwise, at this rate, how soon before some idiot demands to 'marry' an animal, and argues that this Constitution 'allows' it?"*

The article's headline read, "Call Me Names, but Gay Is Not Okay," and it was accompanied by a cartoon of a man marrying a goat with the caption, "I now pronounce you man and goat." However, Qwelane neither wrote the headline nor created the cartoon.

Qwelane's article received what was likely the largest number of hate speech complaints the Human Rights Commission had ever seen. In the trial, he was held liable for hate speech. During the trial, evidence was presented regarding the harm caused by such speech. One of the most impactful testimonies came from a woman whose identity was kept confidential; she was a Black lesbian living in a township. She spoke of the horrors of being Black and gay in her community, including the threat of corrective rape, and discussed how articles like Qwelane's could contribute to this climate. When asked if there was a direct causal link between the article and what had happened to her, she said

no, but noted that it added to the climate of discrimination. Academics also provided evidence about how such speech could shape public attitudes.

Qwelane was held liable. I represented him, not in the original trial, but in the Supreme Court of Appeal and later in the Constitutional Court. In both courts we challenged the constitutionality of the legislation. The Supreme Court of Appeal acknowledged that while Judge Sutherland was trying valiantly to strengthen free speech rights by adding an “and” between the elements of hate speech, the text itself could not be fairly interpreted that way and was declared outright unconstitutional. It was replaced with language largely reflecting Section 16(2)(c) of the Constitution, which defines hate speech as advocacy of hatred against a group based on race, gender, ethnicity, or religion. Notably, sexual orientation was not listed.

Our Constitution includes a Limitations Clause, which allows rights to be limited if it's reasonable to do so. Part of the argument before the Supreme Court of Appeal was that the Constitution explicitly protected gay people in the Equality Clause, so it wasn't an oversight; the framers deliberately chose not to protect them in the hate speech clause. However, the Supreme Court of Appeal ruled that sexual orientation could be considered an analogous ground, given the history of persecution against gay people globally and in South Africa. But, once they declared the act unconstitutional and implemented a new interim test, they ruled they could not hold Qwelane liable, as that was not the test in place during his original case.

The matter then went to the Constitutional Court, and that decision has since become the gold standard for determining hate speech. The Court recognised that you don't need to prove a direct causal link between the speech and actual harm. They found the term “hurtful” to be unconstitutional and removed it. Instead of striking down the entire clause, they revised it, adding several protected grounds that were already in the Equality Act, such as sexual orientation, culture, and marital status. Ultimately, they held Qwelane liable, although he had passed away by the time the judgment was delivered in 2021, 13 years after his original article had been written. The Human Rights Commission had called on his family to apologise on his behalf, a suggestion the court found inappropriate.

Qwelane's case established a framework and a high threshold for hate speech law, where merely offensive speech is not classified as hate speech. The Court explicitly stated that speech which is shocking, disturbing, or offensive is protected; there must be a high threshold of harm, implying severe psychological trauma. This framework was put to the test with how the Old South African Flag was handled.

There's little affection for the Old Flag among South Africans, so much so that the litigation did not involve an individual accused of waving the flag. Instead, it stemmed

from a debate between two CEOs of different NGOs over whether banning the flag would be a good idea. This case was unique because, under South African law, there must be a live set of facts to bring a matter to court.

You can't just say, "Hey, we're having this debate; could you resolve it for us?" You're not supposed to go to court for opinions, but an exception was made in this case and the Equality Court and the Supreme Court of appeal declared most public displays of the Old South African Flag to be hate speech.

I gave a lecture at Wits University and asked the students if they had seen the Old South African Flag in the last six months—this was at the height of the litigation. Three hundred students were in the room, and every hand went up; they had seen it everywhere: in newspapers, on television, whenever there was any press coverage. Then, I asked them to think back five years: how many of them had seen the flag back then? Only two hands went up. So, the banning of the flag had a backfiring effect. People who found the flag offensive and had no prior affiliation with it now saw it as representing something beyond apartheid, perhaps as a symbol of freedom or resistance. People began using the flag or its colours to push back against the state, which highlights the danger of banning speech—it can cause pushback and alter the symbol's meaning.

After the GNU was announced, Jacob Zuma's daughter on behalf of MK created a logo for the African National Congress in the colours of the old South African flag accusing them of being racist sellouts akin to the National Party. I had previously raised a hypothetical example like this in the Supreme Court of Appeal, but they dismissed the suggestion as laughable. It is worth pondering whether MK committed an act of hate speech by publicly displaying the old South African flag. There was little outrage from the press and the question may not be answered.

Another case I'm known for is the *Kill the Boer* case. We planned to approach the trial in a manner similar to the Qwelane trial by presenting evidence to show the dangers of certain forms of speech. We were faced with the leader of the third-largest political party in the country standing in a stadium filled with 90,000 people, singing "Kill the Boer" and calling for violence against an ethnic minority group.

We presented evidence on farm murders and how disproportionate these numbers are compared to other crimes in South Africa. The murder rate in South Africa is about 33 per 100,000 people. Normally, only about five of those are from intruder attacks, as most murders are social fabric crimes resulting from domestic disputes or alcohol fuelled violence. Farm murders, by definition, all involve intruder attacks.

The murder rate among farmers is approximately 100 per 100,000, about 20 times the national average. It's more dangerous to be a farmer in South Africa than to be a police officer, which is an astonishing statistic not found anywhere else in the world. We then

presented testimonies from survivors whose spouses had been murdered in front of them. This led to my cross-examination of Mr. Malema, which was televised, providing a unique opportunity to hear his views directly. Over eight hours, Mr. Malema said some shocking things. He stated that if conditions were right, he would not hesitate to kill, that they were serious when they sang these songs, and that they would bomb the Union Buildings. When asked about the phrase “Kill the Boer” being written in blood over the bodies of a murdered mother and daughter on a farm, he refused to denounce the call for “slaughtering white people” or pledge that he would never do it.

This trial offered a rare look into the party’s actual values. It was astonishing to see this evidence daily in court and then read a very different portrayal in the papers that evening. Fortunately, a strong public record exists. A few years after the case concluded, Elon Musk tweeted clips from the trial, which were viewed over 30 million times and stirred significant alarm, accompanied by footage of Mr. Malema singing “Kill the Boer” in stadiums. Before the trial started, the official line was that they never sang “Kill the Boer,” only “Kiss the Boer.” However, one day during the trial, as we were entering the court, a band of EFF supporters blockaded the entrance, explicitly singing “Kill” at us and miming rifles. This forced them to abandon the “Kiss” argument, and since then, they have openly sung “Kill.”

The Equality Court ruled on the case, dismissing all of the evidence as irrelevant on the grounds that there was no causal link between the speech and any specific killing. This ruling outright defied the test set by the Constitutional Court in the *Qwelane* case. There was also an argument made that the term “Boer” was too ambiguous, suggesting it referred to the ANC government rather than an ethnic group. I imagine most of you didn’t think that when studying the AngloBoer War, it was about the British fighting the ANC. The matter is headed for to the Constitutional Court on appeal.

I mentioned the concept of academic freedom and the importance of universities as spaces for exploring unusual, unique, and challenging ideas. John Endres mentioned that I run a philosophy discussion show called *Brain in a Vat*, where we’ve interviewed about 250 academic philosophers from around the world. People express incredibly strange, fascinating ideas, particularly in moral philosophy. Around half of our episodes cover ethical topics like abortion, immigration, and sexual taboos—subjects that philosopher’s debate with ease. The goal is to understand each guest’s position, ask clarifying questions, and present objections to test the strength of their views, regardless of our own personal beliefs.

This process is the essence of philosophy: engaging with and scrutinising ideas in a civil, methodical way, following a kind of scientific method to discover truth, even in the normative space. Yet, universities worldwide, not just in South Africa, have become some

of the hardest places to have open discussions. In 2016, Flemming Rose was invited by the University of Cape Town's Academic Freedom Committee to deliver the annual TB Davie Lecture on free speech, but it was cancelled due to alleged threats of violence. This decision signalled that certain views would not be tolerated. However, once an institution submits to a "heckler's veto," it becomes difficult to resist future pressures.

It's worth noting that the Institute of Race Relations stepped up when UCT did not. Rose presented the most recent Hoernle lecture, which I attended on these premises, and no one was harmed. David Benatar, from the UCT philosophy department, also invited Flemming Rose to speak, again without incident.

UCT recently faced a similar situation. The new Vice Chancellor, Mosa Moshabela, who has been in office for about two and a half months, announced an open lecture featuring Claudius Senst, the CEO of *Bild*, a German newspaper, who was to speak on democracy, AI, and the media. However, a targeted campaign argued that *Bild* had, at times, taken a pro-Israel stance, making Senst an unacceptable speaker. In response to public pressure, the Vice Chancellor put the lecture on hold. It remains uncertain whether UCT will manage this difficult situation effectively. The Academic Freedom Committee is considering hosting a series of lectures on the importance and meaning of academic freedom

Academic freedom is indeed at stake, and there's an ongoing debate about its meaning. One view suggests that academic freedom is about ensuring people feel safe and comfortable, free from discomfort or emotional distress. By contrast, the traditional philosophical view is that a successful talk leaves you with "a stone in your shoe"—it makes you uncomfortable and challenges you to reconsider your beliefs over time.

Some individuals have taken a brave stance in hosting speakers with unconventional views.

One such figure in South Africa is Roman Cabanac. Roman ran *The Renegade Report* on Cliff Central for several years with Jonathan Witt. They started around the time of the #FeesMustFall movement, initially planning a short series that expanded to hundreds of episodes. They spoke to people from across the political spectrum, including liberals, conservatives, and traditionalists, engaging with their ideas and examining them critically.

They listened to them, giving each person an opportunity to speak, to find out what they believed. They entertained all sorts of weird, and wonderful views—many I would agree with and many I wouldn't. Ramon then went on to start another show called *Morning Shot*, which became extremely popular during COVID. With everyone stuck at home, people tuned in at 6 a.m., drinking their morning espresso and listening to his views. He was later invited to become John Steenhuisen's Chief of Staff, which is when many of you

first heard of Ramon. I don't think anyone in this room or watching online could name another Chief of Staff in South Africa's history, yet Ramon became famous in just two weeks.

The public's interest in his few remaining tweets and the pressure on the DA to remove him was immense. From what I can tell, there was much debate within the IRR regarding their views on the situation. While Ramon isn't a classical liberal like those in the IRR, he supports free markets, private property rights, and certain aspects of the Constitution. One part of the Constitution he supports is the recognition of monarchies; some of you may know we have seven officially recognised monarchies in South Africa.

Ultimately, Ramon was called on to resign, which some celebrated as a victory. But it sets a dangerous precedent: those willing to experiment and entertain unconventional ideas may hesitate in the future. It's challenging to be welcomed back after a public shaming, especially if you've been compared to "Hitler" in the media. This highlights that free speech is not just about the right to speak; it's about creating a culture of free speech where people can express offensive ideas without fear of backlash.

A cartoonist like Zapiro has done an excellent job poking fun at those in power, including various presidents. He has also taken stances that I find utterly repugnant at times, but he should be allowed to do so.

Dr. Sooliman, founder of *Gift of the Givers*, was recently invited to speak at the Helen Suzman Foundation's Memorial Lecture. An article pointed out that *Gift of the Givers* has ties not only to Palestinians but also to Hamas, which has been recognised as a terrorist organisation in several countries, though not in South Africa. Helen Suzman was a strong supporter of Israel and an outspoken opponent of anti-Semitism, so inviting someone with such strong anti-Israel views appeared misaligned with the foundation's values. Nonetheless, the Helen Suzman Foundation has decided to proceed with the lecture, saying they support free speech and the rule of law—even though Dr. Sooliman has said he doesn't consider himself bound by South African law but rather by Qur'anic law, admitting he has broken South African laws on several occasions.

There's value in letting the lecture go ahead, as the Foundation has made clear what they really value by inviting Dr. Sooliman. Their donors can make informed choices based on this decision. I imagine the lecture will proceed, giving everyone a chance to hear what Dr. Sooliman has to say.\*

*This speech was delivered live. It has been transcribed and edited for accuracy and clarity.*

*\*The lecture did proceed*

# The Hoernlé Memorial Lectures

The IRR is republishing the text of the Hoernlé Memorial Lectures, a series of talks which started in 1945. The original introductory note to the lecture series reads as follows:

*A lecture, entitled the Hoernlé Memorial Lecture (in memory of the late Professor R. F. Alfred Hoernle), President of the Institute from 1934—1943), will be delivered once a year under the auspices of the South African Institute of Race Relations. An invitation to deliver the lecture will be extended each year to some person having special knowledge and experience of racial problems in Africa or elsewhere.*

*It is hoped that the Hoernlé Memorial Lecture will provide a platform for constructive and helpful contributions to thought and action. While the lecturers will be entirely free to express their own views, which may not be those of the Institute as expressed in its formal decisions, it is hoped that lecturers will be guided by the Institute's declaration of policy that "scientific study and research must be allied with the fullest recognition of the human reactions to changing racial situations; that respectful regard must be paid to the traditions and usages of the various national, racial and tribal groups which comprise the population; and that due account must be taken of opposing views earnestly held."*

## About the IRR

Since 1929, the Institute of Race Relations has advocated for a free, fair, and prospering South Africa. At the heart of this vision lie the fundamental principles of liberty of the individual and equality before the law guaranteeing the freedom of all citizens. The IRR stands for the right of all people to make decisions about their lives without undue political or bureaucratic interference.