

Factors which influenced the enactment of hate-crime legislation in the United States of America: *quo vadis* South Africa?

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1 Introduction

A “hate crime” consists of criminal conduct that is motivated by the perpetrator’s prejudice or bias towards a personal characteristic of the victim.¹ The perpetrator’s prejudice or bias could have been directed towards the victim’s race, ethnicity, gender, sexual orientation, religion, disability or several other personal characteristics. Hate-crime laws address such criminal conduct by creating specific crimes in terms of which criminal conduct that is motivated by prejudice or bias towards certain victim characteristics is recognized as an independent crime.² They could also include laws which allow sentencing officers to impose enhanced penalties on perpetrators who have been convicted of hate crimes.³ This article examines the most important factors which influenced the enactment of hate-crime legislation in the United States of America. Since hate-crime legislation does not presently exist in South Africa, possible reasons will be identified for the South African government’s failure to enact a hate-crime law. Compelling constitutional grounds are however, identified within the context of the post-apartheid South-African dispensation which make the enactment of a hate-crime law a constitutional imperative. It will also be argued that South Africa has an international human rights obligation to enact a hate-crime law in light of its signature and ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.⁴ Since the United States of America was the first country to recognise hate crime as a specific category of criminal conduct and to enact hate-crime laws, this discussion will commence with an examination of the American context.

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¹ A hate crime therefore consists of a crime which could be referred to as the “underlying” or “base” crime that is accompanied by the perpetrator’s bias motivation. See Gerstenfeld *Hate Crimes: Causes, Controls and Controversies* (2013) 25 and Lawrence *Punishing Hate: Bias Crimes under American Law* (1999) 9.

² See in this regard s 7(a)(2) of the American federal statute, the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act of 2009 (codified as 18 USC §249), which creates a specific crime of causing willful bodily injury or death to a victim because of the victim’s actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability.

³ An enhanced penalty is harsher than the penalty which is imposed on the same crime when it is not motivated by bias or prejudice towards a personal characteristic of the victim. See in this regard the District of Columbia Code 022-3703 (2010) which provides that a person who has been convicted of a hate crime can be fined no more than 1½ times the maximum fine authorized for the designated crime and imprisoned for no more than 1½ times the maximum term that is authorized for the designated crime.

⁴ The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (<http://www.ohchr.org/EN/Professional/Pages/CERD.aspx> (05-01-2016)). ICERD was adopted and opened for signature by the general assembly of the United Nations pursuant to Resolution 2106 (XX) of 21-12-1965. ICERD was signed by the Republic of South Africa in 1994 and ratified in 1998.

2 *The United States of America*

Some consensus exists that the United States of America has been at the forefront of the enactment of hate-crime legislation for the past two decades.⁵ According to Hall,⁶ “the US has led the way” in terms of legislating against hate crimes. Most scholarly research traces the origins of hate-crime laws in the United States of America to the civil-rights movement⁷ of the 1960’s, the women’s- rights movement and the gay and lesbian-rights movement of the 1970’s and the subsequent disabilities and victims’-rights movements.⁸ Jacobs and Potter regard the period of the civil-rights movement as significant since it resulted in the development of “identity politics” which they link to the modern hate-crime movement as follows:

“Identity politics refers to a politics whereby individuals relate to one another as members of competing groups based upon characteristics like race, gender, religion and sexual orientation. According to the logic of identity politics, it is strategically advantageous to be recognised as disadvantaged and victimised. The greater a group’s victimisation, the stronger its moral claim on the larger society. The current hate-crime movement is generated not by an epidemic of unprecedented bigotry but by heightened sensitivity to prejudice and, more important, by our society’s emphasis on identity politics.”⁹

According to Hall,¹⁰ as a result of the civil-rights movement a shift in thinking occurred in relation to the treatment of certain minority groups. The advantages to be gained in recognizing a group’s prior mistreatment and victimisation included official recognition in a number of social contexts such as employment benefits, university admissions, the awarding of public contracts and the creation of voting districts.¹¹ In terms of the logic of identity politics, certain groups make moral claims to special entitlements and affirmative action.¹²

In a similar vein, Jenness and Grattet write that:

“The anti-hate crime movement emerged through a fusion of the strategies and goals of several identifiable precursor movements that laid the foundation for a new movement to question and make publicly debateable, issues of rights and harm as they relate to a variety of constituencies.”¹³

In asserting their respective demands these diverse social movements stimulated public discussions about violence motivated by prejudice and bigotry and began to demand legal reforms, particularly in criminal law, to remedy the problem.¹⁴

⁵ Levin “Hate crimes: worse by definition” 1999 *Journal of Contemporary Criminal Justice* 6; Gerstenfeld (n 1) 31-32 and Hall *Hate Crime* (2013) 18.

⁶ Hall (n 5) 132.

⁷ From the early 1960’s African Americans began asserting their civil rights and protesting against racist practices and segregated public facilities which were commonplace across the USA, particularly in the southern states. The riots, demonstrations, sit-ins and boycotts which ensued are collectively referred to as the civil-rights movement. See Shimamoto “Rethinking hate crime in the age of terror” 2003-2004 *University of Missouri-Kansas City Law Review* 829 843.

⁸ Jacobs “Implementing hate crime legislation, symbolism and crime control” 1992-1993 *Annual Survey of American Law* 541 542; Jacobs and Potter *Hate Crimes, Criminal Law and Identity Politics* (1998) 5; Grattet and Jenness in Gerstenfeld and Grant (eds) *Crimes of Hate: Selected Readings* (2004) 23-24 and Jenness *Contours of Hate Crime Politics and Law in the United States* (2002) 19-22.

⁹ Jacobs and Potter (n 8) 5-6.

¹⁰ Hall (n 5) 23.

¹¹ Jacobs and Potter (n 8) 66.

¹² Jacobs and Potter (n 8) 66.

¹³ Grattet and Jenness (n 8) 26.

¹⁴ Grattet and Jenness (n 8) 25-26.

According to Jenness,¹⁵ the following social movements politicised and emphasised the perpetration of violence against groups with minority status: the civil-rights movement politicised violence against racial minorities (as evident in instances of police brutality against Blacks); the women's-rights movement opposed violence against women (which most often manifested as rape and domestic violence); the gay and lesbian-rights movement called for a cessation of violence against homosexuals (which frequently took the form of "gay bashing"), and the disabilities movement spoke out against violence against people with disabilities (occurrences such as "mercy killings"). The predominant issue that these social movements had in common was the perpetration of violence against specific, minority groups. A later social movement to have a significant influence on the development of hate-crime laws was the victims'-rights movement which demanded that the victims of crime, particularly violent crimes, have the right to special assistance that included counselling services, increased participation in the criminal-justice process, civil remedies and other special protections.¹⁶ The modern anti-hate crime movement emerged from these diverse social movements that represented the interests of different groups of victims and that have been aptly referred to as "strange bedfellows".¹⁷

A significant American federal law which was passed as a result of the civil-rights movement and which may be considered as a precursor of modern hate-crime laws was the Civil Rights Act of 1968.¹⁸ Although the act was not aimed at hate crimes *per se*, it is considered as a "catalyst" for modern hate-crime laws.¹⁹ The Civil Rights Act of 1968 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. The federally-protected rights include, *inter alia*, the right to vote, the right to public education, the right to participation in jury service, the right to interstate travel and the right of access to public places and services. According to Jacobs and Potter²⁰ the Civil Rights Act of 1968 was intended to provide a remedy for the violence that resulted from opposition to civil-rights marches, to voter registration and voting issues, to the admission of Black students to formerly all-white schools and universities and to efforts to abolish the laws that enforced segregation. However, the complicated nature of the 1968 Act²¹ and the high burden of proof required to secure convictions led to the emergence of state hate-crime laws in the United States of America with less onerous evidentiary requirements.²²

As the civil-rights movement gained momentum, civil-society organisations such as the anti-defamation league of B'nai B'rith²³ and the Southern Poverty Law

¹⁵ Jenness (n 8) 20.

¹⁶ Grattet and Jenness (n 8) 26.

¹⁷ Jenness (n 8) 21.

¹⁸ Jacobs and Potter (n 8) 38. The Civil Rights Act of 1968 is codified as 18 United States Code § 245.

¹⁹ Hall (n 5) 24.

²⁰ Jacobs and Potter (n 8) 38.

²¹ Jacobs and Potter (n 8) 38.

²² Hall (n 5) 114. See Wang "Recognising opportunistic bias crimes" 2008 *Boston University Law Review* 1399 1402-1403, who regards the Civil Rights Act of 1968 as a complicated statute to invoke in hate-crime cases since it requires the prosecution to prove a bias motivation in order to fulfil the culpability requirement and that the victim's federally-protected rights were infringed.

²³ The anti-defamation league of B'nai B'rith, which is more commonly referred to as the "Anti-Defamation League" is an American civil-rights organisation that was formed in 1913. It initially focused on anti-Semitism but subsequently began to counter all forms of discrimination and infringements of civil rights. Walker *Hate Speech: the History of an American Controversy* (1994) 18.

Centre²⁴ began compiling statistical reports to establish the number and frequency of hate crimes.²⁵ In 1981, the Anti-Defamation League, concerned by the rise in hate crimes in the United States of America, particularly anti-Semitic crimes, and the fact that media exposure, education and law enforcement were ineffective, drafted a model hate-crime statute which recognised the victim characteristics of race, religion and ethnicity.²⁶ It should be noted that the victim characteristics of gender and sexual orientation were subsequently added to an amended model hate-crime statute.²⁷ The model hate-crime statute was intended to influence state legislatures and the federal government to enact hate-crime laws. The Anti-Defamation League's model hate-crime statute had the desired effect since a number of state legislatures in the United States of America subsequently enacted laws based on the model hate-crime statute.²⁸ Shortly after the drafting of the Anti-Defamation League's model hate-crime statute in 1981, the states of Oregon and Washington passed similar hate-crime laws.²⁹ According to Gerstenfeld,³⁰ while many states used the Anti-Defamation League's model hate-crime statute as a prototype, they often made changes, while other states drafted their own original statutes. Gerstenfeld opines that this is the reason for the diversity of hate-crimes laws in the United States of America today.³¹ Most American states and the District of Columbia have enacted hate-crime statutes based on the Anti-Defamation League's model hate-crime statute.³²

Apart from state-level hate-crime laws, several federal hate-crime laws have been passed in the United States of America. The first significant federal law of the modern hate-crimes era to be passed in the United States of America was the Hate Crime Statistics Act of 1990. While the Hate Crimes Statistics Act did not create any new substantive hate crimes, it compelled the United States department of justice to collect statistics of hate-crime incidents across the United States of America.³³ Since the enactment of the Hate Crimes Statistics Act in 1990 a number of federal hate-crime laws have been passed in the United States of America. The most significant federal hate-crime law is the Matthew Shepherd and James Byrd Junior Hate Crime Prevention Act.

The perpetration of two brutal hate crimes in 1998 prompted public calls for a federal hate-crime law that would permit greater federal intervention in hate-crime investigations at state level and that would extend protection to a wide

²⁴ The Southern Poverty Law Centre was formed by a group of civil-rights lawyers in the American state of Alabama in 1971. Its mission was to test civil-rights laws and to seek justice for the poor and disenfranchised. Website of the Southern Poverty Law Centre at <http://www.splcenter.org/who-we-are/splc-history> (13-01-2016).

²⁵ Grattet and Jenness (n 8) 26.

²⁶ Freeman "Hate crime laws: punishment which fits the crime" 1992-1993 *Annual Survey of American Law* 581 582.

²⁷ Grattet and Jenness (n 8) 27.

²⁸ Freeman (n 26) 583.

²⁹ Gerstenfeld (n 1) 31.

³⁰ Gerstenfeld (n 1) 31.

³¹ The diversity of hate-crime laws in the USA can also be attributed to the American federal system of government. Each state is therefore regarded as a separate jurisdiction with a unique system of law. Website of the Anti-Defamation League at http://www.adl.org/PressRele/HatCr_51/5635_51.htm (03-01-2016). According to Austin and Wallace *State Statutes Governing Hate Crimes* (2005) 3 and Smith and Foley *State Statutes Governing Hate Crimes* (2010) 1 50 American states and the District of Columbia have legal provisions that govern hate crimes.

³³ Lawrence (n 1) 22.

spectrum of victim groups.³⁴ In June 1998, Byrd, a 49-year old African-American man was brutally assaulted and killed by three White supremacists in the town of Jasper, Texas.³⁵ In October 1998, Matthew Shepard, a gay university student in the town of Laramie, Wyoming was lured from a bar by two men who pretended to be gay, assaulted, tied to a fence and left to die in sub-zero temperatures.³⁶ Both murders increased public pressure for stricter federal hate-crime legislation.³⁷ Due to the public outcry produced by both murders, democratic senator Edward Kennedy introduced a hate-crime bill which failed to pass through congress.³⁸ Most opposition to the proposed hate-crime law was based on the extension of protections to gay men and lesbian women in the conservative-led house of representatives.³⁹ The opposition to the proposed federal hate-crime law stalled the bill in congress for almost a decade.⁴⁰ The proposed hate-crime law was eventually passed by the house of representatives in April 2009 whereupon it was sent to the United States senate.⁴¹ According to Leahy, the chairman of the senate committee on the judiciary, more than 300 civil-rights, professional, civic, educational and religious groups endorsed the proposed law.⁴² The bill was also supported by 26 attorneys general and almost all the major law-enforcement organisations in the United States. On 22 October 2009, the United States senate gave final congressional approval to the Hate Crimes Prevention Act which was named in honour of Shepard and Byrd.⁴³

On 28 October 2009 the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act was signed into law by president Obama.⁴⁴

The American context has illustrated how the civil-rights movement influenced previously disadvantaged and victimised social groups to compete for greater social, political and legal recognition in a process that is commonly referred to as “identity politics”. This process culminated in the passing of the Civil Rights Act of 1968 which is regarded as an antecedent of modern hate-crime laws. The American context has also illustrated how civil-society organisations and public-interest

³⁴ Chorba “The danger of federalizing hate crimes: congressional misconceptions and unintended consequences of the Hate Crime Prevention Act” 2001 *Virginia Law Review* 319 322.

³⁵ Husselbee and Elliott “Looking beyond hate: how national and regional newspapers framed hate crimes in Jasper, Texas and Laramie, Wyoming” 2002 *Journalism and Mass Communication Quarterly* 833 834.

³⁶ Husselbee and Elliott (n 35) 835.

³⁷ Chorba (n 34) 322.

³⁸ O’Leary “Have no fear (of piling inference upon inference): how *United States v Comstock* can save the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act?” 2011-2012 *Cornell Law Review* 931 944.

³⁹ Coker “Hope-fulfilling or effectively chilling? Reconciling the hate crimes prevention act with the first amendment” 2011 *Vanderbilt Law Review* 279 282.

⁴⁰ “Senate sends landmark bill to president Obama” (<http://www.civilrights.org/archives/2009/10/787-hate-crimes.html> (08-01-2015)).

⁴¹ “House passes hate crimes bill” (<http://www.civilrights.org/archives/2009/04/297-llehcpa-house.html> (08-01-2016)).

⁴² Testimony by chairman Leahy, hearings before the committee on the judiciary: United States Senate, 11th Congress (24-06-2009) 12.

⁴³ “Senate sends landmark hate crimes bill to president Obama” (<http://www.civilrights.org/archives/2009/10/787-hate-crimes.html> (08-01-2016)).

⁴⁴ Weiner “Hate Crimes Bill signed into law 11 years after Shepard’s death” (http://www.huffingtonpost.com/2009/10/28/hate-crimes-bill-to-be-signed_336883.html (08-01-2016)). The Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act of 2009 is regarded as an improvement on the Civil Rights Act of 1968 since it does not require that the victim had to have been engaged in a federally-protected activity or that the victim’s federally-protected rights were infringed. See Henderson “Offended sensibilities: three reasons why the Hate Crimes Prevention Act of 2009 is a well-intended misstep” 2010 *Chapman Law Review* 163 167-168.

groups were instrumental in raising public awareness about hate crimes in addition to being influential in the enactment of state-level hate-crime laws. The perpetration of high-profile hate crimes, public pressure and political will played a combined role in the enactment of federal hate-crime legislation.

3 *South Africa*

The constitutional obligation to enact hate-crime legislation, ought to be emphasised. The constitutional obligation originates from sections 8(3)(a) and 39(2). The number of fundamental rights that relate to hate crimes (s 9, 10 and 12) as well as constitutional values that are breached by its commission may be identified, but the constitutional obligation to enact this legislation does not flow from these rights and values, but from sections 8 and 39 as mentioned above. The constitutional obligation to enact hate-crime legislation therefore flows from applying these provisions in the bill of rights, and in order to give effect to the bill of rights it is necessary to “develop ... the common law to the extent that legislation does not give effect to that right”. The common law does not criminalise hate crimes, and no hate-crime legislation exists in South Africa. The closest we get in South Africa to criminalising hate crimes is the Equality Act: however, this act also does not criminalise hate speech per se, instead it gives a court the option in terms of section 10(2) of referring cases to the director of public prosecutions “to institute criminal proceedings in terms of the common law or relevant legislation.”

The South African hate crimes working group was formed in late 2009 in response to the perpetration of numerous hate crimes against Black-lesbian women and Black foreigners in post-apartheid South Africa.⁴⁵ Since 2010 the hate crimes working group has made several submissions to the department of justice which have recommended the enactment of a hate-crime law in South Africa. It has also made several public calls for the enactment of a hate-crime law.⁴⁶ In 2013, Radebe, the former minister of justice and constitutional development, established a national task team consisting of government departments, chapter 9 institutions⁴⁷ and civil-society organisations to address the issue of hate crimes in South Africa.⁴⁸ After intensive research and consultation across South Africa the task team formulated a draft policy framework entitled “Combating hate crimes, hate speech and unfair discrimination” (hereinafter referred to as the draft policy).⁴⁹ The draft policy was presented to government in 2014. However, the cabinet decided that a debate on hate

⁴⁵ The hate crimes working group is a multi-sectoral civil-society organisation which focuses on gender-based violence against the lesbian, gay, bisexual, transgender and intersex community, xenophobic hate crimes and hate crimes motivated by race, religion and disability. The hate crimes working group comprises several civil-society organisations and non-governmental organisations. A few lesbian, gay, bisexual, transgender and intersex interest groups and refugee organisations are also members of the hate crimes working group. See the website of the Hate Crimes Working Group (<http://www.hcwg.org.za/HCWG> (01-02-2016)). It should be noted that the term “Black” is used in a narrow sense in this article to refer to persons of African origin.

⁴⁶ Nosarka “Plea for hate crimes legislation” *The Citizen* (07-05-2013) 4.

⁴⁷ Ch 9 institutions were established in terms of ch 9 of the Constitution of the Republic of South Africa, 1996 in order to strengthen democracy. They include the Office of the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality.

⁴⁸ Speech by Jeffrey, former deputy minister of justice and constitutional development, Cape Town on 11-02-2011 (http://www.justice.gov.za/m_speeches/2015/20150211_HateCrimes.html (01-12-2015)).

⁴⁹ Speech by Radebe, former minister of justice and constitutional development, Sandton, on 25-08-2013 (http://www.justice.gov.za/m_speeches/2013/20130825-hate-speech.html (01-12-2015)).

crime had the potential to cause further racial divisions in South Africa and failed to consider the draft policy.⁵⁰ Apart from the government's failure to consider a hate-crime law, the consideration of a hate-crime law has been further delayed because of a recent public debate on hate speech and the government's publicised intention to include hate-speech provisions⁵¹ in a future hate-crime law.⁵² To date therefore, a hate-crime law has not been passed in South Africa and it is unclear when and if a hate-crime law will be passed.

There is, however, increased awareness of the phenomenon of hate crimes in South Africa. This could be attributed to the well-publicised rapes and murders of several Black lesbian women.⁵³ While it is impossible to quantify the number of rapes of Black lesbian women in South Africa due to a culture of non-reporting, at least ten Black lesbian women were murdered between 2006 and 2009.⁵⁴ South Africa has also experienced two countrywide outbreaks of xenophobic violence in the post-apartheid era. In the first outbreak of mass xenophobic violence which occurred between May and June 2008, more than 60 Black foreigners were killed and thousands were displaced.⁵⁵ In the second outbreak of mass xenophobic violence which occurred between March and April 2015, the shops of Black foreigners were specifically targeted for acts of vandalism, robbery and theft.⁵⁶ There have also been numerous farm attacks in which most of the victims have been White farmers and their families.⁵⁷ There have consequently been calls from the academic sector⁵⁸ and

⁵⁰ Forde "Racism: hate law delay" (<http://www.financialmail.co.za/coverstory/2016/01/21/racism-hate-law> (25-01-2016)).

⁵¹ Hate speech is presently prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (and hereinafter referred to as the Promotion of Equality Act). In terms of s 10(1) of the Promotion of Equality Act "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." S 21 of the act provides a civil remedy for hate speech in the form of damages. Ostensibly the government intends criminalising hate speech and subjecting those found guilty of hate speech to a harsher criminal sanction.

⁵² Peterson "Racism will be a criminal offence" *The Star* (01-12-2016) 4.

⁵³ Naidoo and Karels "Hate crimes against Black lesbian South Africans: where race, sexual orientation and gender collide part I" 2012 *Obiter* 243-250. According to Naidoo and Karels, Black lesbian women have been specifically targeted because of their sexual orientation.

⁵⁴ See Naidoo and Karels (n 53) 243-250.

⁵⁵ Breen and Nel "South Africa – a home for all? The need for hate crime legislation" 2011 *SA Crime Quarterly* 33 43. While the term "xenophobic violence" enjoys some currency in South Africa, it is submitted that foreign Blacks are specifically targeted by Black South Africans because of their ethnicity (in other words, because they come from foreign countries, speak different languages and adhere to different cultural practices). These violent xenophobic crimes could therefore be considered as hate crimes that were motivated by the ethnicity of the victims.

⁵⁶ Nair *et al* "Flames engulf Durban" (<http://www.timeslive.co.za/thetimes/2015/04/15/flames-of-hate> (12-03-2015)). However, a few businesses in Black townships belonging to Pakistanis and Bangladeshis were also vandalised.

⁵⁷ Bezuidenhout *Overview of Farm Attacks in South Africa and their Potential Impact on Society* (2012) 16. According to Bezuidenhout, farmers of all races are the victims of farm attacks and African labourers on farms are often killed in these attacks. However, according to Olivier and Cunningham "Victim's perception of attacks on farms and smallholdings in the Eastern Cape, South Africa" 2006 *Acta Criminologica* 115 117-120, since most agricultural land and commercial farms in South Africa are owned by Whites, White farmers are more likely to be the victims of farm attacks. An anti-White, racial-bias motive has been confirmed in some of these attacks.

⁵⁸ In this regard refer to Breen and Nel (n 55) 43; Naidoo and Karels "Hate crimes against Black lesbian South Africans: where race, sexual orientation and gender collide part II" 2012 *Obiter* 600 624 and Mollema and Van der Bijl "Hate crimes: the ultimate anathematic crimes" 2014 *Obiter* 672 679.

the non-governmental sector⁵⁹ for the enactment of hate-crime legislation. Despite the non-recognition of hate crimes in South African criminal law, criminal conduct that is motivated by bias or prejudice towards personal characteristics of the victim could still be prosecuted in terms of the existing common-law or statutory crimes.⁶⁰ The bias motivation of the perpetrator may be considered as an aggravating factor at sentencing.⁶¹

It is submitted that despite some semblance of identity politics in South Africa under the aegis of the multi-sectoral hate crimes working group, this civil-society organisation lacks the political clout to make a significant impact on government policies and legislation. Moreover the hate crimes working group has not benefitted from extensive media coverage and publicity in order to significantly influence public opinion. There is consequently no groundswell of public support for the enactment of hate-crime legislation in South Africa. There has also been a lack of political will to enact hate-crime legislation in South Africa as evidenced by the cabinet's failure to consider the draft policy in 2014. The recent South-African debate on hate speech and the government's intention to include hate-speech provisions in a future hate-crime law has also diverted some attention away from the issue of hate crimes.⁶²

Nevertheless compelling constitutional grounds exist for the enactment of hate-crime laws in South Africa. According to the American writer Lawrence, hate crimes violate the right to equality which protects one of the most highly-cherished ideals in American society.⁶³ Equality is therefore the main prudential reason for the enactment of federal hate-crime legislation in the United States of America. According to Delgado,⁶⁴ if the law does not take cognisance of racist crimes and racist violence a message is conveyed to minority groups that equality is not a fundamental principle and it demoralises those citizens who prefer to live in an equal society. This argument could be extended to the perpetration of crimes, particularly

⁵⁹ Harris "Arranging prejudice: exploring hate crime in post-apartheid South Africa" (<http://www.csvr.org.za/docs/racism/arrangingprejudic.pdf> (01-12-2015)). As has been stated earlier, the hate crimes working group has made several submissions to the government which have called for the enactment of hate-crime legislation.

⁶⁰ In other words specific crimes that are motivated by bias or prejudice towards personal characteristics of the victim are not recognised in South-African criminal law. Nevertheless if an accused has committed a racially-motivate murder, he/she could still be charged with the common-law crime of murder. An accused who has committed the crime of rape that was motivated by the sexual orientation of the victim could be charged with the statutory crime of rape in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶¹ Mollema and Van der Bijl (n 58) 672. However, the consideration of the perpetrators' motive as an aggravating factor at sentencing is left to the discretion of the sentencing officer. See *eg, S v Dednam* 1993 1 SACR 309 (W), where the racial motivation of the accused on a charge of assault with the intent to do grievous bodily harm was considered as an aggravating factor at sentencing. See also *S v Matela* 1994 1 SACR 236 (A), where the racial motivation of the accused on a charge of murder was considered as an aggravating factor at sentencing.

⁶² It is the writer's submission that some confusion exists in South Africa between the terms "hate speech" and "hate crime". While the existing hate-speech provisions which have been referred to earlier (refer to n 52 above) would apply to the dissemination of racist or homophobic words and expressions, they would not apply to a racially-motivated murder or to a rape that was motivated by the sexual orientation of the victim.

⁶³ Lawrence "The case for a federal bias crime law" 1998-2000 *National Black Law Journal* 144 164. Lawrence regards equality as one of the most highly-cherished ideals in the USA since two major historical events, the American Civil War and the Civil-Rights Movement, were fought because of inequality.

⁶⁴ Delgado "Words that wound: a tort action for racial insults, epithets and name-calling" 1982 *Harvard Civil Rights and Civil Liberties Law Review* 133 140.

violent crimes that are motivated by the sexual orientation or the ethnicity of the victims.

The non-recognition of hate crimes within the South-African context is lamentable in light of the constitutional commitment to equality.⁶⁵ The right to equality was recognised and constitutionally entrenched in South Africa after a protracted struggle against apartheid. It would be trite to add that the right to equality protects one of the most cherished ideals within the South-African context in light of an oppressive past based on racial, ethnic and gender inequality. It could be argued that the failure of the state to specifically criminalise conduct motivated by race, ethnicity and sexual orientation could demoralise certain victim groups and that these victim groups would be unable to achieve their full potential in society. This would undoubtedly impact on their self-worth, their self-esteem and ultimately on their dignity.⁶⁶ Since dignity is a founding value of the South African constitution⁶⁷ and a value that has consistently informed the equality jurisprudence of the South African constitutional court,⁶⁸ the enactment of a hate-crime law in South Africa could be regarded as a constitutional imperative in terms of the value of dignity and the right to equality.

The enactment of hate-crime legislation could also be regarded as a constitutional imperative in terms of section 12(1)(c) of the South-African constitution which provides: "Everyone has the right to freedom and security of the person which includes the right ... to be free from all forms of violence, from either public or private sources." Since the perpetration of violence against an individual is a serious violation of personal security it has been suggested that section 12(1)(c) places a duty on the state to protect individuals by placing restraints on itself and by restraining private individuals from violating personal security.⁶⁹ There is no compelling reason why the duty on the state to protect individuals from violence should not be widely construed to include protecting individuals from acts of racial, ethnic, and homophobic violence (or from violent hate crimes that are motivated by the perpetrator's prejudice towards the race, ethnicity or sexual orientation of the victim). This constitutional duty could be fulfilled to some extent by the enactment of a hate-crime law.

The Republic of South Africa also has an international obligation to enact a hate-crime law since it has signed and ratified the International Convention on

⁶⁵ The right to equality is enshrined in s 9 of the South African constitution. Equality is also recognised in s 1(a) of the constitution as one of the values upon which the Republic is founded.

⁶⁶ A number of authors have argued that hate-crime victims suffer more psychological, emotional and traumatic effects than the victims of crimes that are not motivated by personal prejudice or bias. Levin "Bias crimes: a theoretical and practical overview" 1992-1993 *Stanford Law and Policy Review* 165 167-168 and Scotting "Hate crimes and the need for stronger federal legislation" 2000-2001 *Akron Law Review* 853 862. According to Lawrence (n 63) 150, hate-crime victims are not randomly attacked, but are attacked for very personal reasons. They cannot therefore lessen the risk of being attacked in the future since they cannot change the characteristic that made them victims. Hate-crime victims cannot, for example, change their race, ethnicity or sexual orientation in order to minimise the risk of future harm.

⁶⁷ See s 1(a) of the constitution.

⁶⁸ See eg the cases of *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC), *Harksen v Lane* 1997 11 BCLR 1489 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) and *S v Jordan* 2002 6 SA 642 (CC) which illustrate the established practice of the constitutional court to refer to the value of dignity when interpreting the right to equality.

⁶⁹ Currie and De Waal *The Bill of Rights Handbook* (2013) 281. Also refer to *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) and *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA).

the Elimination of All Forms of Racial Discrimination.⁷⁰ Under article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, state parties:

“Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”.

It is submitted that South Africa has not complied with its international human-rights obligations as laid down in article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination.⁷¹ Despite the passing of the Promotion of Equality and Prevention of Unfair Discrimination Act in 2000, the aforementioned act does not criminalise hate speech but provides for a civil remedy.⁷² Moreover no South-African law has hitherto been passed which specifically criminalises racially and ethnically-motivated acts of violence. South Africa’s international human-rights obligations could be fulfilled if a law was passed which penalises hate speech and hate crimes that are motivated *inter alia* by the victim characteristics of race and ethnicity.

4 Conclusion

An examination of the American context has revealed that the decision to enact hate-crime legislation is never a unilateral one that is taken by the government in power. Pressure is always brought to bear on the government from the non-governmental and civil-society sectors. The perpetration of high-profile hate crimes also raises public awareness about hate crimes and increases public support for the enactment of hate-crime legislation. These factors could collectively influence a government’s decision to enact a hate-crime law.

A consideration of the South-African context has revealed that despite the perpetration of numerous hate crimes motivated by the sexual orientation, the race and the ethnicity of the victims and several calls by the civil-society and academic sectors to enact a hate-crime law, all efforts have thus far been in vain. However this article has endeavoured to show that South Africa has constitutional obligations and an international human-rights obligation to enact a hate-crime law. It is therefore recommended that the South-African government should prioritise the enactment of a hate-crime law that would allow for specific, violent crimes⁷³ to be regarded

⁷⁰ See n 4 above.

⁷¹ It is conceded however, that ICERD only places an obligation on member states to enact a hate-crime law that recognises the victim characteristics of race, colour and origin.

⁷² The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was passed in response to the Republic of South Africa signing and ratifying ICERD. S 10 and 12 of this act prohibit acts of hate speech. However a civil remedy is provided for hate speech in s 21(1)(d).

⁷³ In the South-African accounts of hate crimes that have been referred to earlier (n 52 to 56 above), the perpetrators of xenophobic violence, hate crimes against Black lesbian women and farm murders committed a number of violent crimes which included murder, rape, robbery and damage to property. It is therefore recommended that when these crimes are motivated by the perpetrator’s bias towards a victim’s personal characteristic, they should be regarded as hate crimes. A similar approach is evident in the American federal statute, the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act of 2009 (referred to in n 2 above). In s 7(a)(1) and 7(a)(2) of this statute, only the specific crimes of wilfully causing bodily injury or wilfully causing death to a person are regarded as hate crimes when such conduct is motivated by one of several possible victim characteristics.

as hate crimes when they have been motivated by certain victim characteristics.⁷⁴ Once a bias motivation has been proved such crimes should be subjected to enhanced penalties.⁷⁵

While a hate-crime law will not eradicate hate crimes in South Africa,⁷⁶ such a law could serve as a symbolic commitment to equality that would resonate with the international trend in several democratic states where hate-crime laws have been enacted.⁷⁷ The specific criminalisation of conduct motivated by prejudice towards personal characteristics of the victim and the imposition of enhanced penalties on offenders convicted of such conduct would be a reflection of the South-African state's denunciation of such conduct. A hate-crime law would therefore serve as an expression of the serious light in which hate crimes are viewed by South-African society and will convey such a message to the perpetrator. A hate-crime law could also help to raise public awareness of hate crimes since it would allow for the bias motives of hate-crime offenders to be subjected to greater public and judicial scrutiny.

SAMEVATTING

FAKTORE WAT DIE AANNAME VAN HAATMISDAADWETGEWING IN DIE VERENIGDE STATE VAN AMERIKA BEÏNVLOED HET: *QUO VADIS* SUID-AFRIKA?

Haatmisdade is misdade wat deur die oortreder se vooroordeel teenoor die slagoffer se ras, etnisiteit, seksuele oriëntasie, godsdiens, gebrek of verskeie ander persoonlike kenmerke motiveer word. Haatmisdadewette bestraf sodanige gedrag en maak voorsiening vir die oplegging van swaarder strawwe op diegene wat aan haatmisdad skuldig bevind word. Daar is 'n beweging in verskeie Westerse demokratiese regstelsels waarvan die Verenigde State van Amerika die leiding geneem het, om haatmisdadwetgewing aan te neem. In hierdie artikel word die faktore ondersoek wat die aanname van haatmisdadewette in die Verenigde State van Amerika beïnvloed het. Die Amerikaanse *Civil-Rights Movement* word beskou as die belangrikste faktor wat die aanname van haatmisdadewette beïnvloed

⁷⁴ As regards the inclusion of victim characteristics in a future hate-crime law, according to the existing evidence, most of the reported hate crimes in South Africa have been motivated by race, ethnicity and sexual orientation. There is no reason however, why a future hate-crime law should not recognise a wider spectrum of victim characteristics. It is recommended that all the grounds of discrimination that are presently recognised in s 9(3) of the South African constitution should be included in a future hate-crime law. The following victim characteristics should therefore be included: race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, colour, age, disability, religion, belief, culture, language and birth. These victim characteristics have been included in the draft policy that has been formulated by the hate crimes working group. See further: The Website of the Hate Crimes Working Group ([http://www.hcwg.org.za/HCWG\(01-02-2016\)](http://www.hcwg.org.za/HCWG(01-02-2016))).

⁷⁵ While it must be conceded that the crimes of murder, rape and robbery are presently subject to the minimum-sentence provisions of the Criminal Law Amendment Act 105 of 1997, as amended, this statute does not contain any provision which would enable a sentencing officer to consider the bias motivation of a hate-crime perpetrator (for example, a bias motivation based on the race or the sexual orientation of the victim) as an aggravating factor at sentencing. As has been mentioned above, sentencing officers possess the discretion to consider the bias motivation of a hate-crime perpetrator as an aggravating factor at sentencing. In terms of a hate-crime law however, a sentencing officer would be obliged to consider a hate-crime perpetrator's bias motivation as an aggravating factor in order to impose an enhanced penalty.

⁷⁶ In the absence of any empirical data on the deterrent effects of hate-crime laws, one cannot conclude that such laws would deter future hate-crime perpetrators or would eradicate hate crimes altogether. See further Gerstenfeld (n 1) 25-26, who casts some doubt on the deterrent effects of hate-crime laws.

⁷⁷ Refer for example to the British equivalent of a hate-crime law, the Crime and Disorder Act of 1998 and to the French equivalent of a hate-crime law, *Loi 2004-204 du 9 mars 2004* which is commonly referred to as *la loi Perben II*.

het omdat die beweging tot identiteitspolitiek aanleiding gegee het. Ingevolge identiteitspolitiek ding voorheen gemarginaliseerde en onderdrukte minderheidsgroepe mee vir groter regs-, sosiale- en politieke erkenning en sodanige mededinging lei telkens tot regshervorming. Die griewe van die burgerlike gemeenskapsektor word ook identifiseer as 'n besonder belangrike faktor omdat sodanige sektor eerste 'n openbare bewuswording van haatmisdaad teweegbring. Hierdie verskynsel het tot die aanname van die eerste Amerikaanse haatmisdaadwetgewing gelei.

Die pleeg van haatmisdade in Suid-Afrika teen Swart lesbiese vroue, Swart immigrante en Wit plaasboere het tot versoeke alhier vir die aanname van haatmisdaadwette gelei. Tot dusver het die Suid-Afrikaanse regering nie op sodanige versoeke ag geslaan nie. Daar is egter dwingende grondwetlike redes wat die aanname van haatmisdaadwetgewing in 'n post-apartheidbedeling vereis. Aangesien haatmisdaad minstens drie verskanste grondwetlike regte in Suid-Afrika skend, naamlik die reg op menswaardigheid, die reg op gelykheid en die reg op vryheid en sekerheid van die persoon, word geredeneer dat die aanname van haatmisdaadwetgewing grondwetlik vereis word. In die lig van die ondertekening en ratifikasie van die *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* word geredeneer dat Suid-Afrika 'n verpligting het om haatmisdaadwetgewing in te stel. Die aanname van haatmisdaadwetgewing en verhoogde strawwe word dus aanbeveel vir geweldsmisdade gemotiveer deur vooroordeel op grond van bepaalde persoonlike eienskappe van die slagoffer.