WHY REGULATING SOCIAL MEDIA IN SOUTH AFRICA CANNOT, SHOULD NOT AND WILL NOT BE ALLOWED TO HAPPEN

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Minister of State Security, David Mahlobo, says that the South African Government is considering regulating social media use in South Africa. His reason for this is that social media is being abused to peddle information that harms individuals. If he is talking about regulating legitimate information before it is posted to social media, then it is simply a bad idea and will not see the light of day.

Using rumours, gossip, lies, propaganda or "fake news" to influence people is not new. These techniques have been around for as long as one group of people has tried to influence and win another group of people over to their cause. Governments, political parties, activists and others have, over the ages, used paintings, cartoons, posters, pamphlets, films and radio to further their agendas. Just because rumours, gossip, lies, propaganda and fake news are being spread on social media does not make it any different to what was done in the past: it is just the medium that has changed.

We can accept that using techniques involving gossip, lies and propaganda may be offensive and wrong. However, when weighed against the right to freedom of expression, trying to regulate, in advance, what people can and cannot say, is a serious infringement of this right. South Africa's apartheid era involved many laws that restricted the right to freedom of expression. Our Constitutional Court has, for many reasons including those apartheid restrictions, reinforced the right to freedom of expression.

The right to freedom of expression is of course not unlimited. Section 16(2) of the Constitution says that this right does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Even though these limitations on the right to freedom of expression are absolutely justified, how does the Government regulate what a person plans to tweet or post before they have tweeted or posted it? How will the Government decide, once a person has tweeted or posted something, whether what they have said is, for example, propaganda for war or advocacy of hatred?

Social media is like the Speakers' Corner of the digital era. At Speakers' Corner, people express themselves freely, even saying things that may be unpopular or that may offend some of us. So, as much as something may be offensive or unpopular, as long as what social media users tweet or post does not fall into those categories limited in section 16(2), they are free to say whatever they wish.

If people are tweeting and posting information that contravenes section 16(2) of the Constitution, we have recourse to laws like the Electronic Communications and Transactions Act, the Promotion of Equality and Prevention of Unfair Discrimination Act, the Protection from Harassment Act and the common law. We also have the social media platforms' terms of use to get offensive material removed.

There may be solutions like the civic education the Minister suggests or Australia's Office of the Children's eSafety Commissioner, which in any event regulates offences after the fact.

If however, it is the Government's plan to regulate, in advance, what people tweet or post on social media, the Minister's plan is just not going to work.