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Hate speech: the crimen injuria aspect from the Common Law to the Constitution

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MASTERS RESEARCH REPORT

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"Hate Speech: The *Crimen injuria* Aspect from the Common Law to the Constitution"

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Abstract

Crimen injuria as a legal concept has played an important role in recent high profile South African court cases. This research report documents the development of *crimen injuria,* and its resultant implementation. One of the offences which is covered by *crimen* injuria is hate speech. Serious questions have however been asked with respect to the application of *crimen injuria* in a number of hate speech matters.

The concern is, to a certain extent, due to an overlapping of the jurisdiction of the Equality court with the criminal court. This is as a result of the Equality and Prevention of Unfair Discrimination Act (PEPUDA). Two high profile cases have highlighted this, namely the Penny Sparrow and Vicki Momberg matters. A number of problematic factors have been identified. These include: Is *crimen injuria* being implemented in a manner that the very definition of *crimen injuria* prescribes. The exacting of punishment by two competent courts (neither being a court of appeal) for the identical offence, flouting the principle of *Res Judicata*. The hearing of a matter in the Equality Court in the absence of the party accused of the hate speech, contrary to the provisions of The Constitution. The ignoring of a guiding principle of PEPUDA which is to facilitate the participation by the parties in proceedings. The sentencing, for the first time in South Africa, of a person to a direct jail term for the offence of *crimen injuria*.

The research reveals that many of those in power and influence get away constantly with hate speech of the most vicious kind earning at the most a reprimand. However an unknown person is given double punishment by two competent courts, based on the identical facts, one of the punishments being jail time. In summation it can be seen that cases are handled in an arbitrary manner.

1. Introduction

Hate speech is an age-old problem. This can been seen from the ancient Hebrew Proverb:[1] "Whoever hates, disguises himself with his lips and harbours deceit in his heart." The scribe's use of the word "lips" would be today's "freedom of expression".[2] Whether it is lips or freedom of expression, the sage's message is simple – such (hate speech) lends itself to abuse by those intending evil. The abuser's method is to shield behind concepts of free speech to spread hatred whilst feeling protected.

The crime of "*crimen injuria"* has served South Africa for many years, as a means to both prevent and punish hate speakers.[3] For example in *S v Henning* the Appeal Court said, that with reference to the trial court the magistrate stated correctly that the appellant's conduct was: *"totally unacceptable"* and he had *"committed the offence of crimen iniuaria…* by calling the complainant by the k word". [4]

With the advent of The Constitution of the Republic of South Africa, 1996 ("The Constitution")[5] and the Promotion of Equality and Prevention of Unfair Discrimination Act ("Equality Act"),[6] different dynamics have come into play. A number of cases have set conflicting trends with respect to hate speech. This raises legal questions about the original intent of the principle "*crimen injuria".*

The purpose of this research is to document the development of *crimen injuria* in South Africa as well as its elements and current scope. This is looked at with a focus on the criminalisation of hate speech, which falls within the realm of "*crimen injuria".* The law in

[1] Proverbs 26:24.
[2] The saying could then read: "Whoever hates, disguises himself with his freedom of expression and harbours deceit in his heart."
[3] In *S v Puluza* 1983 (2) PH H150 (E) at 230 van Rensburg J stated "… when a black man is called a kaffir by somebody from another race, as a rule the term is one which is disparaging, derogatory and causes humiliation.". In *S v Steenberg* 1999 (1) SACR 594 (N) at 597 the joking use of the word "kaffir" was sufficient to warrant a conviction; In *Ciliza v Minister of Police and Another* 1976 (4) SA 243 (N) at 247G-H James JP stated: "… if one calls a person a 'kaffir' this will in certain cases constitute an injuria".
[4] *S v Henning* (2004) ZAECHC (14) ZED at 17.
[5] The Constitution of the Republic of South Africa, 1996.
[6] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA or The Equality Act).

practice with respect to hate speech is analysed by examining the Constitution which is an overriding factor and the subsequent Equality Act.

A few identifiable problems emerge when studying *"crimen injuria"*[7]:

- Foremost is that by its very essence *"crimen injuria"* is a crime perpetrated against an individual.[8] However, hate crime by its very nature can often be directed at a specific group of people. Excepting group offence situations, hate crimes directed indiscriminately against a group would not be covered by *"crimen injuria".* In recent crimen injuria cases, arbitrary individuals who belong to a targeted group have been used in the charge sheet in order to show the dignitas element irrespective of the fact that the speech was not directed at them personally. I argue that this approach which is being used to illustrate harm to dignitas is too artificial particularly in the context of extending the ambit of a criminal offence.

- The aspect clearly brought to light in both the highly publicised cases of Penny Sparrow and Jacky Momberg (which are discussed below), is whether there is a question of *res judicata*. This arises as two separate courts are hearing the identical facts, but with different charges. One being the Equality Act aspect and the other *crimen injuria*.

- The fact that in 2019, Momberg became the first person to be sent directly to prison (without the option of a fine or a suspended sentence), after being found guilty of *"crimen injuria"* is looked at. Would this set a precedent for future court sentencing?

- Another matter of concern is inconsistency of sentencing. This can be clearly seen when studying both the Sparrow and Momberg[9] matters when compared with other such matters involving people who wield political influence for example Julius Malema.

[7] See the Penny Sparrow matter in the succeeding pages.
[8] Crimen Injuria is a common law crime defined by the South African Law Reform Commission in 2008 as an act of "unlawfully intentionally and seriously impairing the dignity of another" (South African Law Reform Commission. Issue paper 22. Project 130. 2003).
[9] Penny Sparrow and Vicki Momberg were unknown persons, coincidentally both working as estate agents.

This research project will attempt to study these aspects through the twin links of "*crimen injuria"* and the Equality Act.

2. Crimen Injuria

In the case of *S v van Ieperen*, the Appeal Court stated:

> *Crimen injuria* is a crime under South African common law, defined as the act of unlawfully, intentionally and seriously violating the dignity or privacy of another. What is protected by the crime is *"dignitas"*, or the rights of personality other than reputation and bodily integrity.[10]

2.1 Background

The offence of *crimen injuria* came prominently to the general South African public's attention as a consequence of the trial of Vicki Momberg.[11] This happened in the most powerful way as a result of the extremely wide publicity the matter received, resulting in a high profile criminal court case as well as considerable airing of an appeal to the High Court. A woman, Vicki Momberg, was convicted of four counts of *crimen injuria* and sentenced to an effective two years' imprisonment. Her offences were uttering profanities to three complainants. Being faced with an emergency, Momberg called 10111. She referred to the black police officer who took the call as a "fucking kaffir". She then called a second black police officer a "fucking bitch". With respect to the third black police officer, Momberg called him a "kaffir" and further told him that he was stupid and useless.[12]

What is this offence of *crimen injuria?* It is a common law offence and not one created by South African legislation. This means that it falls into a long list of common law crimes

[10] *S v van Leperen* 2017 (1) SACR 226 (WCC) at 230.
[11] *S v Momberg* 2019 (2) SACR 505 (GJ).
[12] Prior to the criminal trial, Momberg appeared in the Equality Court, with respect to the self-same incident. In this Court, Momberg had been fined R100,000.

that include assault, robbery and arson, and as can be seen from the Momberg case, can result in a prison sentence. [13]

2.2 Historical

How did this common law crime of *crimen injuria* become part of South Africa's law?

Snyman states that historically: "according to the traditional common law interpretation, an injuria consisted in the unlawful and intentional violation of the "*dignitas"* (dignity), *"fama"* (reputation) or "*corpus"* (physical security) of another".[14] Snyman goes on to say that when isolating *crimen injuria* from other injuria, "*crimen injuria*" involves the violation of the *"dignitas"* (dignity) of another.

Today's examples would include road rage, stalking, racially offensive language, emotional or psychological abuse. These infringements must occur with intent.

The phrase *crimen injuria* is Latin and means "offences committed without lawful cause". The concept stems from Roman law. The object was to protect the dignity of a person. With the influence in the 19th Century of English Law in Southern Africa, *crimen injuria* appears to have played no part in the law.[15] However, in the early 20th Century, "*crimen injuria* " came strongly to the fore. It can be traced to *R v Umfaan*,[16] where Innes CJ, in 1908, rejected the notion that *crimen injuria* had become obsolete. He accepted the concept as we know it today.

In 1912, in *R v Kobi,*[17] the Transvaal Supreme Court convicted a man of *crimen injuria* for the offence of exposing himself to a young girl. In 1915 the Cape court in *R v M* held that indecent exposure in private amounted to *crimen injuria.*[18]

[13] This is the first time anyone in South Africa has been sent directly to jail after being found guilty of crimen injuria.
[14] CR Snyman *Criminal Law* 5 ed (2008) 469.
[15] J Burchell *Principles of Criminal Law* 4 ed (2014) 633.
[16] *R v Umfaan* 1908 TS 62 at 66. In this matter, a person exposed himself in a private yard.
[17] *R v Kobi* 1912 TPD 1106.
[18] *R v M* 1915 CPD 334.

Subsequently in 1919, in *R v Jacob*[19] the Transvaal Court considered that *crimen injuria* was an important part of the South African legal system. In that case a peeping Tom was convicted of *crimen injuria*.

That *crimen injuria* had become well established in South African law by about the mid-1920s can be seen from the case of *R v Holliday* where Gardiner JP, went so far as to go to the definition of Voet and the words used by the jurist with respect to *crimen injuria* – defining it as:

> A wrongful act committed in contempt of a free man by another who thereby with evil intention impairs either his person or his dignity or his reputation.[20]

2.3 What is crimen injuria

What is the meaning of this "*crimen injuria"?* Various definitions exist.

Burchell defines *crimen injuria* as follows:

> *Crimen injuria* consists in the unlawfully and intentionally impairing the dignity or privacy of another person.[21]

Snyman defines *crimen injuria* as follows:

> *Crimen injuria is the* unlawful, intentional and serious violation of the dignity or privacy of another.[22]

It will be seen that there are a number of identical elements involved in these two definitions. However Snyman brings in an extra element. The three elements which both writers refer to are:

a. Unlawful

b. Impairment of dignity

c. Intention.

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[19] *R v Jacob* 1919 JS 29 T.
[20] *R v Holliday* 1927 CPD 395 at 400. Holliday had peeped through a skylight while a female was undressing. He was convicted of *crimen injuria*. The Court held that there had been an intrusion.
[21] J Burchell *Principles of Criminal Law* 4 ed (2014) at 632.
[22] CR Snyman *Criminal Law* 5 ed (2008) at 469.

Snyman also brings in the element of seriousness.

i) Unlawfulness

The act must be unlawful in character – whether it is verbal or otherwise. But, as there is no fixed and fast rule as to what should or could be "unlawful", same depends to a large extent on the moral attitude of the society in which the statement or action is made. In addition, other factors have to be considered, including verbal retaliation (self-defence) and consent of the offended party.

In *S v Puluza* the appellation of the word "kaffir" was held to constitute a punishable *crimen injuria*.[23] Milton states that this decision was reached by van Rensburg J on the grounds that in South Africa today the word, when applied to a Black person by a person of another race, "as a rule… is one which is disparaging, derogatory and contemptuous and causes humiliation".[24] In this case, in the view of the Judge, the welfare of society and hence good order in general required that such a term should be "visited with criminal sanction". It is noted that the learned judge used the words "by a person of another race", hence, based on this case, two people of the same race insulting each other would not fall foul of a criminal sanction re *crimen injuria*.

However, as a general rule, verbal or other derogatory comments made by one person against the character of another, or against the characteristics of a group to which the other belongs, would be regarded as unlawful.

ii) Intention

Crimen injuria must be committed with intention.[25] If the party making the remarks was so intoxicated at that stage that he did not know what he was saying, he obviously cannot

[23] *S v Puluza* 1983 (2) PH H150 (E); *(*see also *Meta M Ryan v Rodwin Petrus* CA 165/08 I27 March 2009 (EC) at 7).
[24] JRL Milton (ed) *The Annual Survey of South African Law* (1983) at 389. This 1983 decision shows that even before democracy (1994) racism could amount to an *"injuria".*
[25] *S v S* 1955 (3) SA 313 (SWA) at 315.

be regarded as having intent to commit the offence. The person must be aware that he is violating either the dignity or privacy of the complainant. Further, even if sober, he must know that the other party has not consented to his conduct. The intention can also be by way of *dolus eventualis*.

Crimen injuria is a resultant crime.[26] It is the consequence, the impairment of dignity which is being punished. Where a person (like in the *Momberg* case)[27] kept calling another with the k word, there can be no question as to the intent of the offender. The words of Gardener AJA in his dissenting judgement in *Minister of Posts and Telegraphs v Rasool* illustrates this:

> Every person has an inborn right to tranquil enjoyment of his peace of mind, secure against … degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such a right.[28]

The result – for example the hate words spoken – when there is a duty not to utter hate speech, leaves one with no option but to infer the "intent of the offender".

iii) <u>Impairment of dignity or privacy of another</u>

Respect for human dignity should be the hallmark of any civilized society. It is a person's right to be both respected and valued. That includes the concept of ethical treatment. For the individual it is his or her self-worth. Most cases of *crimen injuria* involve either sexual impropriety or racial intolerance (which could include "hatred"). However crimen injuria is not limited to words and can be signs or gestures or even drawings. Further an attack on an individual might in addition to being an attack on the "victim" be an attack on a group. The words themselves might be explicit or can be implied (e.g. the race of the victim).

[26] CR Snyman *Criminal Law* 5 ed (2008) at 473.
[27] *Momberg v S* 2019 (2) SACR 505 (GJ).
[28] *Minister of Posts and Telegraphs v Rasool* 1934 (AD) 167 at 190. See also *Lyon v Petrus* 2010 (1) SA 169 (ECC) at 170.

In *S v Tunteli*,[29] it was held that the uttering by an accused of words "extremely disparaging" of Afrikaans, did not amount to *crimen injuria*. The reason being that the dignity of the complainant himself had not been impaired.

Impairment of the dignity of another implies that the offended party has a dignity to impair. In the 1932 case of *R v van Tonder,* the Transvaal Provincial Division, a lady of easy virtue, a call girl, had no dignity to be impaired, and, therefore, when invited to have sexual intercourse, her dignity was not impaired.[30] This type of situation must be distinguished from where no sexual impropriety is suggested, but an expression of love is afforded. Such voicing of affection cannot on its own be said to be an impairment of a dignity of the recipient.[31]

Crimen injuria is a crime which has a result. In the following cases it can be seen that it is the conduct of a party which is being criminalised. In *S v Ndlangisu,*[32] x spat in y's face. Ndlangisu's defence of provocation did not succeed and he was found guilty. In *R v S* [33] when a stranger embraced a woman without her consent, the offender was convicted. In *S v Momberg,*[34] a traffic ticket was issued by an officer. The recipient swore and abused the officer. The person swearing was convicted of impairing the dignity of the officer. In *S v Steenberg*[35] the calling of a person with the word "kaffir" was held to be humiliating and disparaging. In R v Youngelson[36] the conviction was the result of a married man pretending not to be married and the case against him succeeded with respect to him inducing a woman to have sexual intercourse on that basis.[37]

In the case of *S v M*, in 1979 the court heard that a lady had been called "white bitch".[38] Diemont JA pointed out that where a person accosts a stranger in the street, with a grossly

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[29] *S v Tunteli* 1975 (2) SA 772 (T) at 775.
[30] *R v Van Tonder* 1932 TPD 90. In today's politically correct climate, with special reference to gender-based violence, it is submitted that it is highly unlikely that this case would have been decided the same way today as it was in 1932.
[31] *R v Sackstein* 1939 TPD 40.
[32] *S v Ndlangisu* 1969 (4) SA 324 (E).
[33] *R v S* 1955 3 SA 313 (SWA).
[34] *S v Momberg* 1970 (2) SA 68 (C).
[35] *S v Steenberg* 1999 (1) SACR 594 (N).
[36] 1948 (1) SA 822 (W).
[37] See also *R v Howard* 1917 WPD 192. CR Snyman *Criminal Law* 4 ed (2003) at 456 questions the correctness of both the *Youngelson* and *Howard* decisions.
[38] *S v M* 1979 (2) SA 25 (A) at 28.

obscene remark which insults and humiliates, that person commits *crimen injuria.* A woman was the victim, which added to the seriousness of the act in the eyes of the Court. Also, the court stated that to describe a woman as a "white bitch" was racially degrading. Diemont JA held that there had been "a serious impairment of the victim's *dignitas".*

In *Ciliza v Minister of Police and Another*, [39] the defendant had called the plaintiff a "kaffir". The court held that the appellant was fully justified in feeling that his dignity had been impaired.

iv) <u>The violation must be serious.</u>

The difficulty of defining "serious" in respect of *crimen injuria* can be seen from what the court stated in *R v Walton* "In the ordinary hurly-burly of everyday life a man must be expected to endure minor or trivial insults to his dignity."[40] The *dicta* of the court in *S v S* was that if such was not the case it would lead to unexpected and time wasting results. Here the court stated: "Now, not every insulting word can be made the subject of a criminal charge. Chaos in the courts would otherwise result."[41]

The serious aspect would vary from place to place and time to time.[42] The social milieu would play a role in determining whether an incident was serious or not. By way of example, if a person is insulted by someone he or she does not know, this will be regarded as more serious than an insult given to that same person by a close friend of the complainant. In *S v Lombard* the accused addressed a traffic official loudly with members of the public hearing what he stated. This took place in the main street of Mossel Bay. The words uttered by Lombard were: "Ag fuck-off man. Jy is net 'n laer donderste vark".

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[39] *Ciliza v Minister of Police and Another* 1976 (4) SA 243 (N).
[40] *R v Walton* 1958 (3) SA 693 (SR) at 695.
[41] *S v S* 1964 (3) 319 (T) at 322. The Latin term is *de minimis non curat lex*, which the *Dictionary of Law*, Penguin Reference Library, Penguin Group London 144 states that: "the law is not concerned with trifles (minimal things) the law will not sit in judgement on minor or trivial transgressions of the law." See also *S v Bugwandeen* 1987 (1) SA 787 (N) at 795, where Thirion J stated: "injuria of a trivial nature should not engage the attention of the courts (they can be excluded on the principle *de minimus non curat lex*)."
[42] See *Coetzee v the National Commissioner of Police and the Minister of Safety and Security and Others* Case 70259/09 (11 August 2010) at para 25. Here the court with respect to crimen injuria stated that "normal vulgar abuse will not be an offence except when the circumstances are such that it can be regarded as serious."

The accused was found guilty of *crimen injuria* and sentenced to a fine of R15 or 15 days imprisonment.[43]

Although Burchell does not mention "seriousness" with respect to *crimen injuria* in his definition, he strongly uses that concept in his unravelling of the definition under the heading of unlawful. Burchell states as follows:

> The basis for judging gravity is largely the court's conception of contemporary *boni mores.* This does not mean that the contemporary social attitudes inevitably prevail. The courts rightly only give effect to *mores* which they consider *boni.*[44]

Burchell goes on to list various factors which he describes as "affecting the seriousness of the impairment of dignity".[45] These are age, gender, social standing, sexual impropriety, unfair discrimination, the parties' previous relationship, persistence, publicity, the complainant's personal reaction, the public interest and the nature of the act.[46]

The failing of the court not to punish or not to punish adequately is taken into account in terms of the impact and reaction such will have on the society in question.[47]

In *S v Jana* the complainant, a black male, stated that he had been referred to as "a pig" by an Indian lady. The complainant then told her that she was insulting him. At that stage the lady repeated the words to him – "a pig".[48] The Court stated that:

> It is clear that the Courts will not convict in cases other than serious *injuriae.* The test of seriousness is *inter alia* whether the *injuriae* is likely to lead to results that may detrimentally affect the interests of the state or the community.[49]

The Court found that it was unnecessary for the court to pursue the question as to whether the words were shared with intention to impair the dignity of the complainant due to the fact that under the circumstances the injuriae "was not of a serious nature".[50]

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[43] *S v Lombard* 1970 (2) SA 68 (K).
[44] J Burchell *Principles of Criminal Law* 4 ed (2014) 635.
[45] Ibid.
[46] Ibid.
[47] Also see *S v S* 1964 (3) SA 319 (T).
[48] *S v Jana* 1981 (1) SA 671 (T) at 676.
[49] Ibid.
[50] Ibid.

Snyman states that the event leading up to the matter must be looked at to see if they are "sufficiently serious".[51] Snyman details *S v Sharp* [52] commenting:

> X called Y, a female police offer a "bitch". The court held that the use of the word did not amount to a violation of Y's dignity, since the word formed part of every day parlance, scarcely raised an eyebrow in conversations, and amounted merely to idle abuse. It is submitted that the correctness of this decision is questionable. Police officers, including female officers, are also entitled to the protection of their dignity.[53]

When assessing the four elements (unlawfulness, intention, impairment of dignity or privacy of another and that the violation must be serious) an interesting dicta can be found in *S v Bugwandeen* where Thirion J stated:

> When it comes to insulting remarks one must not be concerned so much with the dictionary meaning of the words used as with the meaning which were meant to bear in the circumstances in which they were uttered and the sense in which the circumstances they were understood.[54]

Bugwandeen who was an attorney was convicted of *crimen injuria* after he said to a constable: "Black bastard. You are a slave. Why are you here while your nation is being killed in Soweto".[55] The court held that the utterances involve a substantial affront to the constable's dignity.

In *S v Jana*, the Appeal Court used an important test:

> The concept of self-respect, mental tranquillity and privacy are judged both objectively and subjectively in that it depends upon the particular person and the circumstances whether it can be said that the *dignitas* has in fact been impaired.[56]

Crimen injuria can be seen to be developing as follows. Racial slurs that are intended to offend, and the victim being offended, fall into realm of *crimen injuria*. Slurs of a trivial nature, however, are not considered as *crimen injuria*.

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[51] CR Snyman *Criminal Law* 5 ed (2008) 472.
[52] *S v Sharp* 2002 (1) SACR (Ck) 360.
[53] CR Snyman *Criminal Law* 5 ed (2008) 472.
[54] *S v Bugwandeen* 1987 (1) SA 787 (N) at 795.
[55] Ibid.
[56] *S v Jana* 1981 (1) SA 671 (T) at 675 A-B.

3. Hate Speech

Jeffrey Howard states that “Freedom of expression” is a positive moral right. But coupled with this right is the moral duty to “refrain from hate speech”. Included in this are the negative duties not to “threaten, harass, offend, defame or incite”.[57]

Tanya Calitz, says: “Hate speech entails any discriminatory speech which stems from hatred which aims to attack or harm an individual or group of individuals”.[58] To paraphrase Andrew Moranti, “I no longer have any doubt that the brutality that germinates from free speech can leap into the world of flesh and blood”.[59] Moranti is stating that incitement by means of hate speech, can result in fatal consequences.

3.1 South Africa: The Constitution

The right to freedom of expression is spelt out in Section 16 (1) of the Constitution, in “The Bill of Rights”. It uses the word “everyone” meaning that this this is the right that all can participate in.[60]

Section 16 (2)(c) limits the right to freedom of expression by stating that it does not extend to: “Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

However, freedom of expression is regarded as an intrinsic right of those living in the South African constitutional democracy.[61] It is meant to serve as a protection to the citizens of the country. In *South African National Defence Union v Minister of Defence and another*, the court stated:

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[57] Jeffrey W. Howard “Free Speech and Hate Speech” (2019) 22 *Annual Review of Political Science* 93 – 109.
[58] T Calitz “Is the prohibition and criminalization of hate speech in South Africa constitutional?” *OxHRH* (9 Sep 2020).
[59] Andrew Moranti. October 4th 2019. The New Yorker. Original quote of Moranti read: “I no longer have any doubt that the brutality that germinates on the internet can leap into the world of flesh and blood.”
[60] D Milo and P Stein *A Practical Guide to Media Law* (2013).
[61] Section 16 (1) of the Constitution, 1996.

> 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 societies and its facilitation of the search for truth by individuals in society. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and do so freely on a wide range of matters.[62]

The Constitution does not use the word 'speak' or 'speech' in section16(1). Instead (as opposed to United States of America where the First Amendment to the United States Constitution provides the right to "Freedom of Speech"), our Constitution uses the term "the right to freedom of expression."[63]

Hence it is not limited to speech, but broadly would include – by way of examples only – symbolic acts like T-Shirts, gestures and graffiti.[64] The practical effect is that any expression that does not fall foul of Section 16(2) cannot be limited unless covered by some other law (e.g. copyright).

Hate speech was specifically prohibited under South African law in 2000 with the Promulgation of the Equality and Prevention of Unfair Discrimination Act (PEPUDA),[65] The Act establishes certain courts known as "Equality Courts" to hear (amongst other matters) hate speech. PEPUDA was established in terms of section 9 of The Constitution (entitled Equality) which directed that such legislation be enacted "to prevent and prohibit unfair discrimination".

In terms of Section 10 of PEPUDA, the notion of hate speech was taken further. It listed speech based on one of a number of grounds – namely:

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[62] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at 477C-D.
[63] Section 16 (1) of the Constitution: "Everyone has the right of freedom of expression".
[64] *Phillips and Another v Director of Public Prosecutions* 2003 (4) BCLR 357 (CC). Para 38 states: "Everyone has the right to freedom of expression. The general content of the right includes amongst others, the freedom to hold views and opinions and to receive information and ideas, and the freedom of artistic creativity."
[65] Promulgation of the Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

a. Be hurtful

b. Be harmful or incite harm

c. Promote or propagate hatred.

Hence the Constitution together with PEPUDA has attempted to create statutory remedies to stamp out any conduct based on hatred, whether by speech or otherwise. However, in *Qwelane v South African Human Rights Commission*, the Constitutional Court found that the term 'hurtful' in section 10(1) of the PEPUDA was vague.[66] The Court referred to section 1(c) and section 36 of the Constitution and ruled that the limitation occasioned by the term 'hurtful' could not be justified, and thus found that the use of the term 'hurtful' in the Act was unconstitutional.[67]

The Constitution, in section 39, makes provision for other legal systems and states: 'When interpreting the Bill of Rights, a Court, tribunal or forum … must consider international law'.[68] The Constitutional Court in *Qwelane*, refers to international law factors in its judgment:

> "[89] Various factors have been identified in international law that justify the curtailment of freedom of expression. These include: (i) the prevailing social and political context; (ii) the status of the speaker in relation to the audience;…"[69]

Additionally, the Court referred with approval to the United Nations Rabat Plan of Action at para 90 which recommends that:

> "Criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations. Civil sanctions

[66] *Qwelane v South African Human Rights Commission and Others* CCT 13/21 [2021] ZACC 22.
[67] Ibid at para 157: The Constitutional Court ruled that in terms of the elements of s 10(1) of PEPUDA, Qwelane's article (made against the LGBT+ community was 'abhorrent' and constituted hate speech. It had clearly been harmful and created hatred.
[68] S 39(1)(a) Constitution, 1996.
[69] *Qwelane v South African Human Rights Commission and Others* CCT 13/21 [2021] ZACC 22.

and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply."

3.2 International Convention on the Elimination of all Forms of Racial Discrimination

This Convention has at this stage 88 signatories of which South Africa is one. In addition 27 countries have ratified the Convention. Its object is to eliminate all forms of racial discrimination. The member countries declaration is that there shall not be racial superiority or hatred and if such does occur, such will be punishable by law.[70] Known as ICERD, it is a United Nations convention which became effective on 4th January 1969. The "depository" of the convention is the Secretary General of the United Nations. This international convention intends to remove any form of racial discrimination based on "the advocacy of hatred and abuse or insult towards any other person or group of persons, ranging from race and gender to social origin". South Africa being one of the signatories to the convention, is bound by certain aspects of it, albeit South Africa has not ratified it yet. The main objectives of ICERD are described by it as:

i) Eradicating racial hatred and incitement to hatred
ii) Combating prejudices which lead to racial discrimination
iii) Guaranteeing the enjoyment of civil, physical, economic, social and cultural rights without discrimination on the grounds of race, colour or national or ethnic origin

With respect to hate speech, the UN in its 'strategy and plan of action on hate speech' states:

> "The term hate speech is understood as any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or group on the basis of who they are, in other words based on their religion, ethnicity, nationality, race, colour, descent or other identity factor".[71]

[70] UN General Assembly Resolution 2106 of December 1966.
[71] UN Strategy and Plan of Action on Hate Speech (2019): https://www.un.org.

4. The current position in South Africa

A few identifiable problems emerge when studying *"crimen injuria"*[72]:

- Foremost is that by the very essence *"crimen injuria"* is a crime perpetrated against an individual. However, hate crime by its very nature can often be directed at a specific group of people. Excepting group offence situations, hate crimes directed indiscriminately against a group would not be covered by *"crimen injuria".* In recent crimen injuria cases, arbitrary individuals who belong to a targeted group have been used in the charge sheet in order to show the dignitas element irrespective of the fact that the speech was not directed at them personally. I argue that this approach to illustrating harm to dignitas is too artificial particularly in the context of extending the ambit of a criminal offence.

- The aspect clearly brought to light in both the highly publicised cases of Sparrow and Jacky Momberg, is whether there is a question of *res judicata*. This is where two separate courts are hearing the identical facts, but with different charges. One being the Equality Act aspect and the other crimen injuria.

- The fact that in 2019, Momberg became the first person to be sent directly to prison (without the option of a fine or a suspended sentence), after being found guilty of *"crimen injuria"* is looked at. Would this set a precedent for future court sentencing?

- Another matter of concern is inconsistency of sentencing. This can be clearly seen when studying both the Sparrow and Momberg[73] matter when compared with other such matters involving people who wield political influence for example Julius Malema.

This research project will attempt to study these aspects through the twin links of "*crimen injuria"* and the Equality Act. This is achieved by analysing two high-profile cases, that of

[72] See the Penny Sparrow matter in the succeeding pages.
[73] Penny Sparrow and Vicki Momberg were unknown persons, coincidentally both working as estate agents.

Sparrow and Momberg, and contrasting them with a few other utterances by those of influence.

5. Penny Sparrow

The Sparrow matter is where "freedom of expression" came into conflict with Section 10 of The Constitution, competing with the right of others to "human dignity".[74]

On 4 January 2016, what was to become a leading national news item first appeared in various newspapers and news reports across the country. Penny Sparrow, a white real estate agent, who lived in Kwa Zulu-Natal had compared black people to monkeys. One newspaper's headline read: "Penny Sparrow calls black people 'monkeys'".[75] Attention to Sparrow's comments, in the media, both print and electronic, resulted in mass publicity.[76]

It is necessary to quote Penny Sparrow's statement. She wrote:

> "These monkeys that are allowed to be released on New Years Eve and new years day onto public beaches, towns, etc obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others. I'm sorry to say I was amongst the revelers 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 get 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".

[74] Section 10 of the Constitution of The Republic of South Africa, 1996 states: "Human Dignity - Everyone has inherent dignity and the right to have their dignity respected and protected."
[75] The Citizen 4th January 2016 Johannesburg. The article went on as follows: "Penny Sparrow has received criticism on social media for a post she made on Facebook. In the post she compares black people to monkeys. The leader of the opposition Mmusi Maimane stated: 'Penny Sparrow's comments are racist. They are an insult to me and our party. We have too many of these in SA and we must criminalise these'".
[76] By way of example: Mail and Guardian 4th January 2016 "Penny Sparrow: can Racism be outlawed in South Africa?"; News24.com 4th January 2016 "It's just the facts: Penny Sparrow breaks her silence."; Weekend Argus 9th January 2016 "Let's tackle racism where it lives"; Mail and Guardian Online. 7th January 2016. "Penny Sparrow: Racism's Sacrificial Lamb".

Sparrow went on Facebook to apologise for her comments. She said her comments came as a reply to a statement she read about dirty beaches on New Years' Day. She also apologized to people who have taken her statements personally, explaining she is not racial and in fact "helps underprivileged people of all races".

5.1 Is the Sparrow case really a matter of *crimen injuria*?

The essence of *crimen iniuria* is that it is a crime perpetrated against an individual.[77] However, hate speech can be, and is often, directed at a group of specific people.

Phrased in different words, the question is whether the offence of *crimen injuria* extends to groups. Sparrow's Facebook entry was not with respect to a particular person. An element of *crimen injuria* is the aspect of "another". Taking Snyman's definition of *crimen injuria*, in that it is the "unlawful intentional and serious violation of the dignity or privacy of another",[78] does *crimen injuria* then also apply to utterances against a group? The decided cases all appear to be with respect to direct attacks against an individual. In Sparrow's criminal trial, arbitrary individuals, belonging to a targeted group were used in the charge sheet in order to show the '*dignitas*' element. However, this speech was not directed at them personally. This results in an artificial situation where a person (or persons) who Sparrow never had intention of offending being brought into the charge sheet. These individuals might not have been anywhere near the beach or the littered area in question, and had nothing to do with Sparrow's comments. Nor had she stated any intent to direct any comment at any of these arbitrary included individuals.

Marais states that she could "not find any precedent in text book examples or case law" where an attack against a group constituted the offence of *crimen injuria.* Further, all the

[77] Crimen Injuria is a common law crime defined by the South African Law Reform Commission in 2008 as an act of "unlawfully intentionally and seriously impairing the dignity of another (South African Law Reform Commission. Issue paper 22. Project 130. 2003).
[78] See section 2.3 above.

cases that are mentioned in this research have the subject of the attack being an individual.[79]

Milton stated that "the crime of *crimen injuria* in principle protects the interests of human dignity". Milton then goes on to say:

> 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.[80]

Marais holds the view that "it cannot be denied that the dignity of an individual can be violated by an insult against a group to which he / she belongs."[81]

The answer to this, could lie in viewing this from a completely different angle.

Why did the words on social media of Sparrow cause so much attention? The answer might be in the case of S v S where Marais J stated:

> That it is only when the welfare of society and good order generally demand some criminal sanction that the State would and should interfere.[82]

In the same way that Sparrow used social media to send out her message, "social media" sent out and generated its interest resulting in publicity. This was then used by radio channels, talk shows, TV, newspapers and magazines and was taken up to generate what Marais J referred to as "the welfare of society and good order".

Hence, the criminal conviction of Sparrow could be said to be a precedent for the ambit of *crimen injuria* to include in it the "group aspect". The question therefore is will this direction be pursued in future cases. It would seem logical, as certain attacks are not against an individual person as the traditional *crimen injuria* has it. Hence, in order to keep it within *crimen injuria,* and in line with developing the common law as stated in

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[79] Burchell & Milton (2005) *Principles of criminal law* at 749 is of the opinion that the victim of *crimen iniuria* must, as a general rule, have been subjectively aware of the insulting utterances. Failing which there can be no criminal prosecution.
[80] JRL Milton *South African Criminal Law and Procedure (1996)* 3 ed.
[81] ME Marais 'A Constitutional Perspective on the Sparrow Judgements' (2017) 42(2) *Journal for Juridical Science* 25.
[82] *S v S* 1964 (3) SA 319 (T) at 322.

Section 39 (2) of The Constitution, the group aspect could in the future play an important part in ensuring that the criminal actions brought against those perpetrating such utterances, will still fall foul of the criminal offence of *crimen injuria.*

5.2 Penny Sparrow – Is there duplication?

In the Equality Court, on the 10th June 2016, it was found that the words posted by Sparrow on her Facebook page, on the 3rd January 2016, constituted hate speech. Sparrow was ordered to pay R150,000 (to a charity) plus costs. Subsequent to that, Sparrow was charged in the Criminal Court with *crimen injuria* for "having unlawfully and intentionally injured, assaulted and impaired the dignity of five named individuals by posting her message". [83] After handing in a plea of guilty (in terms of Section 105 (1) a (i) of the Criminal Procedure Act) [84] the court convicted and sentenced Sparrow to a fine of R5,000 or 12 months imprisonment. She was also sentenced to two years imprisonment, wholly suspended for five years, with conditions.

Hence, the question. Was punishment exacted twice on Sparrow?

In common law, there is a principle that if a person has faced a charge before, and been found either guilty or innocent (i.e. been put at risk), that person cannot be charged again based on the same facts. Known as a double jeopardy rule[85] or *Res Judicata,* this rule is part of the Bill of Rights, contained in the Constitution under the heading "Arrested, Detained and Accused Persons." Section 35 (3)(m) states:

Every accused person has a right to a fair trial, which includes the right… not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted. [86]

The Oxford Dictionary of Law states that:

[83] *S v Penny Sparrow 708/2016* (Unreported case in the Scottburgh Magistrate's Court).
[84] Criminal Procedure Act 51 (1977).
[85] See *S v Radebe* 2006 (2) SACR 604 (O) at 609. The rule against duplication of convictions' main aim and purpose is 'to avoid prejudice to an accused person in the form of double jeopardy, that is, convicted and punished twice for the same offense when in fact he or she has only committed one offense'.
[86] The Constitution of The Republic of South Africa, 1996. See also Matapa JA where he stated in *Lelaka v S (2015) ZASCA 169* (above fn 120) "This subsection provides that an accused has the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted".

Double jeopardy refers to the defence that an accused has already been placed on trial and this is the second time that the accused is being arraigned on the same facts. [87]

The elements of double jeopardy are:

a. There was an alleged crime.

b. The party has already been tried. [88]

c. The competent verdict was that of either guilty or not guilty.

d. And now a court for a second time based on the same facts is reigning the party into a trial.[89]

In *Lelaka v S* it was stated by the Supreme Court of Appeal (SCA):

"It is a general rule of the common law that a person may not be punished twice for the same offence. The common law rule is now entrenched in the provision of Section 35 (3)(m) of the Constitution. In terms of this rule an accused may raise the plea of Autrefois Convict or Acquit, The principle is grounded in the maxim that no person may be brought into jeopardy more than once for the same offence".[90]

These words of the SCA are quite clear. A person may not be punished twice for the same offence.

With respect to this, one must take note of what is stated in Kenny's Outline of Criminal Law:

The charge might be differently worded to make it more aggravating but still brings it into the ambit of the double jeopardy rule. [91]

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[87] The Oxford Dictionary of Law. 6th Ed. 2006. Oxford University Press. Oxford. 177; the Penguin Dictionary of Law states that double jeopardy is "a defense to a prosecution of a crime which has already been tried" (2009 Penguin Reference Library. Penguin Group. London 169).

[88] In *R v Long 1958 (1) SA 115 (A)* at 117 Schreiner JA stated "… he must legally have been in jeopardy on the first trial of being convicted of the offence with which he was charged on the second trial." This is in reference to when a person is in double jeopardy.

[89] In *S v Mngadi* 2000 (1) SACR 152 (W), an accused in this appeal, had been sentenced and served a period of time in prison. He subsequently was brought to court on the identical charges. He did not have a legal advisor. The court per Stegmann J stated:
"…that the accused should meet the charge against him with a plea under s 106 (1) (c) of the Criminal Procedure Act 51 of 1977, that he had already been convicted of the offence which he was charged (a plea that used to be referred to as *autrefois* convict)".
In a concurring judgment, it was stated by Marais J that such a plea could even be brought in at a later stage.

[90] *Lelaka v S* 2015 (2) ZASCA 169. In this case the accused had been found guilty of 'assault' on 14 February, 2013, but the victim subsequently died the following day. The Court held in a majority judgment that a conviction of assault was no bar to a prosecution for murder or culpable homicide when the victim had died from injuries relating to the assault. The plea of autrefois convict was not applicable in this instance as a case of murder or culpable homicide only became viable thereafter.

[91] Kenny's Outline of Criminal Law. Cambridge University Press. 2007. 591.

However, this refers to an instance where both charges are for the identical act on a criminal basis. The charge in terms of the words "*crimen injuria"* in the criminal court might sound more ominous and of graver consequence than the previous charge in the Equality Court which amounted to hate speech. This seems to fall into what Kenny states, "differently worded" with the result that it "still brings it into the ambit of the double jeopardy rule". [92]

A comparison can be made with respect to the 5th Amendment of the United States Constitution, which states that:

"… nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

How this is applied can be seen from the matter of *Brown v Ohio* [93]. A man was convicted of joyriding. The elements of joyriding being "taking and operating without the owner's consent a vehicle". At a later date he was charged with "auto theft". This consists of joyriding while intending to permanently deprive the owner of the vehicle. Here the prosecutor would not have to prove anything more than what was required to prove auto theft, as joyriding and auto theft represent the same offence. The auto theft prosecution was held to violate the double jeopardy principle.

The question now is as to whether the Equality Act has changed the situation. Could there be the situation where you can have a single act leading to parallel consequences. A common practical example is that of a drunken driver crashing into a legally parked vehicle. On the part of the owner of the vehicle he or she could have a civil case against the drunken driver for damages. The state will have a criminal case against the driver. Whilst a criminal case would result in punishment, which could include a jail sentence, the civil case could result in a monetary payment for the damages so caused. Both, it could be argued, amounts to punishment for the drunken driver.

Taking the Sparrow matter, one could argue that it is not one and the same offence. *Crimen injuria* is specific to the person whose dignity was impaired. Hate speech is the infringement of constitutional rights. It is a violation of the public at large.

A factor to be considered is the perception of a person in Sparrow's situation, could be that the *crimen injuria* case in the Criminal Court was the hate speech, for which Sparrow had already been punished in the Equality Court. In different words she had already been placed at risk in the Equality Court. It is important to note that the perception of a person charged in a criminal case must never be dismissed. The person (in this instance Sparrow) could believe she's being charged twice and a miscarriage of justice has occurred. The answer is reasonably simple, using the motor vehicle drunken driver scenario as we have above. Hence, this based on the analogy, leads us to the argument

[92] Kenny's Outline of Criminal Law. Cambridge University Press. 2007. 591.
[93] *Brown v Ohio* 432 U.S. 161 (1977).

that no double jeopardy applies. Though, there was one particular “act” same led to two completely different consequences and punishments.

If the Equality Act has changed the situation to allow for a person to be placed in jeopardy on two different occasions before a competent court, and so punished, a question could be as to whether the Equality Act would therefore be unconstitutional. Therefore, Sparrow has been put at risk twice for the same offence based on the same evidence and both times a punishment imposed by a competent court.

However hate speech and *crimen injuria* can be said to be two different aspects running parallel courses, but from one and the same conduct. Both have their own course to follow, and by necessity, evidence from the one case will be used as evidence in the other.

That an accused can be subjected to a case in the equality court and subsequently face a criminal charge of crimen injuria – without being able to raise the defence of res judicata – is supported by the following:

1. It is hardly likely that the legislature intended to do away with the criminal charge of crimen injuria, when it introduced the hate speech legislation (The Equality Act)
2. The accused is not at risk of a criminal conviction twice – hence only once and therefore no double jeopardy
3. The Equality Court can be seen not to be a criminal court, but one that deals with matters that are not criminal
4. The analogy with the drunk driving example clearly illustrates the path of two parallel consequences

The argument can exist that this ‘is punishment being exacted twice’, and hence it is double jeopardy. Further, the perception of the accused that he or she is being punished twice.

In summation, it can be seen that though a plea of ‘double jeopardy’ can be raised, with reference to what occurred in the Sparrow case it is not likely to succeed.

5.3 Sparrow’s Plea in the Criminal Trial

After Sparrow’s matter was completed in the Equality Court, she subsequently was charged in the criminal court in terms of Section 105 of the Criminal Procedure Act.[94]

[94] Criminal Procedure Act 51 of 1977.

Sparrow appeared in the Scottburgh Magistrate's Court on 12 September 2016 charged with *crimen iniuria* for having unlawfully and intentionally injured, assaulted and impaired the dignity of five named individuals by posting her message.

Sparrow entered into a plea bargain with the State. Sparrow read out her plea in Court. The plea was based on the fact, that on the date in question, she and friends had occasion to see refuse and litter in the local streets and beach area. It was presumably the result of New Year revellers the night before. In response to other comments on Facebook, she had posted her comment without realizing the gravity of the comments at the time. However, on realizing the seriousness of her inconsiderate remarks, and further that several people had both taken offense and been aggrieved by what she said, she had posted various apologies.

Sparrow was convicted on her own guilty plea. She received a 12-month prison sentence or R5000 fine. In addition she received a two year suspended sentence "wholly suspended for five years during which time she must not be convicted of *crimen injuria"* .

The plea, which was both read and handed in by Sparrow at the Scottburgh Court, has been criticized by Marais on two main bases.[95]

Firstly: "It does not state the existence of a subjective intention in terms of the offence".[96] That the facts set out in Sparrow's plea are correct. However, it is not up to the court to draw conclusions of intent at the time. Further, it is not for the accused at the time of the plea to make a value judgement of herself by means of an apology. It is for the accused to state the intent he or she had at the time of the offence. In the Sparrow instance, the intent to commit *crimen injuria* (or defame another person) is not in the plea.

In terms of section 112 of the Criminal Procedure Act, admission of unlawfulness and intent is a prerequisite that must also be supported by the facts at the time of the offence.[97] By way of example, in *S v Witbooi* the court held that an accused's admission that he had

[95] ME Marais 'A Constitutional Perspective on the Sparrow Judgements' (2017) 42(2) *Journal for Juridical Science* 25.
[96] Id at 57-9.
[97] *S v Witbooi* 1978 (3) SA 590 (T) at 595. See also *S v Diniso* 1990 (1) SACR 532 (C) at 533.

no “right to disobey” a maintenance order had no value to it.[98] It was merely self judgment by Witbooi on himself after the fact. In Sparrow, the same can be said as she was, in her plea, merely reflecting on her judgment now long after the action.

Secondly, Marais states that it is not clear that “the self-esteem of each of the individual complainants was actually impaired.”

Sparrow did not bring into her plea that what she had said on Facebook was a “violation of the dignity of another.” The inference being to what can be described as a group, which is not in accordance with case law and common law with respect to the offence she was charged with and found guilty of (*crimen injuria*). The charge, in the charge sheet, in the criminal court was that of “*crimen injuria* for having unlawfully and intentionally injured and assaulted and impaired the dignity” of five named individuals. These were the parties which the Facebook message she had posted had to be directed at.

Hence Marais maintains that the plea should never have been accepted by the court. The elements required with respect to a plea did not conform to the CPA. Lacking the two points (above) that Marais has brought to light, the plea explanation was not acceptable and a trial should have ensued.

5.4 The Equality Court Hearing

On the day of Sparrow’s hearing in the Equality Court, Sparrow’s daughter, Corne Cowie asked for a postponement on her mother’s behalf.[99] Cowie stated:

> Sparrow is sick at the moment with sugar diabetes… she was unable to come to court today because of the stress obviously that this has caused.[100]

Further, Cowie told the court:

> Sparrow did try to get legal counsel and no one will represent her.[101]

[98] Ibid.
[99] *ANC v Sparrow* (01/16) [2016] ZAEQC (10 June 2016).
[100] Ibid.
[101] Ibid.

The Court dismissed the application for postponement. The matter was heard in the absence of Sparrow with the Court imposing a fine of R150,000 and costs on Sparrow.[102]

Sparrow had the common law right to defend herself. Section 35(3)(e) of the Constitution specifically caters for a person being present when having to face any form of a trial and hence a right to defend oneself. This was not the case with respect to Sparrow in the Equality Court. Sparrow was not treated in terms of what the Constitution states.[103]

The objective of the Equality Court, as spelt out in Section 4(1)(a) of the Equality Act reads:

> The expeditious and informal processing of cases, which facilitates participation by the parties to the proceedings.

Marais states with reference to the Sparrow matter:

> 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 … Participation is essential to achieve full utilization of the innovative corrective, restorative and preventative measures provided by the Equality Act.[104]

In addition, Section 35(3) of the Constitution states:

> Every accused person has the right to a fair trial which includes the right to be present when being tried.[105]

The words used in The Constitution are specific and are not subject to misinterpretation.

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[102] The Magistrate, Mr Khalil, stated: "The words posted by the respondent on her Facebook page on 3 January 2016 constitutes hate speech as defined in section 10 of The Promotion of Equality and Prevention of Unfair Discrimination, Act 4 of 2000. Equality Act".

[103] That a person accused of an offence is present at the proceedings is regarded as a fundamental right. In *S v Radebe* 1973 (4) SA 24 (O) the accused, Radebe, had a previous conviction for drinking and driving. That had resulted in a six month suspension endorsement to his driving license. In this case, the magistrate in Radebe's absence altered the six month suspension to 12 month. The Supreme Court reversed the ruling of the Magistrate due to the matter proceeding with the accused not being present in the Magistrate's court. F Cassim "The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process" (2005) 38(2) *The Comparative and International Law Journal of Southern Africa* 285 describes the presence of a person accused of any wrongful act as being "meaningful participation" in the process.

[104] ME Marais 'A Constitutional Perspective on the Sparrow Judgements' (2017) 42(2) *Journal for Juridical Science* 25 at 35.

[105] Section 35(3) of the Constitution.

Though it was not a criminal hearing, Sparrow was accused by the applicants of "hate speech". And further, the Court penalized Sparrow with a R150,000 fine, and costs.

The Equality Act is based on reconciliation and not punishment. Without participation such cannot be achieved. To further proceed to "punish" Sparrow with a fine takes away any form of justice as envisaged by the objective of the Act in question.

Allowing a postponement would have been in the interests of justice, fulfilling the constitutional requirement of Section 35(3) as well as the explicit wording of the Equality Act in Section 4(1)(a).

6. The Momberg Matter

Vicki Momberg, an estate agent, was attacked in a smash and grab robbery. This resulted in her "losing it" by referring multiple times to the policeman who had come to help her as a "kaffir". Further, Momberg also called one of the three complainants, who worked for the emergency line, a "fucking bitch".

Momberg's matter was first heard in the Equality Court[106] and, subsequently, in the Criminal Court. The Equality Court imposed a fine of R100,000 on Momberg, payable to the police officer she had abused. Momberg was found criminally guilty on four counts of *crimen injuria* resulting in a sentence of three years imprisonment with one year of the sentence being suspended.[107] This case is clearly properly crimen injuria.

Crimen injuria always – in effect – resulted in an option of a fine. Additionally, Momberg was a first offender and would have expected her to have received at the worst a suspended prison sentence. The exception to that has been where the *crimen injuria* included an element of physical assault. The Momberg case was the first where a direct jail sentence was given.

[106] Case A 206. / 2018 ref number 10/2/5/1 – 2018 / 183.
[107] *Momberg v S* 2019 (2) SACR 505 (GJ). Momberg was originally found guilty and sentenced in the Randburg Magistrate's Court. Her appeal against both the conviction and sentence was dismissed by the court *a quo*. The High Court however granted Momberg leave to appeal. Her appeal against both conviction and sentence was dismissed.

S v Henning[108] is an informative case in this respect. The appellant, Henning, had called a traffic officer a "kaffir". The accused stated that he had been provoked by the officer calling him a "boer". The Aliwal North Magistrate's Court found Henning guilty of *crimen injuria* and sentenced him to four months' imprisonment. After being sentenced, Henning's attorney made an application for bail, pending an appeal application. The attorney stated that the sentence was "the heaviest for *crimen injuria"* he had come across, to which the magistrate said:

> This could be so as far as he is concerned, but in our Court heavier sentences for *crimen injuria* have been passed and confirmed by the High Court.[109]

The Appeal Court noted that the magistrate did not refer to any specific such case in support of this contention.[110] Pickering J went on to say that both the state and the defence attorneys could also not find any decision of the High Court "in which an effective term of imprisonment was imposed or confirmed on review or appeal in a case of *crimen injuria* of this nature". The Judge further stated:

> I too am unaware of any such matter and my own research in this regard has proven fruitless.[111]

The Court (Pickering J with Sandi J concurring) altered the sentence to R3000 or six months imprisonment of which R1500 or 3 months was suspended.

In *S v Steenberg,*[112] the accused used the word 'kaffir'. He was sentenced to R1000 or six months imprisonment, conditionally suspended for five years.

In upholding the Momberg judgement, including the first time that an accused was sent to prison directly for *crimen injuria*, the Appeal Court (Mudau, J) quoted from *S v Eadie* per Navsa JA:

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[108] *S v Henning* 2004 ZA ECHC 14.
[109] Ibid at 17.
[110] Ibid.
[111] Ibid.
[112] *S v Steenberg* 1991 (1) SACR 594 (N) at 596 the court stated: "In deciding the *injuria* in the circumstances in a particular case merits a conviction of *crimen injuria*, the Court has to some extent pass a value judgement in regard to the reprehensibility of the offending conduct, viewed in the light of the principles of morality and conduct generally accepted as the norm in society." See S Bhamjee and S Hector '*Of Obedience and Offence' (2006)* Obiter 663 at 672 who refer to this with approval as *boni mores*.

> When an accused acts in an aggressive goal-directed and focussed manner, spurred on by anger or some other emotion, while still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manoeuvre he lost his ability to control his actions".[113]

In a road rage incident, Eadie[114] killed the driver of another vehicle with a hockey stick. Therefore in all fairness to Momberg, as she neither killed anyone nor offered any physical violence, this quote does not seem apt. Momberg's case highlights the disproportionate sentence received as compared to the above-mentioned matters.

The above must be looked at in light of two recent cases. In *Rustenburg Platinum Mines v SAEWA obo Bester*,[115] the Constitutional Court held that recognition of the country's history of apartheid and its legacy should be the starting point of any inquiry where the alleged perpetrator is white and the victim is black. This is in contrast to the Equality Court in *Khumalo* stating that it is inappropriate to treat different perpetrators of alleged racism differently from one another based on historic inequality.[116]

7. Others involved in hate speech

An article by the former journalist, radio talk show host and ambassador to Uganda, Jon Qwelane, compared gays and lesbians to animals. The article was described by the Constitutional Court as 'abhorrent' was said to constitute hate speech in terms of Section 10(1) of the Equality Act.[117]

[113] *Momberg v S* 2019 (2) SACR 505 (GJ) at 511.
[114] *S v Eadie* 2002 (3) SA 719 (SCA) at 734.
[115] 2018 (5) SA 78 (CC).
[116] *SAHRC v Khumalo* 2019 (1) SA 289 (GJ).
[117] Qwelane v South African Human Rights Commission and Another CCT 13/21 [2021] ZACC 22. The article – titled 'Call me names – but gay is not okay' – was published in the Sunday Sun in 2008.

Many of the hate speech cases that this essay will examine below have had no effective consequences and in some instances no consequences at all for the speakers. It is submitted that a common thread is racial hatred. In virtually all the cases involved, hate speakers (or the perpetrators) are individuals with some form of importance, from national to community type bases. In other words many of the perpetrators are people with some form of influence. It will be seen that the lack of effective punishment in these cases, or no punishment at all, enforces the belief that the more status one has, the less likely for effective legal consequences. Below are seven such instances.

Julius Malema

In 2010 Julius Malema, then a member of the ANC Youth League – and its leader, together with other prominent ANC politicians, led students at the University of Johannesburg in the singing of the song "Kill The Boer".[118]

It is common cause that "Boer" is the Afrikaner. The call to "kill" the Afrikaner is a call for genocide. It is a direct threat aimed at an identified group of people. The word genocide was looked at in detail in this case.[119] Judge Lamont, quoted the Rome Statute of the International Criminal Courts' definition:

> … genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national ethnic racial or religious group such as:
>
> a. Killing members of the group,
>
> b. Causing serious body or mental harm to members of the group
>
> c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part…
>
> Genocide is created as a punishable crime and includes direct and public incitement to commit genocide.

[118] Stephen Grootes. "Kill The Boer Ruling." Daily Maverick. 10 November 2012.
[119] *Afri-Forum v Malema* 2011 (6) SA 240 (EqC).

Of note, are the words used: “public incitement”. In this matter Lamont J found Malema guilty of “hate speech”. In the case, Malema admitted in his plea to singing the song which translated states: “they are scared the cowards, you should shoot the boer – farmer they rob these dogs”.[120]

In November 2016 Malema stated the following:

> We are not calling for the slaughter of white people, at least for now… the rightful owners of the land are black people. No white person is the rightful owner of the land here in SA and the whole of the African continent. [121]

This statement caused the FW de Klerk Foundation to lay a complaint to the South African Human Rights Commission.

The matter was heard by the Deputy Chairperson of the Human Rights Commission, Advocate Priscilla Jana. The complaint was that the “alleged statement incites violence against white people” and constitutes hate speech”.[122] The ruling by Jana was to the effect that “Mr Malema explicitly states that he is not calling for the slaughter of white people”.[123] [ref] She went on to state that “Mr Malema’s statement can reasonably be construed to demonstrate a clear intention to cause harm at some indeterminate time in the future. Such incitement is not “imminent” or per the language of section 11 (2) (c) of the Constitution, or foreseen at the time when the utterances are made”.[124] [ref] Hence, the statement does not amount to hate speech.[125]

This ruling must be criticized. Firstly, the statement is a direct threat aimed at an identified group of people. Secondly the threat is clear and unambiguous – “slaughter” – which in the context means “murder”. Thirdly the words, “at least for now” have an ominous ring of “wait, it is coming”. Fourthly the tying of the land to the “slaughter” and the words “not

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[120] *Afri-Forum v Malema* 2011 (6) SA 240 (EqC).
[121] SAHRC KZ/1617/0259/HO (14/3/2019). See https://www.politicsweb.co.za (14/03/2019).
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Ibid.

for now" is a threatening indication that those who do not hand over their property will be killed.[126]

Velaphi Khumalo

Khumalo, an official and sports promoter at the Gauteng Department of Sports, Arts, Culture and Recreation, posing with a pistol in his profile photo, stated on his Facebook post:

> I want to cleanse this country of all white people. We must act as Hitler did to the Jews. I don't believe any more that the is a large number of not so racist whit people. I'm starting to be skeptical 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 are all a bunch of racist fuck heads as we have already seen [all sic].[127]

He subsequently posted the following:

> U have the sane venom moss. look at Palestine. noo u must be bushed alive and skinned and your off springs used as garden fertilizer.[128]

Subsequently, Khumalo was suspended for "conducting himself in an improper, disgraceful and unacceptable manner".[129] He however after receiving a "final written warning" was allowed to continue his duties as a Sports Promoter.

[126] The FW de Klerk Foundation with respect to the finding stated as follows. That the findings have been noted with "great concern" because they "brushed aside Malema's chilling implication". This implication being that he could at a later stage call for the slaughter of white people. The statement according to the de Klerk Foundation further demonstrates by the words "at least for now" that hate speech was present and further advocates for a genocide at a future date. As a result of this finding the foundation has questioned whether it is appropriate for the SAHRC to be allowed to continue to act as South Africa's agent on the UN Committee on the Elimination of Racial Discrimination.
[127] Court finds government official Velaphi Khumalo guilty of hate speech. 05 October 2018. https://www.sahrc.org.za/index.php/sahrc-media/news/item/1633-court-finds-government-official-velaphi-khumalo-guilty-of-hate-speech.
[128] Ibid.
[129] Velaphi Khumalo found guilty of hate speech. 05 October 2018. https://www.iol.co.za/news/politics/velaphi-khumalo-found-guilty-of-hate-speech-17366497.

After 19 complaints to the South African Human Rights Commission, the matter went to the Equality Court. There, on 27th September 2018, Khumalo was found guilty of hate speech. He was directed to apologise to all South Africans.

Jacob Zuma.

Jacob Zuma, the former president of South Africa said at the ANC's 103rd birthday event in Cape Town in 2015 that:

> How can you say we told the Afrikaners to go? No, I said the problem began when Jan van Riebeeck came here.

Zuma's comments distinctly draw attention to the arrival of a particular racial group to the country. Thus by implication, Zuma is stating that all South Africa's troubles were caused by these people, who are clearly referred to in Zuma's previous line as being the "Afrikaners."

Zuma's utterance drew very little attention other than some talk show phone-ins. The South African human rights commission appears to have taken no action whatsoever.

Matome Letsoala

On June 21 2018, the South African Jewish Board of Deputies (SAJBD) received a message from Motome Letsoala. It read:

> @SAJBD the #holocaust will be like a picnic when we are done with all you Zionist bastards. Fuck all of you.[130]

The text was accompanied by an image of holocaust victims.

Later that morning Letsoalo sent a second message to the SAJBD reading:

> @SAJBD we must get decimated. We can't have Scandinavian rats, fake Jews, Zionist bastards running our economy.[131]

[130] Motome Letsoala handed 3 year sentence over anti-semitic tweet. https://iol.co.za. Actual URL?
[131] Motome Letsoala suspended sentence of 3 years. https://www.iol.co.za.

In subsequent twitter exchanges with Jewish community members who challenged him, Letsoalo posted further threatening and abusive messages.

Letsoala studied architectural drafting, and was a blogger on Times Live. He describes himself as “an African Artist” and used to exhibit his works on Facebook.

Letsoalo pleaded guilty to a charge of *crimen injuria,* in the Randburg Magistrate’s Court as a result of a case lodged by the SAJBD. Letsoalo was sentenced, in September 2020 to three years’ imprisonment suspended for five years, for threatening anti-Semitic tweets that he had posted.

The sentence against Letsoalo, can be seen to be virtually a non-sentence, as it was just merely words with no real punishment meted out against Letsoalo, unless one calls a slight slap on the wrist and a “do not do it again” as a punishment.

8. A Comparative Analysis

An interesting comparison is that of the “Facebook” post of Sparrow with the Khumalo “Facebook” post.[132]

i) Sparrow went on a racist comment and rant – Khumalo called for a genocide of a section of the South African population.
ii) Sparrow’s comments were with respect to a certain race calling their acts that of monkeys – Khumalo refers to a certain race as venom.
iii) Sparrow is an irrelevant unknown saleslady – Khumalo is an official of a Provincial Department, a position which by its very nature must exercise some influence.
iv) Sparrow issued an immediate apology – Khumalo followed up his original post with a second even more venomous attack and repeated his genocidal call.

[132] See section 4.2 above.

v) Sparrow was punished by two competent courts – Khumalo, at work received a warning and continued in his duties as a sports promoter. In the Equality Court, Khumalo was found guilty and ordered to make an apology.

From the above comparative analysis, the punishment can be seen to be totally one sided with respect to the committed offences.

9. Conclusion

The common law crime of *crimen injuria* is today very much part of South Africa's law. Its presence, highlighted by the Sparrow and Momberg cases, is just as important today as it has ever been in the years gone by. Incidents of road rage, racial hatred and lewd comments are a daily occurrence. Lansdown in 1960 neatly states: "South African courts will treat as a criminal injuria any conduct which … is of a reprehensible character, which, in the interests of society, should be punished".[133] There is no doubt that *crimen injuria* will continue to play an important role in South Africa. However, referring to the Sparrow and Momberg cases the question must be asked: "was *crimen injuria* looked at in the way that the common law prescribes, and moreover upholding Constitutional values".

The courts have started extending the aspect of *"crimen injuria"* to cover a group. Though in terms of the Constitution quite possible,[134] such extension by judges could result in inconsistent precedent, making it bad for the rule of law. The legislature would seem to be the more appropriate place for the necessary enactment. Sentencing for crimes of *crimen injuria* can in the same way be regulated by the legislature. In addition this would lessen the chance of inconsistent sentencing.

Res judicata can be seen to be an item that might be raised at future times. However the chances of it succeeding will be unlikely, as the two aspects – namely the hate

[133] LV Lansdown *Outlines of South African criminal law and procedure* (1960) 2ed at 89.
[134] Section 39 of the Constitution: "When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underly an open and democratic society based on human dignity, equality and freedom … (b) when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights."

speech as such aspect and the *crimen injuria* criminal aspect, though based on the same facts, can be seen to be two separate matters.

The ancient Hebrew saying: “whoever hates, disguises himself with his lips, and harbours deceit in his heart”, is yet another example of how nothing really changes. All that one has to do is to apply the wisdom of the old to the circumstances of today.

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