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Submission to the Facebook Oversight Board on Posts Displaying the South African Apartheid-Era Flag

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Introduction

The apartheid flag was first raised in 1926 as the flag of the Union of South Africa, formed in 1910 at a critical turning point in the country's history when in the wake of the Anglo-Boer War the two sides came together to create one country and excluded any representation of the majority black population. The flag drew on the orange, white and blue of the 17th Century Netherlands flag and incorporated the British Union Jack and the flags of the former Transvaal and Free State Boer Republics. Thus, ingrained in its vexillography was racism and the exclusion of black Africans.

The flag was retained when South Africa broke with the Commonwealth, in the face of opposition to its racial policies, and declared a Republic in 1961. It was for the government of the day the key symbol of apartheid and Afrikaner nationalism, its defiant resistance to the global denunciation of its crimes against humanity, and the violent suppression of opposition to it.

With the arrival of democracy in 1994, this flag was replaced by a multi-coloured flag that symbolized the coming together of diverse peoples into a new celebration of freedom. The old flag, however, has persistently been raised and used by those who reject the new democratic order and wish to evoke a nostalgia for apartheid, Afrikaner nationalism, white superiority and black exclusion. It is seen occasionally at certain types of anti-government protests and has gained international popularity among white supremacists and other extremists, such as when it was worn alongside the Rhodesian flag by the perpetrator of the 2015 Charleston massacre in the US.¹

There can be no question that the old flag represents to most South Africans a history of racist exclusion and violent suppression, a celebration of white superiority, made particularly painful when

¹ <https://www.theguardian.com/world/2015/jun/19/charleston-shootings-the-apartheid-era-flags-that-have-found-new-life-with-americas-racists>

it is used to celebrate this hurtful history. Its display in South Africa may provoke a strong, even violent, reaction, especially as it often appears to be used with the intention of causing ugly confrontation. In 2023, the Supreme Court of Appeal judges, in a unanimous opinion, called the flag “a symbol of the cruel ideology of apartheid, infamous for its assault on the dignity, freedom and equality of black people”.² The CEO of the Nelson Mandela Foundation, Sello Hatang, said in his application to declare the display of the flag as hate speech that the gratuitous display of the old flag more than a generation after the abolition of apartheid reminded him that “some South Africans still see me and black people as ‘other’ and would deny them the opportunity to be human. They have no concern or compassion for the majority of South Africans who suffered under apartheid.”³

The obvious comparison is with the Nazi Swastika. While not suggesting a simplistic equivalence between Nazism and apartheid, both the swastika and the old apartheid flag are used by those who want a return to policies declared crimes against humanity and are particularly painful for victims of those crimes or their descendants. It is important to state that one is not simply talking about ideologies that one may not like or may disagree with or may cause hurt, but have been declared by the United Nations to be crimes against humanity.⁴

South African law

Section 16 of the South African Constitution of 1996 guarantees freedom of speech including “(a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.”

It excludes (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Thus the definition of hate speech was narrowly defined, requiring that it had to be targeted at a defined group of people or include incitement to cause harm.

These principles were enacted into law through the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (known as PEPUA or the Equality Act). This Act makes it illegal to “publish, propagate, advocate or communicate words” that could “reasonably be construed to demonstrate a clear intention to be hurtful, be hurtful, be harmful or to incite harm [and]⁵ promote or propagate hatred” based on any of the following characteristics: “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, disability, religious, conscience, belief, culture, language and birth, or any other ground where discrimination causes or perpetuates systemic disadvantage, undermines human dignity and adversely affects the enjoyment of a person’s rights and freedoms.

²<https://www.saflii.org/za/cases/ZASCA/2023/58.html#:~:text=This%20interpretation%20was%20confirmed%20by,11%20of%20the%20Equality%20Act.>

³ Ibid

⁴ https://treaties.un.org/doc/Treaties/1976/07/19760718%2003-04%20AM/Ch_IV_7p.pdf

⁵ The Act neglected to provide a conjunctive, making it unclear whether it intended this to be *and/or*, but the Constitutional Court ruled that *and* was appropriate.

It is important to note is that the categories or grounds for discrimination have widened and now include elements such as conscience, belief and culture and a wider definition of harm.

This was followed by the Prevention of Hate Crimes and Hate Speech Act of 2023. This law went further in criminalising hate speech, threatening lengthy prison sentences for transgressors, and further expanded the definition, including new characteristics such as age, albinism, social origin, HIV or AIDS status, nationality, migrant, refugees or asylum seeker status, occupation or trade, political affiliation or convictions. This broad criminalization went beyond the International Convention on the Elimination of All Forms of Racial Discrimination which recommends jailing only for the most serious hate speech offence.

The pattern is clear: the definition of hate speech is expanding in South African law, beyond the tight framing of the Constitution. This is understandable in a country plagued by a history of racism and ongoing expressions of it, but raises a concern about its potential long-term impact on free expression.

Supreme Court of Appeal ruling on the old flag

When the old flag was displayed at a protest against the murder of farmers in 2017, the Nelson Mandela Foundation and the Human Rights Commission asked the High Court for a declaratory order asserting that the public display of the flag was illegal and, despite opposition from the protest organisers, Afriforum, obtained the court order. Even while fighting for the right to display the flag Afriforum distanced itself from it. The Supreme Court of Appeal dismissed Afriforum's appeal in 2023, finding that the gratuitous public display of the flag constituted not just hate speech but also unfair discrimination and harassment. It allowed for exceptions, though, for *bona fide* academic, scientific, artistic or journalistic use of the flag (as these exceptions are in any event legislated in the Equality Act). In addition, non-gratuitous displays of the flag not covered by these exceptions would also be permitted – for instance, displaying the flag in the Apartheid Museum as part of the historic account of South Africa's ugly past of white hegemony and racism.

In its judgement, the unanimous appellate court was unequivocal in its view of the flag: “As a revered icon of apartheid, the old flag represents hate, pain and trauma for most people, particularly black South Africans. The gratuitous public displays by people of the old flag – a provocative symbol of repression, authoritarianism and racial hatred – brings into unmistakable view their affinity and mourning for the apartheid regime, characterised by its degrading, oppressive and undignified treatment of black South Africans. The message conveyed is a longing for the days of apartheid and the restoration of white minority rule.

“Those who publicly hold up or wave the old flag, convey a brazen, destructive message that they celebrate and long for the racism of our past, in which only white people were treated as first-class citizens while black people were denigrated and demeaned. It is a glorification and veneration of the hate-filled system that contributed to most of the ills that beset our society today. The message is

aimed at intimidating those who suffered, and continue to suffer, the ravages of apartheid; and poses a direct challenge to the new constitutional order.”

And, it concluded, “There is no escaping it: the message [sent by the display of the flag] legitimises white supremacy”. However, the court also made it clear that context was important – the flag was permissible in certain circumstances, which it defined as *bona fide* academic, scientific, artistic or journalistic use.

Local and International Contexts

In the South African context, it is clear that the old flag is considered anathema and that the closeness of the historical horrors of apartheid mean there is a particular sensitivity to its meaning and impact. Its display can be seen, in this context, as a provocation that may lead to violence and harm. The courts have accepted that there is sufficient justification to over-ride concerns over the suppression of historical symbols and artefacts.

It is noteworthy, though, that exceptions are made even within South Africa for its use for *bona fide* academic, scientific, artistic or journalistic purposes and for non-gratuitous displays. This is a recognition that context is important – that the meaning of the display of the flag depends on how and where it is being displayed.

The Supreme Court of Appeal noted in its judgement that “white supremacists around the world have adopted and used the old flag as a symbol of hatred, oppression and racial superiority”. The Charleston shooter, Dylan Roof, who killed nine black people, posted a photograph on the internet of himself wearing a jacket with the old South African and the old flag of white-ruled Rhodesia (now Zimbabwe). “Roof’s choice of symbols and the murder of black worshippers, could hardly send a stronger message of white supremacy and hatred.”

This is the extreme case, but one can imagine the flag displayed in other contexts which may not contain the same dangers and threats of violence, and therefore fall short of the definition of hate speech. The legislation defined this as academic, scientific, artistic or journalistic use, and the decision itself allows for non-gratuitous use, but there are potential difficulties with this definition, given the loose nature of what might be considered academic, scientific, artistic, journalistic and non-gratuitous use. It is easy to see how a white supremacist, for example, can hide behind the mask of these categories. This is particularly true when the definition of a journalist has become increasingly vague, loose and indeterminate. The same may be true also of the definition of an artist, scientist or academic.

Conclusion

There is a need to act to prevent the use of symbols like the old apartheid flag and the swastika to promote the return to ideologies and practices which have been declared crimes against humanity. However, it would not be justified to ban *any* use of these symbols in *any* context, as they can also be used to expose, examine, educate and remind people of these historic crimes and what led to them. We need to ensure a ban is focused on preventing harm, potential violence and crime without

unduly infringing other free expression rights. To do this any restriction needs to be narrow, focused and deliberate in its purpose.

Recommendation

We recommend that Facebook take down postings in which the flag is used to promote, glorify or incite white supremacy, apartheid, violence or crime.

This may require that artificial intelligence be used to identify the flag online, but for a human decision on the context and usage of it. We would also recommend that the persons making such an assessment be people who are aware of the history, nature and usage of this flag in the South African context.

*Campaign for Free Expression is a registered non-profit, public benefit organisation operating in five Southern African countries (South Africa, Zimbabwe, Botswana, Eswatini and Malawi) to defend and expand free expression for all citizens.

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