

K Naidoo & MG Karels

Prosecuting “hate”: An overview of problem areas relating to hate crimes and challenges to criminal litigation

Abstract

Several calls, from a wide spectrum of sectors for the enactment of hate-crime legislation in South Africa, suggest that there is limited knowledge about the theoretical underpinnings of this area of criminal law and of the practical problems associated with the implementation of hate-crime laws. This submission briefly examines the origins of hate-crime laws and attempts, by using existing American sources, to provide a conceptual framework for hate crimes. The different models of hate-crime laws, definitional issues and the controversies associated with hate-crime laws are considered. These controversies include disagreements about the use of the term ‘hate’, the inclusion of victim categories, and the consideration of motive as a requirement of hate crimes. The article also considers practical problems associated with the implementation of hate-crime laws. These problems could commence at the complaint stage when evidence of bias has to be established by law-enforcement officers, and extend to the trial stage, when the role of victims must be considered, when plea bargaining is a possibility and when bias has to be proved in court.

“Haatvervolging”: ’n Oorsig van probleemareas wat betrekking het op haatmisdade en uitdagings tot straflitigasie

Verskeie beroepe wat vanuit ’n wye spektrum ontvang is vir die daarstelling van Suid-Afrikaanse wetgewing op haatmisdade veronderstel dat daar beperkte kennis is oor die teoretiese grondslae van hierdie area van strafreg, asook oor die praktiese probleme wat met die implementering van wetgewing op haatmisdade verband hou. Hierdie bydrae ondersoek bondig die ontstaan en pogings van wetgewing op haatmisdade deur gebruik te maak van bestaande Amerikaanse bronne ten einde ’n begripsgrondslag vir haatmisdade daar te stel. Die verskillende modelle van haatmisdadewetgewing, omskrywingskwessies, asook die twispunte wat met hierdie wetgewing verband hou word oorweeg. Hierdie polemiek sluit verdeeldheid in oor die gebruik van die terminologie ‘haat’, die insluiting van kategorieë van slagoffers, asook die oorweging van motief as ’n vereiste vir haatmisdade. Hierdie artikel oorweeg ook praktiese probleme wat verband hou met die implementering

Dr K Naidoo, Senior Lecturer, and Dr MG Karels, Senior Lecturer, Department of Criminal and Procedural Law, University of South Africa. This article emanates from a paper presented at the 10th Annual Eastern and Western Cape Universities Emerging Researchers’ Conference, Faculty of Law, Nelson Mandela Metropolitan University, Port Elizabeth, 29-30 January 2015.

van haatmisdaadwetgewing. Hierdie probleem mag ontstaan op die stadium waarop die aanklag aanhangig gemaak word wanneer wetstoepassers getuenis van vooroordeel moet vasstel. Dit kan ook uitgebrei word na die verhoorstadion wanneer die rol van die slagoffers oorweeg word, waar pleitonderhandelinge 'n moontlikheid is, asook wanneer vooroordeel in 'n hof bewys moet word.

1. Introduction

There have been calls from various sectors for the enactment of hate-crime legislation in South Africa.¹ Within the South African context, however, there is ostensibly a limited theoretical knowledge of the origins of hate-crime laws and of the controversies surrounding hate crime as an academic area of study. There is also an apparent lack of awareness of the problems associated with the implementation of hate-crime laws and of the difficulties associated with the prosecution of hate crimes.

1.1 Conceptualising hate crimes: An American perspective

Hate crimes are crimes that are motivated by the perpetrator's prejudice or bias towards the victim's membership in a particular group. The victim's group membership could refer to race, ethnicity, gender, sexual orientation, religion, disability and several other characteristics of the victim.² In jurisdictions that have enacted hate-crime legislation, there is a general trend for a harsher sentence, known as an aggravated or enhanced penalty, to be imposed on a convicted hate-crime perpetrator.³ An aggravated or enhanced penalty is more severe than the penalty imposed on the same crime when it is not motivated by bias or prejudice.

There is some consensus that the United States of America (USA) was the first country to recognize hate crimes and to enact hate-crime laws.⁴ The majority of research on hate crime is consequently of American origin, although there is a growing body of research from other parts of the world.

1 In this regard, see Breen & Nel 2011:33; Naidoo & Karel 2012b:623-624; Mollema & Van der Bijl 2014:672-679 (which is broadly representative of the academic sector). See also Harris (11 November 2014). The Hate Crimes Working Group, a broad, multi-sectoral civil-society organisation also made submissions to the Department of Justice recommending the enactment of hate-crime legislation in South Africa (Nosarka 2013:4).

2 The victim characteristics that are recognised in a hate-crime law would differ depending on the jurisdiction concerned.

3 In this regard, see the American Federal Hate Crime Laws; the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act, 2009 (codified as 18 United States Code §249). Section 7 imposes enhanced penalties on the convicted perpetrators of hate crimes if the crimes involved the race, colour, national origin, or religion of the victim. See also the British Crime and Disorder Act, 1998. Section 28 of this statute imposes enhanced penalties on the convicted perpetrators of "racially aggravated" offences.

4 Levin 1999:6; Gerstenfeld 2013:11; Hall 2013:25.

As regards the origins of hate-crime laws, some writers trace the origins of hate-crime laws to the period of Reconstruction⁵ in the USA, when several federal civil-rights laws were enacted.⁶ Federal civil-rights laws were enacted to protect newly freed slaves and people of colour who were particularly susceptible to violence and coercion immediately following the American Civil War.⁷

Other academic writers, however, trace the origins of hate-crime laws in the USA to the Civil-Rights Movement of the 1960s, and to the women’s rights and the gays and lesbians’-rights movement of the 1970s.⁸ From the period of the Civil-Rights Movement onwards, interest groups based on race, ethnicity, gender and sexual orientation realized that it was strategic to gain recognition for prior disadvantage and mistreatment in order to obtain social benefits, social inclusion, and recognition by the criminal law.⁹ An example of a precursor of present hate-crime laws dating back to this period is the Civil Rights Act of 1968,¹⁰ which prohibits interference with a person’s federally protected rights in cases of violence or threats of violence *because of a person’s race, colour, religion or national origin*.¹¹

Two distinct models of hate-crime laws are identifiable within the USA: the “racial-animus” or “hostility” model and the “discriminatory-selection” model.¹² In the racial-animus/hostility model, hate crimes are defined on the basis of the perpetrator’s racial *animus* towards the racial or ethnic group of the victim, and such *animus* is central in motivating the perpetrator. In the discriminatory-selection model, hate crimes are defined in terms of the perpetrator’s discriminatory selection of his victim. The reason that the perpetrator selected his victim is irrelevant. The simple fact that a particular victim was selected is sufficient proof of bias motivation.¹³

As an area of academic study and research, hate crimes are subject to considerable disagreement and controversy. First, there is no universally accepted definition of a hate crime.¹⁴ Within the American context, each

5 The period of Reconstruction refers to the 19th century post-Civil War period.

6 Levin 2002:227; Hall 2013:20-22; Levin 2009:7.

7 Levin 2002:231. The American Congress passed the Civil Rights Act of 1866, which granted citizenship to all persons who were born in the USA as well as the Enforcement Act of 1870, which guaranteed the right of due process of law and equal protection of the law provided in the Fourteenth Amendment of the American Constitution. These federal civil-rights laws aimed to protect certain racial and status groups (in particular African Americans and former slaves). They are thus considered the earliest American laws to recognize the group-based protection of people. At present, hate-crime laws also serve to protect specific groups of people.

8 For example, Jacobs 1992:542; Jacobs & Potter 1998:5.

9 Jacobs & Potter 1998:66.

10 Codified as 18 United States Code (USC) §245.

11 The Civil Rights Act of 1968, therefore, also provides for the group-based protection of people.

12 Lawrence 1999:30.

13 Lawrence 1999:30.

14 Boeckmann & Turpin-Petrosino 2002:208; Hall 2013:1.

state has legislation with its own definition of hate crime that recognises different victim groups.¹⁵

Academic scholars disagree as to the use of the term “hate” within the context of hate crimes. There are critics who opine that hate crimes are not motivated by “hatred” as the term is commonly understood, but rather by the prejudice, bias or bigotry of the perpetrator.¹⁶ These critics consequently suggest a change in terminology from “hate crime” to “bias crime”.¹⁷ While this disagreement may exist at an academic level, the term “hate crime” is, in fact, commonly used, particularly in the USA.

Hate crimes are a controversial area of criminal law in the USA, since there is no consensus on which categories of victims to include within a hate-crime law. The victim categories that are included in a hate-crime law will depend on “political” considerations.¹⁸ According to Jacobs,¹⁹ American politicians readily support laws that recognise minority groups in return for their votes. Generally, however, the majority of hate-crime laws include race, ethnicity and religion as victim characteristics.²⁰ The inclusion of these victim characteristics in hate-crime laws is less controversial. Within the context of the USA, conservative and religious lobby groups often contested the inclusion of sexual orientation as a victim characteristic in hate-crime laws.²¹ At present however, sexual orientation is included as a victim characteristic in most of the American hate-crime laws.²²

There is also some controversy surrounding the consideration of a perpetrator’s motive in establishing his criminal liability. In the majority of Western legal systems, a perpetrator’s criminal liability is based on his criminal conduct and his guilty state of mind in the form of intention or negligence, which is referred to as *mens rea*.²³ This is an established principle of law in South Africa.²⁴ Motive, however, refers to the thoughts, ideas, or reasons underlying a perpetrator’s *mens rea*.²⁵ Motive is not usually regarded as an element of a crime.²⁶ In the USA, the consideration of motive as an element of a crime in order to establish a hate-crime perpetrator’s guilt has prompted critics of hate-crime laws to refer to them as laws that punish “thoughts”.²⁷ This criticism should be considered in

15 Since the USA has a federal system of government, each state has its own system of law. Hate crimes are consequently defined differently in each American state, although common threads exist in their definitions.

16 Lawrence 1999:9.

17 Grattet & Jenness 2001:668.

18 Jacobs 1992:546.

19 Jacobs 1992:542.

20 Shively 2005:19.

21 Grattet & Jenness 2004:27; Harris (11 November 2014).

22 Shively 2005:19.

23 Cook 1917:646.

24 Snyman 2014:146.

25 Gerstenfeld 2013:46-47.

26 This is the position in South African criminal law (see Snyman 2014:186) and in American criminal law (see Gaumer 1994:13).

27 Gellman 1992:509; Jacobs 1992:551.

light of the First Amendment of the US Constitution, which protects free speech, freedom of belief and expressive, symbolic conduct. Certain American hate-crime laws have been held to be unconstitutional on the basis of the First Amendment. In the case of *R.A.V. v. St. Paul*,²⁸ a hate-crime law was held to be unconstitutional on the basis of content and viewpoint-based discrimination, because it selectively forbade "fighting words" which communicated messages of racial, gender, or religious intolerance, but not "fighting words" which communicated messages of intolerance based on union membership, political affiliation, or homosexuality. The hate-crime law was thus held to be a selective curtailment of the right to free speech.²⁹

Some controversy also exists over the fairness and constitutionality of imposing enhanced penalties on the perpetrator of a hate crime. Penalty-enhancement laws increase the sentence for a crime if it was motivated by bias or increased the level of a crime from a simple misdemeanour to a felony.³⁰ The same crime is not subject to such a penalty enhancement when it is not motivated by bias or prejudice. Within the context of the USA, the imposition of enhanced penalties has raised constitutional issues relating to the equal protection clause in the Fourteenth Amendment of the American Constitution.³¹ A penalty-enhancement law was, however, held to be constitutional in the U.S. Supreme Court case of *Wisconsin v Mitchell*.³²

The critics of hate-crime legislation question whether hate-crime laws do, in fact, promote reconciliation or sow further divisions in multicultural

28 *R.A.V. v. St. Paul* 505 U.S. 377 (1992).

29 It is the authors' submission that if a hate-crime law were to be enacted in South Africa, it is unlikely that a constitutional challenge to such a law on the basis of the right to freedom of expression would succeed, since this right is not as widely interpreted in South Africa as it is in the USA. In this regard, see Currie & De Waal 2013:338. The right to freedom of expression contains specific limitations in South Africa (refer to section 16(2) of the *Constitution of the Republic of South Africa* and to the general limitation clause in section 36 of the *Constitution*).

30 Lawrence 1999:93. It should be noted that these grades or levels of crimes do not exist in South African criminal law.

31 Lawrence 1999:93.

32 *Wisconsin v. Mitchell* 508 U.S. 476 (1993). If a hate-crime penalty-enhancement law were to be enacted in South Africa, it is unclear whether such a law would survive a constitutional challenge based on the right to equality. The right to equality is enshrined in section 9 of the South African *Constitution*. Equality as a right has often been interpreted with regard to the value of dignity, which is regarded as the foundation of most rights in the South African *Constitution*. In this regard, refer to *S v. Makwanyane* 1995 (3) SA 391 (CC)). If hate crimes, motivated by the victim's race, ethnicity, or sexual orientation can be shown to be a violation of the victim's dignity, a future hate-crime penalty-enhancement law could possibly withstand constitutional scrutiny on the basis of the right to equality, since it could be argued that the offender has violated the dignity of the victim. The violation of the victim's dignity could merit the imposition of a harsher sentence.

societies.³³ The proponents of hate-crime laws, however, aver that crimes motivated by bias or prejudice, particularly racial and ethnic bias or prejudice, are worthy of harsher punishment, since they are more harmful than their non-hate-crime equivalent crimes and should thus be punished more severely.³⁴ According to Lawrence,³⁵ the hate-crime victim is not randomly attacked, but is attacked for a personal reason and cannot reduce the risk of being attacked in the future since s/he cannot change the characteristic that made him/her a victim. A victim of a racially motivated hate crime would not be able to change the colour of his/her skin or his/her physical appearance in order to minimize the risk of future violence. According to Lawrence, hate crimes “strike at the very core of the victim’s identity”.³⁶ The same could also be said of hate crimes that are motivated by the sexual orientation of the victim. It could be argued that a victim cannot change his/her sexual orientation and that a hate crime is an attack on an essential, core element of the victim’s identity.

2. South African context

At present, hate crimes as a specific form of criminal conduct are not recognised in South African law. Moreover, specific statutory provisions do not exist in South Africa that would allow sentencing officers to impose harsher penalties on offenders who have committed racially or ethnically motivated crimes, or crimes motivated by the victim’s sexual orientation.³⁷

Hate crimes have recently received considerable public attention in South Africa, particularly with regard to crimes committed against foreign Africans (which are collectively referred to as “xenophobic violence”), the “corrective rapes” of Black lesbian women, and farm attacks, in which the majority of the victims were White farmers.³⁸

One of the worst episodes of mass xenophobic violence in South Africa occurred from May to June 2008 when more than 60 African foreigners were killed and thousands were displaced and injured.³⁹ In the most recent outbreak of xenophobic violence in South Africa between March and April 2015, mobs of African South Africans attacked foreigners and looted foreign-owned shops in Isipingo, KwaMashu and Umlazi near Durban.⁴⁰ Foreign-owned shops in central Durban and in Pietermaritzburg were also

33 Gerstenfeld 2013:80.

34 Levin & McDevitt 2002:11; Levin & McDevitt 2002:17; Lawrence 1999:39.

35 Lawrence 1998-2000:150.

36 Lawrence 1998-2000:150-151.

37 Although these factors may be aggravating during trial or sentence, there are no specific legislative provisions to enhance penalty based exclusively thereon.

38 Breen & Nel 2011:33-34.

39 Robin 2009:637; Breen & Nel 2011:34.

40 <http://mg.co.za/article/2015-04-13-thousands-mob-kwamashu> (accessed on 16 April 2015). In one of the early attacks, two Somali shopkeepers were injured when their shop was petrol-bombed.

attacked and looted.⁴¹ The shops of Somalis, Ethiopians and Malawians were specifically targeted in these attacks.⁴² In Johannesburg, mobs of African South Africans also attacked and looted foreign-owned shops in Jeppestown and in some of the townships and informal settlements of the metropolitan area.⁴³ The majority of the victims were targeted, because they were foreigners who looked different, dressed differently or spoke with foreign accents. They were, therefore, more vulnerable to violence in the townships and informal settlements of urban South Africa. It is submitted that the killings and assaults of African foreigners, and the attacks on their properties, may be considered hate crimes, since the victims were specifically targeted because of their ethnicity.

As regards Black lesbian women⁴⁴ in South Africa, research has revealed that they have been subjected to a particular form of rape referred to initially as "curative rape",⁴⁵ but more commonly as "corrective rape" in South Africa.⁴⁶ "Corrective rape" can be distinguished from other rapes because of an additional motive, namely to "cure"⁴⁷ or "correct"⁴⁸ a lesbian woman's sexual orientation. There is also some evidence to show that a number of Black lesbian women have been murdered because of their openly lesbian status.⁴⁹ Mkhize *et al.* have documented more than ten cases involving the rape and murder of young Black lesbian women in several peri-urban Black townships and some urban areas in South Africa between 2006 and 2009.⁵⁰ These crimes against Black lesbian women may be considered hate crimes, since the victims were specifically targeted because of their sexual orientation.

From the early 1990s, violent attacks on White farmers in the remote rural areas of South Africa were first brought to the attention of the public. From 1997, farm attacks were reported as having increased at an alarming rate.⁵¹ A racial motive was suggested in most of the highly publicised cases of farm attacks since the perpetrators were Africans and

41 Nair *et al.* (16 April 2015).

42 <http://www.timeslive.co.za/local/2015/04/16/police-vow-to-halt> (accessed on 16 April 2015).

43 Hosken *et al.* (16 April 2015).

44 Within the context of this article, the term 'Black' is used in a narrow sense to refer to African lesbian women.

45 Muholi 2004:118.

46 According to most of the anecdotal reports, Black lesbian women in South Africa are nearly always the victims of 'corrective rape'. There is, however, some suggestion that a few 'Coloured' lesbians have also been subject to 'corrective rape', but this is not immediately evident from the majority of the media reports. Gontek 2007:42).

47 Kelly (9 March 2015).

48 Thorpe (7 March 2015).

49 Naidoo & Karel 2012a:248.

50 Mkhize *et al.* 2007:46-47.

51 Olivier & Cunningham 2006:115; Moolman 2000b:172. According to Moolman, between January 1997 and January 1998, there were 466 farm attacks, and between February 1998 and March 1999, 962 farms were attacked.

the victims were White.⁵² The establishment of a Committee of Inquiry into Farm Attacks under the auspices of the National Commissioner of Police in 2003 analysed over 3,000 farm attacks for the period 1998 to 2001.⁵³ The Committee found that a racial or political motive could be confirmed in only 2% of farm attacks and that the majority of farm attacks were motivated by robbery.⁵⁴ Despite the perception that most of the attacks on farms are racially motivated, the limited existing research suggests that only a small percentage of farm attacks are, in fact, racially motivated and could thus be considered hate crimes. In other words, White farmers and their families have been targeted because of their race in only a small percentage of these crimes.

There has consequently been a call for the enactment of hate-crime legislation in South Africa.⁵⁵ South Africa, like the USA, is a country with a long, well-recorded history of racial violence and discrimination as well as violence and discrimination towards gay and lesbian people. After receiving a number of petitions from civil-society organisations in 2013, Jeff Radebe, the former Minister of Justice and Constitutional Development, established a National Task Team consisting of government departments and civil society organisations to address the issue of hate crimes in South Africa.⁵⁶ After intensive research and consultation, the National Task Team formulated a draft policy framework on hate crimes.⁵⁷ However, the draft policy still has to be presented to various government departments in the safety and security cluster and to the general public before it is submitted to parliament.⁵⁸ It is unclear, therefore, when and if hate crime legislation will be enacted in South Africa.

In early 2011, Breen and Nel⁵⁹ suggested that hate crimes are a major problem area in South Africa and that they warrant the implementation of specific law, because they are message crimes that undermine social

52 Moolman 2000a:49-55.

53 Summary of the Report of the Committee of Inquiry into Farm Attacks. <http://www.iss.co.za/CJM/farmrep/farmsummary.pdf> (accessed on 1 November 2014). The Committee examined police reports and dockets for the period 1998 to 2001.

54 Summary of the Report of the Committee of Inquiry into Farm Attacks. <http://www.iss.co.za/CJM/farmrep/farmsummary.pdf> (accessed on 1 November 2014).

55 For example, by Breen & Nel 2011:33; Naidoo & Karels 2012b:18-23; Mollema & Van der Bijl 2014:672-679; Harris (11 November 2014).

56 Speech by the Honourable John Jeffery, Deputy Minister of Justice and Constitutional Development, Cape Town, 11 February 2015. http://www.justice.gov.za/m_speeches/2015/20150211_HateCrimes.html (accessed on 9 March 2015).

57 Speech by the Honourable John Jeffery, Deputy Minister of Justice and Constitutional Development, Cape Town, 11 February 2015. http://www.justice.gov.za/m_speeches/2015/20150211_HateCrimes.html (accessed on 9 March 2015).

58 Speech by the Honourable John Jeffery, Deputy Minister of Justice and Constitutional Development, Cape Town, 11 February 2015. http://www.justice.gov.za/m_speeches/2015/20150211_HateCrimes.html (accessed on 9 March 2015).

59 Breen & Nel 2011:33-43 at 38.

cohesion and have an especially traumatic impact on victims. In their submission, the authors make no recommendation as to which model of hate crime legislation (*viz.* discriminatory selection or racial animus/hostility) would be most effective, nor do they make a case for the creation of specific substantive crimes, or amendment to existing sentence enhancement instruments.⁶⁰ Whether the issue of hate crime is eventually dealt with within the South African law by means of a separate criminal law or legislative enactment, or forms part of aggravated sentence legislation, there are challenges to prosecuting “hate”, over and above the obvious conundrum of conclusively proving the perpetrator’s state of mind. Some of these challenges are already evident in practice, as demonstrated in the recent slew of so-called *corrective* or *curative* rape cases before the courts.

Minister Radebe, remarked recently that

[n]otwithstanding the absence of specifically designated legislation on hate crimes, South Africa’s legal framework is comprehensive enough to ensure that current incidences of crimes involving bias motive are dealt with severely by the law enforcement agencies.⁶¹

If one, however, examines the prosecutorial perspective from the current criminal justice framework, the result is not as positive as Minister Radebe depicts it to be.

Currie-Gamwo,⁶² for example, opines that successful prosecution, in cases that involve motive (even though not necessary to prove), is reliant on the *manner* in which cases of this nature are prosecuted and the specific attitude of the prosecution to these cases. She continues that the prosecution of these types of crime rest on early identification, and expert handling by qualified and experienced litigators. Meredith, a prosecutor from the Wynburg Magistrate’s Court, who has dealt with corrective rape cases (although not termed as such), highlights the difficulty in this excerpt:

Dealing with a rape charge is not an easy task and my burden was intensified when the media began reporting on the matter. I must say that it was quite difficult because I had a complainant who had tremendous hatred towards the accused and just wanted to attack him at every chance she got. She was also a very difficult witness to lead, because she was traumatized and enraged. At that stage she had also already been exploited by a lady in the community who took pictures of her and allegedly sold it to the international media. I therefore had to constantly remind her that I was biased towards her and was representing her best interest. I also had to deal with her supporters who literally assaulted the accused in front of the court.

60 For example, the *Criminal Law Amendment Act 105/1997*.

61 Radebe (22 January 2015).

62 <http://www.npa.gov.za/UploadedFiles/NPA%20Khasho%20December%202013.pdf> (accessed on 19 January 2015).

The attorney basked in the negative impression and I was scared that the court would hold it against the state case...⁶³

Although this case resulted in a conviction,⁶⁴ the prosecution of hate is not a simple matter, nor reflective of the ordinary prosecutorial process. Although the current framework, in the words of Radebe, may appear *prima facie* “comprehensive”, it does not take into account the difficulty in securing a successful conviction for a crime committed with a specific state of mind or mental *animus*.

According to the Terms of Reference for the Rapid Response Team to fast-track pending and reported LGBTI-related cases in the Criminal Justice System, the task of the National Prosecuting Authority, when dealing with a case of corrective rape, is to:

- a. Ensure successful prosecutions of hate crimes against LGBTI persons.
- b. Ensure the systematic reduction of secondary victimization within the criminal justice system as experienced by victims of hate crimes.
- c. Ensure speedy prosecutions of hate crime cases as per the prescribed turnaround times.
- d. Provide a victim-friendly environment.
- e. Empower witnesses to be more effective witnesses and to decrease the potential of them experiencing victimization.
- f. Provide court preparation support to the victims in regional, district and high courts specialising in sexual offences.

In theory, the above guidelines are an appropriate response. However, the task team, it is submitted, did not consider the potential prosecutorial difficulties involved in prosecuting cases involving a bias motive. In the absence of specific prosecutorial directives, or perhaps even if they were in place, there are a few obvious challenges arising during the prosecution of hate crimes, over and above the apparent admissibility of evidence challenges that such a case potentially raises.

Hate crimes ultimately attack fundamental rights and thus deserve the protection of one of the guardians of the rule of law, *viz.* prosecutors. In short, prosecutors can contribute to a swift resolution of hate crime cases, but face challenges in addition to the factors of proof.

63 <http://www.npa.gov.za/UploadedFiles/NPA%20Khasho%20December%202013.pdf> (accessed on 15 January 2015).

64 The accused had three previous convictions that were relevant to the current matter and, therefore, he received 22 years' direct imprisonment.

3. Prosecuting hate: Procedural implications and challenges

Successful prosecution, in the ordinary course of events, depends on the preparation of a case by members of the National Prosecuting Authority. The duty of diligence is, however, compounded in cases involving a bias motive. In the absence of specific substantive law addressing hate crimes, prosecutors are required to address the base crime and deal with the added impact of bias. In this process, the following may be obstacles⁶⁵ in the adjectival process underlying the implementation of substantive criminal law.

3.1 Receipt of complaint

Initial reporting of the commission of a crime takes place through channels provided by the South African Police Services. Prosecutors rely on investigative steps and procedures to ensure that a case has a solid evidential basis. When the crime involves issues of bias, law enforcement, and so on, the investigating officer is required to recover and integrate evidence of bias into initial statements. This is, however, not a straightforward task. The challenge is one of current lacunae in specific elements for hate crimes not provided for in the description of specific crimes and a lack of training in identifying evidence to support such claim. In this respect, joint training and cooperation between law enforcement and the prosecution service are essential.

Joint training is not a panacea to guarantee effective investigation and subsequent prosecution. Rohrs, for example, shows that one of the major failings of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* is that police officers routinely fail to meet standards and comply with the operating protocols prescribed by the legislation.⁶⁶ The legislation is, in other words, not self-effective, or self-regulating and human error, or in some cases prejudice, quickly undermines the aim of law, especially when it relates to already vulnerable victims. The effect of a lack of proper procedure and protocol is, we submitted, equally applicable in the case of bias-motivated crimes, even when such are the subject of legislation in comparative jurisdictions.

⁶⁵ Many of the obstacles discussed, in this instance, are reflected in international trends, as identified by the Organization for Security and Co-Operation in Europe (OSCE) in their publication “Prosecuting hate crimes: a practical guide”. <http://www.osce.org/odihr/prosecutorsguide>. In this article, they are discussed from a South African perspective.

⁶⁶ Rohrs S 2011.

3.2 Establishing bias

When considering a case for prosecution, one of the considerations is the availability of evidence to prove a case. In the case of hate crimes, the base crime evidence may be easily identifiable by the *facta probantia*. Evidence of bias may, however, prove more difficult especially when considered against the lack of clear guidelines to prosecutors dealing with these cases. The lack of clear guidelines requires a prosecutor to consider the facts for evidence. Research suggests that certain indicators reveal hate or bias and provide the basis for extended or specific investigation. According to the *OSCE Guideline for Prosecuting Hate Crimes*,⁶⁷ the indicators can include victim characteristics,⁶⁸ circumstances connected with the target,⁶⁹ circumstances connected to the offender,⁷⁰ the conduct of the offender,⁷¹ circumstances of the time and place of a crime,⁷² the perceptions of the victim,⁷³ and the absence of other motives.

Once a prosecutor is able to identify bias in a criminal matter, it must be proven in court by evidence.

3.3 Proving bias

Earlier we discussed the difference between the discriminatory selection model and the hostility model. The model used in the prosecution of bias has implications on the burden of proof resting on the prosecution. The discriminatory selection model is objective and requires the prosecutor to prove that the offender selected a victim due to his membership of a specific group. The hostility model is subjective, and requires proof of animosity towards a specific group or person.⁷⁴ This distinction appears unremarkable at first glance. In fact, it forms the central core of any hate-focused legislation or regulation. The discriminatory selection model does

67 OSCE 2014:57.

68 These are the most obvious characteristics that associate a person with a minority group or indicate that the person associates with such a group. The challenge, in this instance, is that victim identification itself involves the operation of stereotypes.

69 These characteristics usually relate to specific places such as places of worship or places where certain groups of people assemble or congregate.

70 These characteristics are usually known by law enforcement as in the case where the offender is a member of a specific group or has shown previous conduct of acting against certain types of victim.

71 These indicators are usually apparent in the offender's comments, gestures or written communication during the incident or during pre-trial preparation and investigation.

72 This indicator includes specific holidays or days of remembrance and can show a propensity towards committing crimes in areas associated with specific groups or minorities.

73 This indicator is perhaps problematic because of the victim's state of vulnerability and comes down to the subjective feelings of the victim, which are not always reliable evidence of fact.

74 OSCE 2014:57.

not involve an investigation into subjective feelings of hate or bias, but relies almost exclusively on circumstantial evidence and/or evidence that may be the subject of admissibility considerations.

Proof of hate or bias relies, to a large extent, on the subjective experience of the victims, who alleges that they were targeted based on a specific characteristic or group identification.

3.4 Victims and the prosecution of bias crimes

Prosecutors appear on behalf of the state, but their role as victim advocates is seldom recognised as a central feature of the rule of law. Preparing a complainant and other witnesses is usually a task characterised by various challenges and the situation is compounded where the victim was targeted because of a specific characteristic or group identification. One of the challenges that may arise, for example, relates to the characteristic or group identification itself. When the characteristic or group identification is not known to the victim's immediate family or social circle, such as, for example, in the case of sexual orientation, this raises concerns for the wellbeing and truthful narration of events in court. In addition, fears of secondary victimization, and a lack of trust for the prosecution, as well as security concerns, contribute to these issues. Another important issue regarding victims is stereotypes and prejudices held by the prosecution and bench. These are important aspects when assessing victim credibility and reliability.

3.5 Trial aspects

There are many aspects relating to arraignment and trial, which can raise challenges to successful prosecution and conviction. One that is prominent is the issue of plea bargaining.⁷⁵

Plea bargaining is attractive to the prosecution for a variety of reasons, but has the potential to raise ethical concerns in matters involving prejudice. If an offender enters into formal plea bargaining, what is the position with regard to the hate aspect of the crime? Should the prosecution accept a plea to the base crime, which fulfils the requirements of legal guilt, without detailing the offender's state of mind relating to the victim? If the statement details the hate motive, is the process not seeking to punish thought as opposed to action or omission to act? Naturally, the same can be said of the in-court prosecution of the offender. Plea bargaining in the absence of specific hate-crime legislation puts the prosecutor in a position where only a plea to the base crime can be entered. In the current framework, the prejudice of the perpetrator towards the victim would be irrelevant to the charge itself.

75 OSCE 2014:59.

Another example of trial-related aspects is associated with the defence case. According to the OSCE manual for the prosecution of hate crime,⁷⁶ the accused has multiple options on which to defend a charge relating to a hate-motivated incident. The same Guide supposes that an accused can rely on an averment that the matter was a simple fight with no bias motive, a defence that disputes the intention to be racist or homophobic, for example, or one in which the accused disputes the motive because s/he displays the same characteristic or group orientation as the victim.⁷⁷ In the absence of specific legislation, any of these may present a version that is deemed reasonably possibly true especially where bias related to motive is not a specific element of the crime charged.

3.6 Trial on sentencing

In South Africa's current sentencing framework, the bias motive of the perpetrator is aggravating in so far as racially motivated crimes are concerned. In *S v Salzwedel and Others*,⁷⁸ the court remarked, for example:

The relevance of racial conditioning in the sentencing of offenders influenced by its effects in the commission of serious offences was confronted by the Namibian Supreme Court in the case of *S v Van Wyk*. Counsel for the appellant in that case contended that because the appellant had been socialised or conditioned by a racist environment, the fact that the murder of the deceased was racially motivated should, in the circumstances, be treated as a mitigating factor and not an aggravating factor. The Namibian Supreme Court rejected that submission and expressed itself *inter alia* as follows: "To state that the appellant's racism was conditioned by a racist environment is to explain but not necessarily to mitigate. At different times in history, societies have sought to condition citizens to legitimize discrimination against women, to accept barbaric modes of punishing citizens and exacting brutal retribution, and to permit monstrous invasions of human dignity and freedom through the institution of slavery. But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past ... I can find no fault with the finding of the Court a quo that the racial motive which influenced the appellant to commit a serious crime must in the circumstances of the case be considered as an aggravating factor. Substantially the same temper should inform the response of South Africa to serious crimes motivated by racism, at a time when our country had negotiated a new ethos and a clear repudiation of the racism which had for so long and so pervasively dominated so much of life and living in South Africa. The commission of serious offences perpetrated under the

76 OSCE 2014:60.

77 Those who perpetrate hate crimes sometimes have the same victim characteristic or group association as the victim. The reason behind the infliction of violence in these cases is a topic that requires further research if South Africa eventually enacts hate-crime legislation.

78 *S v Salzwedel and Others* SCA 273/98.

influence of racism subverts the fundamental premises of an ethos of human rights which must now “permeate the processes of judicial interpretation and judicial discretion” including sentencing policy in the punishment of criminal offences.

The above extract reflects a constitutional value-based approach to sentencing and to transformative criminal justice. The problem with sentencing in South Africa is that it is not standardized. Sloth-Nielson found that so-called minimum-sentencing legislation⁷⁹ has not affected judicial behaviour in terms of sentencing like crimes alike, nor has it reduced the rate of violent crimes in South Africa.⁸⁰ As a result, what reflects as biased and thus aggravating in one court may be deemed less valuable to the sentencing decision by another.

Dixon and Gadd⁸¹ opine that the greater hurt caused by crimes of hate justifies greater punishment on retributive grounds. In South Africa, however, the trend in recent criminal justice legislation, the *Child Justice Act* 75 of 2008, for example, is toward restorative justice rather than, or blended with retributive punishment.⁸² In South Africa, hate is not always a simple human emotion, but has deeper social, historical and political roots. Aggravating these factors at trial on sentence may have unintended consequences that are not confined to the courtroom or the merits of a specific case.

4. Conclusion

The enactment of hate-crime legislation may have deeper implications than mere prosecutorial issues or challenges to sentencing enhancement. Unless South Africa deals with the roots of hate, such as patriarchy and misogyny, hate-crime legislation, whether substantive or sentence enhancing, may simply become another “white elephant” on the statute books.

79 Correctly named the *Criminal Law Amendment Act 105/1997*.

80 Sloth-Nielsen & Ehlers 2005:15-22.

81 Dixon & Gadd 2012:25-30.

82 On this point in relation to sexual offences, see Songca & Karel 2016.

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