

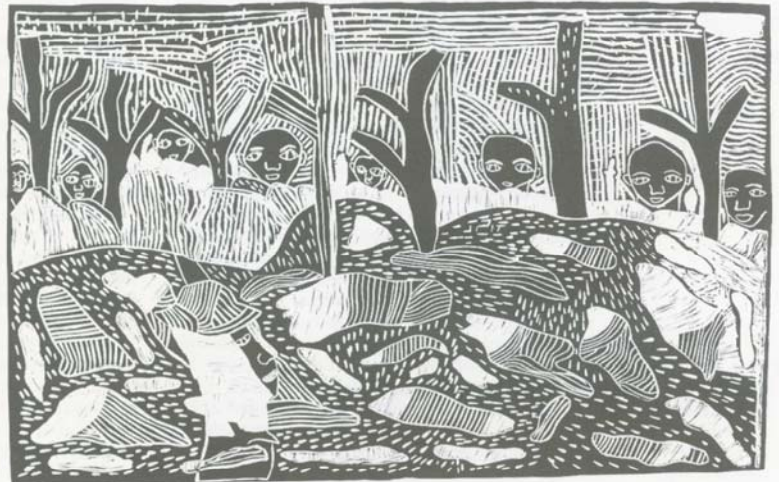
freedom VS racism

ZOLA TOVI
b. 1975

Ukuzalwa wedwu ngumlu wanyama
– To be the only child is a misfortune

My image shows Xhosa warriors waiting to attack behind the trees at Makanaskop. In front of the warriors is a single man. This is Makana telling his warriors that they must not be scared to go and fight because no harm will come to them because all the bullets will be turned to water.

I believe Makana was a prophet and that his powers must have made him a lonely man. I have therefore placed him alone, and not with the other warriors.



THE FXI'S POSITION IS THAT:

■ There should be no hierarchy of rights.

■ FXI considers itself part of the broader human rights family and therefore wishes to see the human rights agenda advanced.

■ Because freedom of expression is compromised already by having internal qualifiers in section 16 of the Constitution, no further inroads should be made on it.

The conundrum of defining racism is one that confronts all of us. It is important to note that there is a tendency to equate covert racism (some of it may be more overt, but generally it is the problem of subliminal racism we are dealing with here) with outright 'hate speech'.

Although many commentators wish to advance the idea that covert racism is banned by our Constitution, we need to be clear that 'hate speech' per se is not banned. It is only that hate speech which 'constitutes incitement to harm' which does not have the protection of the Constitution.

The topic of legal consequences of the Human Rights Commission inquiry needs to be addressed because we fear that certain expectations regarding the power of the Commission have inadvertently been created.

Several complainants asked the Commission to find certain publications and stations guilty of contravening the rights of dignity and equality. In terms of the powers of the courts and in particular the Constitutional Court, FXI is sure the Commission will agree that it does not have jurisdiction to rule on competing constitutional rights.

In addition the Commission cannot ask for the prosecution of any publication under any piece of legislation.

Although the complaints received may in future be dealt with under the recently passed Promotion of Equality and Prevention of Unfair Discrimination Act, no institution can have charges brought against it in retrospect (section 35 (3) (1)).

In terms of future actions under this piece of legislation, it is clear that the drafters appreciated that there needed to be a degree of certainty to bring charges of discrimination against those disseminating or broadcasting information which may be discriminatory.

Consequently section 6 reads that no person may:

■ disseminate or broadcast any information;

■ publish or display any advertisement or notice, that could reasonably be or reasonably be understood to demonstrate a clear intention to discriminate against any person.

The emphasis is ours to indicate that apart from having to initially apply a test of "reasonableness", complainants will also have to prove intention. Therefore

much of the subliminal racism that has been discussed would be difficult to prosecute under this Act.

Regarding the current investigation, what the Commission can do is make recommendations. We therefore urge that these recommendations made should take cognisance of the need not to undermine one fundamental right by giving preference to another.

It is our belief that the Constitution should be construed as a whole and that no right should be seen in isolation to the other rights.

There will be occasions where the courts will be faced with human rights dilemmas. The theory that where constitutional rights collide, it is necessary to make the choice which realises fundamental rights, i.e. an interpretation favouring the protection of fundamental rights must take preference, is an approach which should be considered. This is elaborated on in *The Interpretation of Fundamental Rights Provisions*, an Article 19 publication, where the following from *Asakura v City of Seattle* (judgement of the US Supreme Court, 265 US 332 (1924) at 342) is quoted: "... when two constructions are possible, one restrictive of rights that may be claimed under it and the other favourable to them, the latter is to be preferred."

The conclusions the Commission reached in considering the complaint by the National Party on three statements uttered by the ANC, and which the NP claimed violated the right to human dignity of FW de Klerk, are illustrative of the application of this theory.

In this case the Commission limited the right to dignity in favour of freedom of expression, saying it believed that "in this instance the limitation is essentially for the maintenance of a vibrant and open democracy where debate and freedom of speech are essential elements of a democratic society".

The current debate does not address the fact that the vast majority of the population is unable to access the means of communication. Therefore even if the mainstream media were forced to conform to some politically correct formula of content, this would not resolve the fact that nothing will have changed for those people – particularly women – who are discriminated against because of their poverty, and whose dignity is most impaired because of their economic status and their rural location.

Only when there is a diversity of voices will the problem of racism in the media diminish.

The full text is at:
<http://fxi.org.za/addendum.htm>



Executive
Director **Laura
Pollecutt.**

Legal remedies
for racism are
limited, but
media diversity
is part of the
answer, says
the FXI in
these excerpts
of its
submission to
the HRC.



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