

The Constitution, Prejudice and Unfair Discrimination: Racism: To Criminalise or Not to Criminalise?

Following the recent incendiary and racist comments made by the now infamous Penny Sparrow, economist Chris Hart and Gauteng government employee Velaphi Khumalo, the question of whether or not racism should be criminalised has become a pertinent topic amongst civil society.

In response, the Wits School of Governance in collaboration with the Wits School of Law, the Ahmed Kathrada Foundation, the Nelson Mandela Foundation, the Oliver & Adelaide Tambo Foundation and the Delegation of the European Union to South Africa presented **Dialogue 4** in the **Development & Rights Series**.

The seminar tackled issues such as defining racism and the constitutional boundaries of the right to freedom of expression, and the regulation of hate speech. This article is a selection of major themes and highlights from the dialogue, aimed at giving readers a taste of perspectives and concerns from both the panellists and the audience.

The Panellists: Framing Comments



Adv Thuli Madonsela
[Moderator]



Cathi Albertyn



Faraaz Mahomed



Simamkele Dlakavu



Jallow Momodou



Millard Arnold

In keeping with the topic of the dialogue, the panellists in their individual and professional capacities represent passion for and commitment to overcoming racism and its damaging effects and consequences for individuals and society.

Adv Thuli Madonsela: the Public Protector, in the role of Moderator, masterfully framed the discussions, adding valuable insights from her extensive experience to the debate.

Cathi Albertyn, Professor of Law at Wits, provided a legal perspective on the meaning of racist hate speech, the role of the Constitution and the under-utilised Equality Act in protecting against racial bigotry, and some of the dangers of criminalising racist hate speech.

Faraaz Mahomed, Senior Researcher responsible for Equality at the SA Human Rights Commission, outlined the Commission's perspectives on racism, some of the challenges relating to criminalising racism, the need for rigorous and extensive consultation around this, and the value of using a variety of methods and approaches to tackle racism.

Simamkele Dlakavu, a producer of *The Big Debate* series and a Masters student at Wits University, spoke to the realities of systemic, power-based racism as experienced by young black South Africans, and her conviction that questions around criminalising racism served to avoid the deeper, more difficult issues of inequality and discrimination.

Jallow Momodou, current vice chair of the European Network Against Racism (ENAR) and the founder and chair of the Pan African Movement for Justice (PMI) in Sweden, spoke about the need for strong laws and decisive action against racism, and the potential these had to change attitudes and behaviour.

Millard Arnold, Executive Director of the South African Business Schools Association and Special Representative of the law firm Bowman Gilfillan, shared his view that combatting racism called for changing attitudes and behaviour rather than legislation, that the dignity of the individual was the best defence against racism, and that legislating against racism would validate the racist perpetrator.

Framing Quotes:

“More than 21 years since the advent of our democratic dispensation founded on the noble principles of forgiveness, reconciliation and healing in the interest of a united, non- racial, non-sexist and prosperous South Africa, there are still elements who are resisting efforts for racial unity and are working tirelessly to widen the racial rifts and tensions created by apartheid oppression...In the context of our painful past, racial bigotry...must be considered [a] serious human rights violation that must be punishable by imprisonment.”

– **Extract from a Statement issued by the Office of the ANC Chief Whip, 5 January 2016**

“For a democracy to thrive, the protection of the right to freedom of expression is of vital importance. If our right to engage in robust discussion and debate about political and social issues is curtailed, we lose some of our ability to form independent opinions. Our ability to think critically about the world we live in is diminished and it becomes ever more difficult to make meaningful and real political choices... But not all forms of speech make any contribution to democratic debate or enhance our personal well-being. In fact, some forms of expression harm individuals or groups with no discernible benefit for society, for individuals or for our democracy.”

– **Professor Pierre de Vos as cited in the *Daily Maverick*, 6 January 2016**

“Criminalising racist speech would be an unnecessary over reaction to brief and inconsequential outbursts by racial provocateurs. It would only create more antagonism and conceal real feelings that it is necessary to expose.”

– **Sikonathi Mantshantsha as cited in the *Financial Mail*, 21 January 2016**

“It would be almost impossible to legislate against racist speech...You can’t use the law to change behaviour in this instance.”

– **Millard Arnold as cited in the *Financial Mail*, 21 January 2016**

The Dialogue: Highlights and Key Themes

Racism and racist hate speech

The 4th Development & Rights Dialogue grappled with issues of racism and how it is made manifest through behaviour. Hate speech, in particular, was underscored as a troubling by-product of racist ideology.

Under the broader question of whether or not to criminalise racism is the question of whether or not to criminalise bigoted speech.

Further still, will the criminalisation of bigoted speech successfully address and eradicate structural racism, or will it simply suppress it?

Would the criminalisation of racist speech infringe upon the right to freedom of expression, and is the criminalisation of hate speech, particularly racist speech, the appropriate remedy in the South African context?



The moderator and panellists

The comments set forth by the panellists may be clustered into three main arguments: those for the criminalisation of racism, those against its criminalisation and those who felt that the criminalisation of racism would be an insufficient remedy on its own.

For Criminalisation:



The question of whether or not racism should be criminalised may be answered by considering countries in which anti-racism legislation exists. Many European countries have witnessed a proliferation of hate speech and racism legislation post World War II. Germany, for example, has instituted such laws to guard against the kind of xenophobic and anti-Semitic propaganda that gave rise to the Holocaust.

Given South Africa's own harrowing history of racial discrimination, it would seem obvious that the criminalisation of racism is a necessary measure. Current laws are not sufficient to discourage racists and only the criminalisation of racism will ultimately ensure the reformation of bigoted behaviour.

Against Criminalisation:

Racism is not easily defined and it would be a significant challenge to narrow racism to a particular form of speech or behaviour for the purposes of criminal prosecution. If racism is confined to a specific grouping of behaviours, we may overlook the ways in which it is made manifest in social and economic inequality. The danger then lies in not adequately addressing material, socio-economic injustices.

Further, it is almost impossible to criminalise attitudes and racist generalisations. Criminalising racism would only serve to veil prejudice and limit dialogue. What is required instead is education and critical discussion on the subject.

“...sometimes people are not aware that they are being racist; to criminalise something we are not aware of is jumping the gun.”

Faraaz Mahomed

For Criminalisation, but...

Laws to criminalise racist speech would only deal with the symptoms of racism and not the underlying cause. The undergirding logic of racism is power. Racism is about hierarchical power relationships and it is oppressive not because of prejudicial sentiment, but because it is a system that promotes domination and subjugation.

This debate cannot ignore the way in which racism is informed by the living legacy of colonialism. It is thus not enough to criminalise racism; we must also do the more difficult work of decolonisation and dismantling white domination.



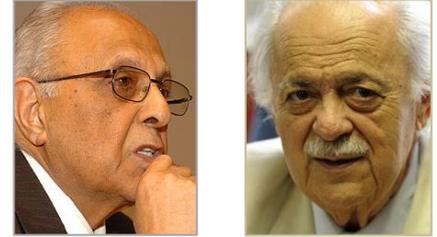
Racism and Power

Racism goes beyond prejudice, which may be defined as an attitude. It works to deliberately structure privilege by means of a differential and unequal treatment of people resulting in an ideology of supremacy.

Racism structures this power advantage politically, economically and culturally within a social system. Essentially, racism is the deliberate structuring of privilege. It comprises culturally sanctioned strategies that defend the power of white people and the subordinated position of blacks.

The structural and institutionalised features of power are key aspects of racial oppression. In South Africa, though the black majority hold political power, they still lack socio-economic power. The white minority still maintain a disproportionate share of society's power, property and privilege.

The question of criminalising racism must be considered within this broader context.



Special guests Ahmed Kathrada and Adv George Bizos

Hot Topics

Some key points of contention raised by the audience:

- Given the recent examples of bigoted behaviour, does the Rainbow Nation still exist?
- Are our constitutional commitments to equality and non-racialism upheld?
- Does South Africa's current democracy protect all citizens, or does it remain anti-black and anti-poor?

Are Existing Laws Sufficient?

Our civil legislation currently includes two important laws which safeguard against racism and racist speech:

- The first is the Employment Equity Act which protects workers and job seekers from unfair discrimination and also provides a framework for implementing affirmative action.
- The second is the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act). This Act prohibits unfair discrimination by the government and by private organisations and individuals and forbids hate speech and harassment.

Both acts provide civil remedies and recompense should an individual be subject to derogatory epithets or discriminatory behaviour. It may be helpful to consider whether or not we are underutilising these remedies before we seek to create a new law against discrimination. Chapter 5 of the Equality Act already contains a 'blueprint' to tackle systemic racism. This chapter creates a general duty and responsibility on the state to promote equality, and sets out the steps that the state should take in order to do so.

However, is this sufficient? Can the recent, disturbing incidences of racism be left merely to the processes of civil procedures and sanctions? Is racial bias ingrained in the South African legal system?

"The judicial system in South Africa is flawed. Racism is embedded in the law and blacks don't have as much access as whites do to the judicial system, or power within that system." Simankele Dlakavu

Do race categories perpetuate racism?

Two views were expressed:

- The continued use of race categories reinforces the view that people are different – even though we are trying to undo the damage done by apartheid.
- Unless I confirm my category, how can we show to what extent the system is transforming?

Race and Racism as Social Constructs

Some individuals posit that the best way to end discrimination is by recognising the fallacy of racism and treating individuals as equally as possible, without regard to race.

Others would argue that this view is problematic because it fails to recognise how racism is enforced on an institutional level. While individuals may work to disregard race in their own lives, society continues to be racialised and racism continues to function independently of individual motivations. It also fails to recognise that individuals may identify strongly with their race.

In this respect, Advocate Thuli Madonsela underscored the importance of an intersectional perspective. One cannot engage with questions of racism without tackling all the ways in which it intersects with various modes of oppression. Race cannot be set aside as it is only one axes of oppression in a web of various intersecting and inseparable modes of discrimination.



The Way Forward

The debate focussed attention on the reality of racism in our society and the urgent need to dismantle systemic racism. Only once this was in process, could society really engage with the social and cultural issues and effects.

While legislation could play a role, many panellists viewed constructive dialogue as the most effective means of moving forward (a view sharply opposed by several speakers from the floor). This should form a key part of a range of strategies including advocacy and public education.

Government bore a crucial responsibility to ensure full use of the existing and enabling legislation.

Ultimately, the greatest hope and potential for creating an equitable society rested with the individual.



SHARING THROUGH TWITTER

The Dialogues on Development & Rights are all about opening up issues of vital importance to our country's development to public scrutiny and debate.

Here we share the top 20 tweets from the hundreds of Twitter interactions going on during the session.

Click on <https://twitter.com/search?q=%23DevDialogues&src=tyah> to read the tweets.

479	106	484,465	8,910,140
<small>posts</small>	<small>users</small>	<small>reach</small>	<small>impressions</small>



The after-party: Former speakers Max Sisulu, Frene Ginola, in deep discussion with Adv George Bizos, EU Ambassador Cornaro, Adv Thuli Madonsela and CEO of NMF, Sello Hatang.

