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Discriminatory Language: A Remnant of Colonial Oppression

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ABSTRACT: Speech carries tremendous power. It shapes our realities, influences our consciousness and, often, the chance for any real change requires changing the way we speak. In South Africa's post-apartheid constitutional state, remnants of colonial oppression surround us, not only in tangible aspects, but also through speech. This paper argues that the way hate speech has been developed through jurisprudence has rendered the concept of hate speech sterile within a South African context. Specifically, this paper uses the tenets of critical race theory and its accompanying endorsement of an intersectional approach to critique the reasonable man test as contained in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') and as formulated by the courts through its jurisprudence. The argument proposed is that the courts' formulation of the legal test for hate speech under section 10 of the Equality Act does not and will not protect previously (and currently) disadvantaged groups because the present test fails to take cognisance of the fact that 'objectivity' is a tainted principle where apartheid and colonialism has shaped laws and its adjudicators. This paper explores aspects of race and law and the way in which 'colour-blindness', non-racialism and the apparent neutrality of the law constitute a veil behind which implicit biases are left unchecked to the detriment of Black people. Importantly, this paper engages with the harms that arise from applying laws that are, and so we argue, 'conceived through the white eye', and we attempt to demonstrate the resulting fallacious nature of the 'reasonable man' test. Ultimately, this paper seeks to question: Who is the reasonable person? Is the reasonable person a member of the group of persons targeted by the speech? Or is the reasonable person akin to the utterer of speech? Or, yet again, is the reasonable person a neutral third party who is assumed to be aware of the South African context but belongs to no racial group?

KEYWORDS: critical race theory, hate speech, intrinsic bias, reasonableness

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I INTRODUCTION

> We construct the social world, in large part, through speech. How we speak to and of others determines whether and on what terms we accept them into our world as groups and as individuals. [1]

Speech carries tremendous power. It shapes our realities, influences our consciousness and, often, the chance for any real change requires changing the way we speak. In South Africa's post-apartheid constitutional state, remnants of colonial oppression surround us, not only in tangible aspects, but also through speech. Not yet belonging in our past, apartheid persists through oppressive spatial planning and economic disenfranchisement based on race, gender, and sexual orientation; and, like a roach, persistent in its will to persevere, oppressive and discriminatory language is aimed at perpetuating the derision of dignity of many individuals and groups. Despite our country's hate speech laws, it is not uncommon to find news stories about racist, sexist, homophobic or ableist language unashamedly spewed at previously (and currently) disadvantaged groups.

For example, the Constitutional Court prompted a reframing and possible renewal of the law through its judgment in *Qwelane v South African Human Rights Commission and Another*.[2] The Court declared s 10(1) of the Equality Act unconstitutional and invalid to the extent that it was inconsistent with sections 1(c) and 16 of the Constitution; and highlighted the importance of hate speech laws in protecting marginalised persons and groups.

While we applaud the Court for vehemently condemning homophobia, we argue that the Court's formulation of the legal test for hate speech under s 10 of the Equality Act[3] did not and will not adequately protect previously (and currently) disadvantaged groups. In this article, we argue for the use of a critical race theory (CRT) perspective which we contend is consistent with the South African constitutional framework. We apply this perspective to the requirement that the notion of hate speech must be determined with reference to a 'reasonable person' test.[4] Through engaging with the history and vagueness of the test, we highlight its propensity to hide judicial bias. Doing so, in our view, leads to two conclusions. First, we argue for the need to continue advancing the racial transformation of the judiciary. Secondly, we highlight the importance of awareness of bias by judges and the role of legal academics in exposing instances of inherent bias.

II THE RELATIONSHIP BETWEEN RACE AND THE LAW

The choice of CRT as a theoretical framework is mostly justified by its precept of questioning the status quo in an effort to gauge the tangible impact of said status quo on Black people.

1 R Delgado 'Hateful Speech, Loving Communities' (1994) 82 *California Law Review* 851, 859.

2 '*Qwelane*' [2021] ZACC 22.

3 Before the Court in *Qwelane* (ibid) was the constitutional validity of s 10(1) of the Equality Act which stated that: 'Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to – (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred.'

4 At the time of writing in November 2021, *Qwelane* was the latest judgment on hate speech handed down by the Constitutional Court. This means that the reasoning of the judgments on hate speech that arose before *Qwelane* only apply to the extent that they relate to the requirements of the hate speech test under s 10(1) of the Equality Act that have withstood constitutional scrutiny. In this case, as will be seen later, the requirement of reasonableness still stands, and on this basis, the reasoning in *Afriforum v Malema* [2011] ZAEQC 2, 2011 (6) SA 240 (EqC), and *Nelson Mandela Foundation Trust v Afriforum* [2019] ZAEQC 2, 2019 (6) SA 327 (GJ) must still apply.

A malleable and evolving paradigm, CRT challenges existing theories of society with the acknowledgment that without a consideration of race and racism, there can be no adequate account of power relations and consequently, existing norms and theories will be biased in the favour of white supremacy.

The theory started as a scholarly movement in the United States in the early 1970s, burgeoning from the works of well-known Black civil rights lawyer, Derrick Bell.[5] Back then, Bell had claimed that regardless of the abolition of slavery, and promulgation of civil rights statutes to prohibit racial discrimination, 'the fact of slavery refuses to fade'.[6] Grounded in this 'refusal to fade', scholarly writings under CRT effectively point out that what is seen as 'racial progress' is usually only a 'regeneration of the problem in a particularly perverse form'.[7] Critical race theory thus arose at a time where 'new theories were needed to cope with emerging forms of institutional or "colorblind" racism and a public that seemed tired of hearing about race.'[8] Critical race theory's constant challenge to the dominant liberal thought is to provide a platform where scholars are free, not only to judge civil reforms on paper, but rather to assess their tangible impact in practice.

This assessment has led critical race theorists to conclude that, during changing times, racism was evolving too. The theory repositioned racism and characterised it as 'ubiquitous, ordinary, making it hard to see'.[9] In contrast to the blatant racism imposed by demeaning laws under apartheid or slavery, the racism that post-racial society is facing is covert and does not necessarily amount to racial vilification:[10]

> In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset – one that whites sought to protect and those who passed sought to attain, by fraud if necessary. Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, [American] law has recognised a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.[11]

The new 'neutral' and 'colour-blind' laws have led to the depoliticisation of race, and the assumption that race is no longer necessary as we are all treated equally before the law. Yet, laws that do not consider our different lived experiences and struggles, cannot lead to substantive equality. The argument is usually that laws, whether posturing as neutral or not, reflect the views of policy-makers and the white majority. In the South African context, there is a Black majority government and a Black majority population. However, despite white people constituting a minority, they own a majority of the means of production, wealth, knowledge

[5] R Delgado & J Stefancic 'Critical Race Theory: Past, Present, and Future' (1998) 51(1) *Current Legal Problems* 467.

[6] R Delgado & J Stefancic *Critical Race Theory: An Introduction* (2nd Ed, 2012) 9.

[7] Ibid.

[8] R Delgado & J Stefancic 'Critical Race Theory and Criminal Justice' (2007) 31(2–3) *Humanity and Society* 133, 133.

[9] C Hallinan & S Coram 'Critical Race Theory and the Orthodoxy of Race Neutrality: Examining the Denigration of Australian Indigenous Athlete Adam Goodes' (2017) *Australian Aboriginal Studies* 99, 100.

[10] Ibid at 101.

[11] CI Harris 'Whiteness as Property' in K Crenshaw, N Gotanda, G Peller & K Thomas (eds) *Critical Race Theory: The Key Writings That Formed the Movement* (1995) 276, 277.

and power.[12] This very distribution of power to the minority population was the objective of apartheid laws. As Modiri argues on CRT in a post-apartheid South Africa:

> Law, it is said, is conceived through the white eye; it represents the white perspective. It starts from the white experience and fails to recognise the view and experiences of the disadvantaged and black persons.[13]

Given the history of South Africa, an example of the law being 'conceived through the white eye' is the absence of a defence against witchcraft as justifiable under South African criminal law. Despite the efforts of white settlers and the apartheid government, the majority of South Africans still believe, and continue to believe, in witchcraft, For example, '*busakatsi*', which refers to witchcraft in an African context, includes the use of harmful medicine; harmful magic; and other means or devices that may cause illness, misfortune or death to a person, or damage to property.[14] This belief prevails in both educated and uneducated communities regardless of geographic location.[15] Yet, in many instances, courts have ignored accused persons' belief in witchcraft, and in so doing have denied the traditional culture of the parties.[16]

An example of this disregard of traditional culture is found in *S v Mokonto,* where the Appellate Division disregarded the issue of the accused's belief in witchcraft as having no relevance to the question of whether the accused had had the intention to kill the deceased.[17] In addition to this, regardless of the fact that everyone has the right to freedom of conscience, religion, thought, belief and opinion under section 15 of the Constitution, as well as everyone being free to enjoy their culture and practice their religion under section 31, the use of witchcraft remained prohibited under the Witchcraft Suppression Act 3 of 1957. A CRT approach seeks to question the disregard of traditional culture and we argue that such disregard of traditional culture in favour of western norms is but a single example of how the law is 'conceived through white eyes'.

This was particular evident in *Rex v Mbombela*,[18] a case decided by the then South African Appellate Division in 1933, where the accused had killed his younger cousin under the erroneous belief that the latter was a 'tikoloshe'.[19] The Judge rejected the accused's defence, stating that:

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[12] JSM Modiri 'The Grey Line in-between the Rainbow: (Re)Thinking and (Re)Talking Critical Race Theory in Post-Apartheid Legal and Social Discourse' (2011) 26 *South African Public Libraries*, 183.

[13] Ibid.

[14] Commission of Inquiry into Witchcraft Violence and Ritual Murders *Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic in South Africa* (1996).

[15] H Ludsin 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law' (2012) 21 *Berkeley Journal of International Law* 62, 64.

[16] South African Law Reform Commission *The Review of the Witchcraft Suppression Act 3 of 1957* (2014) 18, available at https://www.justice.gov.za/salrc/ipapers/ip29-prj135-Witchcraft-2014.pdf. In certain cases, the belief in witchcraft was considered as a mitigating factor in sentencing. For more, see *S v Xaba & Others* [2018] ZAKZPHC 28, 2018 (2) SACR 387 (KZP); *R v Fundakubi & Others* 1948 (3) SA 810 (A); *S v Nxele* 1973 (3) SA 753 (A); *S v Motsepa & 'n Ander* 1991 (2) SACR 462 (A); and *S v Latha & Another* 2012 (2) SACR 30 (ECG).

[17] 1971 (2) SA 310 (A), [1971] 2 All SA 530 (A).

[18] *Rex v Mbombela* AD 269 (1933).

[19] A *tikoloshe* is believed by amaXhosas to be a mischievous or malevolent spirit that takes the form of a little man with small feet. The accused argued that he did not recognize the victim as his young cousin since the former had looked away before dealing the blows. According to indigenous religious belief receiving a glance from a *tikoloshe* means death.

> by the law of this country there is only one standard of 'reasonable man'… the man of ordinary knowledge and intelligence… [T]he race, or the idiosyncrasies, or the superstitions, or the intelligence of the person do not enter into the question.[20]

While many could argue that a reasonable Xhosa man would have believed that the victim was a tikoloshe, the Court refused to take into consideration the context of the accused, implying that:

> this 'reasonable man' – an ideal figure, bleached of the cultural and religious traits of the accused and (although not conceded by the Court to be so) reanimated with those of the colonial official – would not have shared the belief in the tikoloshe underpinning [the accused's] mistake.[21]

These examples suggest that despite the constitutional change, the law retains a bias against the cultures and beliefs of Black people – with the law being used as a 'colorblind' tool which we argue can lead to the demise of Black communities and individuals. This challenges the liberal view that the law is innocent, neutral and that any connection between racism and law is exceptional and curable.[22] What appear to be 'colour-blind' laws entrench a bias against Black people and further preserve the status quo through their application.

Beyond just the law itself, critical race theorists argue that the application of the law too often entrenches bias and furthers white interests under the guise of race neutrality. While many legal scholars accept the notion of judicial bias, CRT takes it further and explains that this judicial bias is often in favour of whiteness. Judicial bias manifests itself through explicit and implicit biases. Explicit biases are stereotypes and attitudes known to the judge, and openly sanctioned as suitable because there are no social norms against these explicit biases.[23] If social norms against explicit biases do exist, the judge may conceal the explicit bias. Implicit biases, on the other hand, are stereotypes and attitudes that are held subconsciously and do not depend on the judge's conscious awareness of the reasons they give for decisions but are reflected in those decisions.[24]

To prove the existence of implicit bias, Harvard University developed an 'Implicit Association Test' (IAT) which assesses the strength of associations between concepts, evaluations or stereotypes.[25] While the IAT is a test that was developed and applied in the United States, we rely on its observation that white judges demonstrate strong implicit bias favouring white people over Black people to show that judges hold racial bias too, even unknowingly. Empirical evidence based on the IAT in the United States shows that white judges demonstrated strong bias favouring white people over Black people.[26] Thus, compared to the view that law is distinct and autonomous from social life, judges' decisions are not based on an organic and pre-political interpretation of the law.[27] Instead, judges reveal their biases

[20] *Rex v Mbombela* (note 18 above) at 270.

[21] P Lenta 'The *Tikoloshe* and the Reasonable Man' (2004) 16(3) *Law and Literature* 354.

[22] P Fitzpatrick 'Racism and the Innocence of Law' (1987) 14(1) *Journal of Law and Society* 122.

[23] Ibid.

[24] J Kang, M Bennett, D Carbado, P Casey, N Dasgupta, D Faigman, R Godsil, AG Greenwald, J Levinson & J Mnookin 'Implicit Bias in the Courtroom' (2012) 59 *University of California, Los Angeles Law Review* 1124, 1132.

[25] Ibid.

[26] Ibid at 1146. JJ Rachlinski, S Johnson, AJ Wistrich & C Guthrie 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 *Notre Dame Law Review* 1195, 1210.

[27] J Modiri 'Race, Realism and Critique: The Politics of Race and *Afriforum v Malema* in the (In)Equality Court' (2013) *South African Law Journal* 284.

in their interpretations and applications of law to facts. In fact, many critical race theorists consider these implicit biases not to be remediable. If so, such biases will be widespread in a country like South Africa with a history of racial discrimination and inequality. Such biases have the opportunity to reveal themselves in many ways and often in the interpretation of broad terms where judicial discretion must be exercised such as 'reasonable', 'sensible', 'common sense' and 'fit and proper'.[28] This article considers the notion of 'reasonableness' and will seek to highlight the dangers it poses for judicial bias in the context of deciding what constitutes hate speech or not.

A Critical race theory and hate speech

In recognising explicit and implicit biases in judges, one cannot escape the impact that these biases have on interpreting the law. As a result, when a legal test or threshold incorporates an objective standard of reasonableness, it can work to obscure the effect of perspective. The work of Richard Delgado is a useful starting point in our interrogation of how perspective can serve to perpetuate or redress racial harm.

Delgado believes that the 'old, formalist view of speech as a near-perfect instrument for testing ideas and promoting social progress is passing into history' and in its place is 'a much more nuanced, skeptical (sic); and realistic view of what speech can do, one that looks to self- and class interest, linguistic science, politics, and other tools of the realist approach to understand how expression functions in our political system.' [29] The outcome, he argues, is more humane.

Delgado proposes that the CRT approach to hateful and racist language is as follows – firstly, that the marketplace of ideas is sterile when dealing with 'systemic social ills like racism and sexism' because these systemic ills are 'embedded in the reigning paradigm, the set of meanings and conventions by which we construct and interpret reality' and any person speaking out against the ruling paradigm is labelled as politically extreme or incorrect. [30] Secondly, freedom of expression is used to sanitise the status quo. Specifically, Delgado argues that 'communication is expensive, so the poor are often excluded; the dominant paradigm renders certain ideas unsayable or incomprehensible; and our system of ideas and images constructs certain people so that they have little credibility in the eyes of listeners.' Thirdly, and lastly, that hate speech may be more of an inequality problem and less of a freedom of expression problem, as hate speech entrenches the status quo and solidifies the unequal distribution of social power. In explaining the perceived tension between speech and equality, Delgado stated '[s]peech, at least in the grand dialogic sense, presupposes rough equality among the speakers'[31]

He poses an important question: 'We are questioning whether the continuum of high-value (viz., normal) and low-value speech may not be all there is. Could there be no-value speech, or negative-value speech, which not only could, but should be restricted?' We argue that, at least in South Africa, there is such a category of speech, and it should be restricted.

[28] Faigman et al (note 24 above) at p 126.

[29] R Delgado 'First Amendment Formalism Is Giving Way to First Amendment Legal Realism' (1994) 29 *Harvard Civil Rights-Civil Liberties Law Review* 170.

[30] Ibid at p 171.

[31] Delgado (note 1 above) at 868.

B Hate speech in South Africa

South Africa's position in relation to hate speech is a rejection of the notion that the right to freedom of expression is supreme above all other rights.[32] This approach is in line with the Constitution's vision for South African democracy. It is clear from the various duties in section 7(2) of the Constitution[33] that the duties of the state are not only limited to protecting the constituent rights but, additionally, the state is obliged to promote rights that foster social welfare. Accordingly, the Constitutional Court, in *Islamic Unity*,[34] recognised two categories of harm which are engendered by hate speech, the harm that it causes to the recipient of the speech and the harm caused to society as a whole.[35] Significantly, the judgments from the Court regarding hate speech stress that through the regulation of hate speech, an important balance between the rights to equality, dignity and free speech needs to be achieved.

The most recent judgment of the Court on hate speech, the *Qwelane* case, highlighted this balance between the rights to equality, dignity and free speech. The facts in *Qwelane* are as follows. The applicant, the late Mr Qwelane, was the author of an article entitled: 'Call me anything but gay is not okay' published in the *Sunday Sun* newspaper in 2008. The article was understandingly deeply offensive to members of the LGBTQIA+ community and eventually led to proceedings in the Equality Court and the High Court. When the case reached the Constitutional Court, the Court found that s 10(1)(a) of the Equality Act – which allowed 'hurtfulness' to be sufficient for speech to constitute hate speech – to be unconstitutional due to its vagueness and unjustifiable limitation of section 16 of the Constitution.

The Court read s 10(1) of the Equality Act to prohibit speech that 'could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred'.[36] The Court in *Qwelane* found that the words 'reasonably be construed' and 'to demonstrate a clear intention' imply an objective test which takes into consideration circumstances and facts around the utterance and 'not mere inferences or assumptions that are *made by the targeted group*' (emphasis added). Adding that the Supreme Court of Appeal erred in its conclusion that the test was subjective, the Constitutional Court highlighted that an objective approach which considers the context in which the words are spoken, is more in line with the spirit, purport, and objects of the Bill of Rights.[37] The Court also endorsed the criteria of reasonableness as applied in *Le Roux*, a case that dealt with the context of defamation:

[32] *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 25.

[33] Constitution s 7(2):'The state must respect, protect, promote, and fulfil the rights in the Bill of Rights.'

[34] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) ('*Islamic Unity*').

[35] The Court in *Islamic Unity* endorsed the theory of the two harms which were developed by the Canadian Supreme Court in *R v Keegstra* [1990] 3 SCR 697, (1990) 3 CRR (2d) 193 ('*Keegstra*'). The Court found the first harm against the individual arose from the fact that there could have been a 'grave psychological and social consequence' to the 'individual's sense of self-worth and acceptance'. The United States Supreme Court in *Virginia v Black* 538 US 343 (2003) relied on this grave psychological and social consequence which it believed was based on the terror associated with the physical violence which minorities have experienced in the past, for being 'punished' because of their immutable characteristics. The second category of harm in *Keegstra* was broader and was based on the belief that hate speech has the potential to fuel violence and discrimination, and thus, the potential to social tensions. It is interesting to note that there was a split vote in the Canadian Supreme Court in *Keegstra* with a division of four to three.

[36] *Qwelane* (note 4 above) at para 176

[37] Ibid at para 99.

> [t]he test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that [they] would have had regard not only to what is expressly stated but also to what is implied.[38]

Relying on *Rustenburg Platinum Mine*,[39] the Court in *Qwelane* held that words themselves do not bear an inherently racist meaning and indicated the importance of the context in which the words are published, propagated, advocated or communicated.[40]

Taking into consideration all the above, the Court concluded that the hate speech test is objective and the requirement of reasonableness in and of itself was left intact. This is even though the judgment embraced the principle of intersectionality, one of the key products of CRT.[41] Instead of questioning what an objective test means in relation to hate speech, the focus was on the objectivity of the requirement of reasonableness. As illustrated in the previous sections, a CRT approach to hate speech would have required an in-depth analysis into this allegedly 'neutral' requirement of reasonableness. However, before this paper delves into this analysis, it is important to consider whether CRT is compatible with the South African Constitution.

C Critical race theory in South Africa

It is not commonly accepted that the South African legal landscape allows for the application of CRT. This is mostly because of the value of 'non-racialism' adopted by the South African Constitution.[42] It is commonly understood that non-racialism is a vision embraced by the drafters of the Constitution in an effort to work towards a society which will not be driven by racial identification. Yet, the problem arises as to what the value of non-racialism means *pro tem*. In the absence of a society in which race would not matter, what does non-racialism mean? Does one ignore race in an effort to achieve such a society? Is such a society even fathomable if one does not address existing racial discrimination?

To answer these questions, it is essential to briefly consider the history of non-racialism. The concept seems to have emerged some time before the adoption of the Freedom Charter in the 1950s.[43] Chief Albert Luthuli adopted the phrase to convey his 'universal' vision for South

[38] *Le Roux v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC) at para 89.

[39] *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13, 2018 (5) SA 78 (CC), 2018 (8) BCLR 951 (CC).

[40] *Qwelane* (note 4 above) at para 98.

[41] K Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour' (1993) 43 *Stanford Law Review* 1241, 1244 and *Qwelane* (note 4 above) at paras 58–60 shows that the Court endorsed the principle of intersectionality to highlight that people are affected by different aspects of their identity and occupy vastly different positions in society based on their wealth and resources. See also *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24; 2021 (1) BCLR 1 (CC); 2021 (2) SA 54 (CC) at paras 65, 73–107, discussed below.

[42] This article does not attempt to provide an exhaustive account of non-racialism under South African law. For more information regarding discussions on non-racialism, see M Brassey 'The More Things Change … Multiracialism in Contemporary South Africa' (2019) 9 *Constitutional Court Review* 443–471 and K Minofu 'Non-racial Constitutionalism: Transcendent Utopia or Colour-Blind Fiction' (2021) 11 *Constitutional Court Review* 301. Section 1(b) of the Constitution states that: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: non-racialism and non-sexism.'

[43] Minofu ibid.

African society, one which would reject race as a means of categorisation and differentiation.[44] Such a meaning appears to be in line with what Glasgow described as 'racial eliminativism'.[45] This translates into the removal of racial categorisation from state policies and institutions, from public life and social discourse, and finally, from private attitudes and thoughts. The endpoint would be that racial categorisation would no longer be of import in our lives, and we would all be equal regardless of race.

While the achievement of such a society is laudable, it is not one that can be achieved while there is still rampant systemic inequality and socio-economic inequity.[46] As it stands, an interpretation of non-racialism which rejects any acknowledgment of race or redress measures may in fact entrench existing racial inequalities.[47] Acknowledging race allows us to see that Black people and other people of colour still endure the consequences of apartheid, despite its formal abolition. It is with this knowledge in mind that the legislature put into place affirmative action as per the Employment Equity Act 55 of 1998. It is clear from the Employment Equity Act's preamble that these laws aim to provide Black people with redress in the form of equality of opportunities to correct for past injustices.[48]

If the value of non-racialism, as per the Constitution, is understood as the complete rejection of racial categorisation, then policies such as affirmative action would be deemed unconstitutional. This view, in its denial of the ramifications of existing, long-lasting, and pervasive racism has been termed by Conradie as a 'power-evasive' ideology, an ideology that refuses to acknowledge existing power dynamics in society. Simply put, this 'power-evasive' ideology seeks to mask the historical power amassed by the minorities that have historically wielded such power.[49] Much like our earlier discussion about the allegedly neutral laws, such power-evasive ideologies allow holders of these ideologies 'to avoid obtaining knowledge about the way race plays out in society'.[50] Many people who believe in these power-evasive ideologies do so because they find it hard to understand the appeal of investigating 'so-called new guises of racial (dis)advantage' now that blatantly racist legislation has officially been repealed by a non-racial constitution.[51] Thus, racism is only seen and acknowledged in the form of violent racist incidents, which is then blamed on particular individuals:[52]

> Social ills are crafted as problems located within specific individual relationships and the possibilities for social action are thus undermined. The hegemonic liberal humanist discourse insisting that we focus on our 'common humanity' erases the specificities of race experiences and evades the question of who has the power to define that humanity.[53]

[44] Ibid.

[45] J Glasgow 'A Theory of Race' (2009) 41(1) *New York: Routledge, Philosophical Papers* 175–179.

[46] MS Conradie 'Critical Race Theory and the Question of Safety in Dialogues on Race' (2016) 36(1) *Acta Theologica* 5, 6.

[47] Ibid.

[48] Employment Equity Act 55 of 1998 Preamble: 'Recognising – that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities created such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.'

[49] Conradie (note 46 above).

[50] Ibid at 9.

[51] D Hook *(Post)Apartheid Conditions: Psychoanalysis and Social Formation* (2013) 70.

[52] Conradie (note 46 above).

[53] L Vincent 'The Limitations of Inter-Racial Contact: Stories from Young South Africa.' (2008) 31(8) *Ethnic and Racial Studies* 1426, 1432.

This understanding of non-racialism, in its refusal to acknowledge the existing harms of racism in a post-apartheid society, is not, in our view, in line with and does not give effect to the spirit, purport and objects of the Bill of Rights. This is because, on a textual reading of the Constitution, it is clear that it envisages race as a ground on which unfair discrimination may take place. Section 9(3) prohibits discrimination based on race, thereby anticipating from its inception that race not only still exists but also has an impact.

In *Rustenburg Platinum Mine,* a case in which a white man used the term 'swartman' ('Black man') to refer to a Black person, the Court remarked that,

> The past may have institutionalised and legitimised racism but our Constitution constitutes a 'radical and decisive break from that part of the past which is unacceptable'. Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by'strife, conflict, untold suffering and injustice'. Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others.[54]

It becomes clear that a view that society as it currently exists should be sanitised of context, is misconceived. The Constitution's commitment to break away from the past, as is seen from *Rustenburg Platinum Mine*, to achieve a society which is non-racial, requires the judiciary to deal with racial discrimination head-on by acknowledging not only its origins, but also its continued existence. An approach that acknowledges the influence of race on different aspects of the lives of people in South Africa is in line with CRT and would require a deeper engagement of the continuing legacy of racism on our law and judicial decision-making.

Additionally, the Constitution mandates affirmative action. Section 9(2) of the Constitution states that 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

On this premise, the Constitution once again not only recognises that race will have an impact on people's lives, it will also allow the state to adopt measures and legislation actively to assist with people's advancement on the grounds of their race. These are precisely the kinds of policies that people with power-evasive ideologies believe should not be permissible. Since we already pointed out that not allowing these policies would, in and of itself, serve to perpetuate racial inequality, we now point out that it would also be unconstitutional. This is because, as Ngcobo J writes in *Doctors for Life*, '[p]rovisions in the Constitution should not be construed in a manner that results in them being in conflict with each other. Rather, they should be construed in a manner that harmonises them.'[55] Additionally, 'while it is true that foundational values play a role in the interpretation of the Bill of Rights, their role is limited to illuminating the language of a particular provision of the Bill.'[56] We consequently argue that an interpretation of the value of 'non-racialism' which aligns with a power-evasive ideology is one that would be in conflict with section 9(2) of the Constitution and thus ought to be abandoned.

Lastly, the Equality Act aims to protect previously marginalised communities, including Black people. The prohibited grounds included in s 10(1) of Equality Act are directly extracted

[54] Ibid.

[55] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 48.

[56] *New Nation Movement NPC & Others v President of the Republic of South Africa & Others* [2020] ZACC 11, 2020 (8) BCLR 950 (CC), 2020 (6) SA 257 (CC) at para 163.

from section 9(3) of the Constitution, under the equality clause.[57] The Equality Act was enacted to give effect to the equality clause, as shown by its long title.[58] The preamble of the Equality Act would suggest that its content was enacted with the aim of being a means of redress for inequalities suffered in the past and those that are still being suffered:

> The consolidation of democracy in our country requires the eradication of social and economic inequalities, *especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people*; […]
>
> Although significant progress has been made in restructuring and transforming our society and its institutions, *systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy* [emphasis added]

The Equality Act's point of departure is aimed at protecting groups which have been and are currently unfairly discriminated against, which includes Black people within the South African context. This acknowledgement of the impact that race has in the daily lives of people in South Africa, once again shows that CRT is consistent with the approach adopted in the South African legal landscape.

Having carved out the place of CRT within a South African context, we now demonstrate that the Court has already adopted tenets of CRT in previous judgments, albeit not always explicitly. In *Rustenburg Platinum Mine*,[59] the Constitutional Court held that the Labour Appeal Court's point of departure regarding 'presumptively neutral' phrases was misguided as it 'fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present' and—

> it cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary.[60]

More recently, in the case of *Mahlangu,* dealing with a Black domestic worker's claim for compensation for her daughter under the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Court underscored the suitability and the need to consider CRT in a South African context.[61] In *Mahlangu*, Victor J for the majority, went to great lengths to detail how

[57] Constitution section 9 states: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[58] The long title of the Equality Act states the following: 'To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination, to prevent and prohibit hate speech, and to provide for matters connected therewith.'

[59] *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13, 2018 (5) SA 78 (CC).

[60] Ibid at para 48.

[61] *Mahlangu* (note 41 above).

the Court has in the past endorsed CRT through the concept of intersectionality, albeit without necessarily having used the term. Intersectionality, a term coined by Kimberlé Crenshaw, has been defined as highlighting '[t]he interconnected nature of social categorizations such as race, class, and gender, [that create] overlapping and interdependent systems of discrimination or disadvantage.'[62]

In *Mahlangu*, the majority held that domestic workers are discriminated against on multiple levels due to their race, gender, class and social status. If the value of non-racialism absolved the courts from considering one's race, to achieve a non-racial society, the Court would have rejected the concept of intersectionality not only in *Mahlangu*, but in numerous other cases.[63] We argue that the Court was correct in endorsing the concept of intersectionality, and that doing so is in line with the Constitution. Since we have demonstrated that CRT is applicable in the South African legal landscape, and indeed helpful, we turn to consider its application to the notion of 'reasonableness' when determining what constitutes hate speech test under the Equality Act.

III REASONABLENESS AND CRT

Through the words 'could reasonably be construed,' s 10 of the Equality Act calls for the application of a reasonableness test. Here, many questions arise: Who is the reasonable person? Is the reasonable person a member of the group of persons targeted by the speech? Or is the reasonable person akin to the utterer of speech? Or, yet again, is the reasonable person an allegedly neutral third party who is aware of the South African context but belongs to no racial group?

A The 'reasonable man': a colonial legal fantasy and a colourless fallacy

In South Africa, the test for the reasonable person in criminal law is derived from the civil law test found in the delictual case of *Kruger v Coetzee*.[64] While this test was formulated in 1966 in the South African context, its use dates to the 1800s in the French, English and Anglo-American legal systems. In the post-enlightenment context, the 'reasonable man' was a means for the judge to provide the jurors with a hypothesis 'as a way to distance [them] from their more immediate response to the case' so as to reduce 'the chance of them deciding simply on the basis of whether they thought the defendant was morally culpable'.[65] Consequently, the objective test enabled jurors to step into the shoes of this hypothetical man. Instead of having a stable identity and characteristics, the reasonable man 'is conjured by the specifics of the case in which he is invoked'.[66]

[62] M Perlman 'The Origin of the Term "Intersectionality"' *Columbia Journalism Review* (2018) available at https://www.cjr.org/language_corner/intersectionality.php.

[63] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15, 1999 (1) SA 6 (CC) at para 113, *Hassam v Jacobs N.O.* [2009] ZACC 19, 2009 (5) SA 572 (CC) and *Brink v Kitshoff NO* [1996] ZACC 9, 1996 (4) SA 197 (CC) at para 42.

[64] 1966 (2) SA 428 (A) 430.

[65] C Dent 'The "Reasonable Man", His Nineteenth-Century "Siblings", and their Legacy' (2017) 44(3) *Journal of Law and Society* 406.

[66] KI Baxter 'The 'Reasonable Man' in Colonial Nigeria' (2020) 6(1) *Open Library of Humanities* 3.

Yet, despite its longevity in the legal sphere, this test is globally controversial with many scholars calling it an 'inappropriate standard' due to its inability to address bias.[67] In the United States, some scholars have called for the test to be replaced by the 'Reasonable Black Person Standard'.[68] The debate around this test has leaned towards questions of the identity of the reasonable person: how old is the reasonable person? What is the sex or race of the reasonable person? But more importantly, is the reasonable person a veil behind which a court hides the biases inherent in its judicial discretion?

Within an African context, Carpiniello has argued that the 'reasonable man' was during colonial times necessary as the idea of a 'reasonable native' was deemed questionable.[69] Hence, regardless of the reasonable man's immutable characteristics, there were identities that he could not adopt – in this case, that of a non-European. This was because the colonial administration deemed that the 'natives' were incapable of being reasonable, as a consequence of being 'savages'.[70] In fact, the reasonable man test 'used to signify the [District] Commissioner's exceptionalism, demonstrating his ability to enter imaginatively into the psychology of the colonial subjects whilst maintaining *his* hold of reason.'[71] From its inception, and particularly in the African context, the reasonable man was white.

B A reasonable man in South Africa

The idea of reasonableness can be a veiled threat. The requirement of reasonableness allows judges to hide their racist and harmful stereotypes and attitudes behind this notion. In turn, given the supposed neutrality of the concept, it is difficult to challenge the reasoning as to what a reasonable individual would say or do, thus leading judicial biases to become entrenched in precedent. Consequently, it is important to consider the nature of the reasonableness test in South Africa. Astrada and Astrada have argued that revisiting the reasonable person through the lens of culture and demographic reveals that the enduring historic reasonable person requires some form of reconceptualization if law is to maintain congruence with the sociocultural, political and economic actualities of the present.[72] They further argue that a re-examination of the reasonable person from a sociocultural perspective reveals a complex relationship between the reasonable person and the administration of justice. Retaining the historical reasonable person – one premised on specific racial (White), ethnic (Western), class-based (upper class) and gendered (Male) components – is problematic if the law is to serve and reflect the people that comprise the present polity. This is because, as shown through our earlier discussion of the lack of innocence of the law, the law is not neutral.

It becomes clear from our discussion of CRT that to be 'colour-blind' in one's approach to the law does not benefit previously marginalised groups, especially not in cases where context is imperative. The reasonable person ought to be one who is neutral in the face of racial discourse, and if one dares put it, a 'raceless' reasonable person. However, that person does not exist: every

[67] AD Donovan & SM Wildman 'Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation' (1981) 14 *Loyola of Los Angeles Law Review* 435.

[68] M Carpiniello 'Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion" Terry Stops' (2001)6 *Michigan Journal of Race and Law* 355.

[69] Baxter (note 66 above)

[70] Ibid at 5.

[71] Ibid at 6.

[72] M Astrada & S Astrada 'Law, Continuity and Change: Revisiting the Reasonable Person within the Demographic, Sociocultural and Political Realities of the Twenty-First Century' (2017) 14 *Rutgers Law Journal* 200.

individual belongs to a particular race group and cannot, particularly within the South African context, claim to be beyond racial bias. Individuals would have either benefitted from privilege by virtue of their race or have suffered prejudice for the same reason. While they might not be consciously aware of either, the intrinsic bias remains.

Thus, the reasonable person test will reflect what the judge deems to be reasonable. As pointed out by Delgado, 'judges are no quicker than others to surmount their own limitations of culture and experience'.[73] He adds: 'Only a judge with no experience, history, or community – virtually with no language – could render a completely unbiased decision in a case calling for reformulation of the terms by which we define that community, change our history, alter our language. There is no such judge.'[74]

Judges, like other members of society, belong to different communities. Their interpretation of neutral terms such as 'reasonable', 'just' and 'fair' is not devoid of context. It remains dependent on the judges' experiences, on what they have heard or read, on 'an interpretative community of its own'.[75] Judges, when presiding on matters relating to hate speech, are required to choose which meaning they ascribe to the speech. This is because speech often has more than one meaning.[76] The meaning can either be that which is put forward by the targeted audience of the speech; that put forward by the utterer of the speech; or, as should be the case, the meaning ascribed by a reasonable by-stander who happens to bear witness to the speech (the reasonable man). The judge, in choosing the latter proposition would in theory not be choosing from the first two meanings of the speech, that of the utterer or the targeted audience. However, this is simply not true because no individual, even in the judge's imagination can be raceless. Given the ubiquity of race, the reasonable person in South Africa still must belong to a race group.

Based on this line of thinking, we argue that the reasonable man is a heuristic, a mental shortcut used by the judiciary to signal neutrality but which in fact conveys their own values and, unfortunately, biases.

IV WHAT DOES THIS MEAN FOR THE HATE SPEECH TEST?

Having established that the reasonableness requirement in the hate speech test is one which needs closer consideration given our history, the way forward is a difficult one. While judicial bias exists, it cannot be removed that easily. If the interests of the judges are reflected whenever discretion is exercised, then it seems logical that a transformation of the judiciary and the appointment of more Black people, should eventually alter the 'reasonable man' test. Hence, the first sound step to rid the judiciary of racial bias against Black people is to appoint more Black judges. However, while this approach seems sound in theory, it unfortunately does not account for the fact that, as we discussed above, the law itself is not neutral and Black judges will have their own biases.

The only solution appears to be, in the tradition of critical legal studies (CLS), the critique and uncovering of implicit bias. Judges must remain perpetually vigilant about the way in

[73] R Delgado & J Stefancic *Must We Defend Nazis: Why the First Amendment Should Not Protect Hate Speech and White Supremacy* (2018) 105.

[74] Ibid.

[75] Ibid at 107.

[76] *Nelson Mandela Foundation Trust & Another v Afriforum NPC & Others* [2019] ZAEQC 2, [2019] 4 All SA 237 (EqC), 2019 (10) BCLR 1245 (EqC), 2019 (6) SA 327 (GJ).

which they apply the reasonable person test; it runs the risk that they will be influenced by implicit biases to draw their conclusions. With greater awareness, it is possible that more obvious prejudices can be countered. The role for academics becomes vitally important in exposing cases of implicit bias. Great acknowledgement of subjectivity than a false objectivity would aid in more transparent adjudication.

It is important to recognise that most of the changes that need to be introduced are cultural and social, and require a long-term overhaul of the many stereotypes held by people in power. The need for such change is clear. During the period 2016 to 2017, the South African Human Rights Commission found in their Annual Complaints Trends Analysis Report that race related complaints accounted for 69 per cent of all complaints, with those relating to hate speech being the most prevalent. As it stands, the prevalence of instances of deeply derogatory speech being hurled at previously (and currently) disadvantaged persons does not inspire confidence, in the law, and in our ability as a nation to rid ourselves of strong racial prejudices. Consequently, pointing out the discrimination that Black people face at the hand of seemingly neutral laws and judges is never a futile exercise. As Botha contends, in a society where hate speech is met with silence, 'hate is normalised and eventually the speech 'gains the informal authority of a social practice'.[77]

V CONCLUSION

> The power of the white world is threatened whenever a black man refuses to accept the white world's definitions.[78]

Such are the words of James Baldwin, succinctly summarising the issues which we have addressed in this paper. The theme that arises time and time again in this paper is the supposed neutrality of the law and its 'pure and neutral' interpretation and application. Much like slavery, the fact of apartheid refuses to fade. The discrimination communities used to suffer under apartheid remains vividly alive, not only through the act of hate speech, but through its adjudication. Using CRT, we argue that laws, and those regulating hate speech, are not neutral and inadvertently give expression to power-evasive ideologies which include intrinsic racial biases. Such biases exist not only in the laws, but through their interpretation in the courtroom too. This is rendered particularly possible where a wide discretion exists, such as the notion of the 'reasonable person', which is the focus of this paper. Within the context of discoursing hate speech, we argue that the reasonable man test under s 10 of the Equality Act is just a veil of neutrality behind which judges' implicit biases are unlikely to be challenged. We underscore that there is no such thing as a 'raceless' reasonable man who can be used as yardstick to measure speech constitutes hate speech. To address this lacuna that often leads to the implicit prioritisation of white interests, this paper highlights the need for continued transformation of the judiciary through the appointment of more Black judges. Additionally, we argue that all judges should constantly be aware of their biases and their impact when relying on supposedly neutral laws, especially when deciding on and developing hate speech jurisprudence. Finally, we

[77] R Langton 'The Authority of Hate Speech' in J Gardner, L Green & B Leiter (eds) *Oxford Studies in Philosophy of Law* (2018) 123, 129 quoted by J Botha 'Swartman': Racial Descriptor or Racial Slur? Rustenburg Platinum Mine v SAEWA obo Bester [2018] ZACC 13, 2018 (5) SA 78 CC' (2020) 10 *Constitutional Court Review* 353, 368

[78] James Baldwin 'Letter from a Region in my Mind' *The New Yorker* (1962), available at https://www.newyorker.com/magazine/1962/11/17/letter-from-a-region-in-my-mind

contend that academics also have a vital role in analysing judgments and exposing the operation of judicial bias therein. While these efforts will be of help, we acknowledge that they will only have tangible effects in the long term, and therein lies the importance of continuous critique of hate speech jurisprudence through the lens of CRT.