

Psychology and hate speech: a critical and restorative encounter

Melanie Judge¹ and Juan A Nel²

Legal and policy frameworks in South Africa ensure the recognition of diversity, human rights, and recourse to justice in ways that take into consideration identity markers, including those related to sexual orientation and gender identity. However, an enduring effect of colonial and apartheid histories is that violence is a central feature of the contemporary landscape. In this context, it is hate crimes – particularly those targeting especially marginalised groups such as lesbian, gay, bisexual, and transgender (LGBT) people and nonnationals – that have drawn significant public attention, both locally and internationally. This is not due to the pervasiveness of such prejudice-motivated crimes, per se, but rather their impact on safety and belonging, prompting calls for concerted action by South African authorities to tackle the root causes and to hold perpetrators to account (Breen, Lynch, Nel, & Matthews, 2016).

Across the African continent, there is a growing engagement with the ways in which LGBT people are rendered vulnerable to particular forms of discrimination and violence. The African Commission on Human and Peoples' Rights (ACHPR), in its 55th Ordinary Session in 2014, passed a resolution which notes that 'acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity' (ACHPR, 2014, para 4). Furthermore, the resolution calls for states to 'end all [such] acts of violence and abuse, whether committed by State or non-state actors' (ACHPR, 2014, para 11). Against this increased recognition and response, South African psychology – and the Psychological Society of South Africa (PsySSA) in particular – has begun to play a critical role in shaping public discourse and policy to address hate crimes in general,¹ and the violent othering of those whose sexualities and/or genders challenge heteronormative and patriarchal power arrangements, specifically. These national and regional initiatives by PsySSA, specified in Nel (2014), include the bringing of expert evidence to a court of law on

¹Faculty of Law, University of Cape Town, South Africa

²Department of Psychology, University of South Africa, South Africa

Corresponding author:

Melanie Judge, Centre for Law and Society, Faculty of Law, University of Cape Town, Kramer Law Building, Rondebosch, South Africa.

Email: melanie@justcommunication.co.za

the psychological hurt and harm caused by homophobic hate speech in the case of *South African Human Rights Commission v. Jon Qwelane* ('the Qwelane' case).

In July 2008, a high-profile journalist and political figure, Jon Qwelane, wrote an article, published in the Sunday Sun tabloid, that received an unprecedented number of complaints to the South African Human Rights Commission (SAHRC) for its homophobic content. In the article, Qwelane expressed support for Robert Mugabe's notorious views on homosexuality, stated that being gay is unnatural, and animalised gay and lesbian people by associating same-sex marriage with bestiality. He also argued that gay and lesbian equality rights and protections should be removed from the Constitution. The SAHRC approached the Equality Court to seek a public apology and damages from Qwelane on the grounds that the contents of his article constitute prohibited hate speech in terms of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), 2000 (a.k.a. 'the Equality Act').² In reaction to this, Qwelane mounted a constitutional challenge to the hate speech provisions of the Equality Act, arguing that its definitions are too broad and thus infringe on constitutional protections of freedom of expression.

PsySSA, as a Learned Society committed to social transformation and to addressing historical silences within psychology itself, entered the Qwelane case in 2013 as *amicus curiae* ('friend of the court').³ PsySSA's intention was to make submissions to the court on the importance of the relevant provisions of the Equality Act in stemming verbal and physical violence, arguing that these provisions meet constitutional muster. In particular, PsySSA sought to bring to the court's attention, the pernicious psychological and social effects of the speech contained in Qwelane's article and its impact on LGBT people and communities, and on wider society.

In this editorial, we reflect on this critical encounter between psychology and the law, in holding hate to account. We raise some preliminary thoughts on how the discipline might contribute to transformative restoration through such encounters. The nexus point of psychology, law and hate, is approached as an 'encounter' at two levels; first, in relation to the intervention of a Learned Society in court proceedings to bring a relevant body of knowledge to bear on the interpretation of equality laws; and second, in regard to the possibilities of equality legislation in facilitating an encounter with prejudice and its impacts, and for victims/survivors to speak back to hateful speech.

Courting justice

In March 2017, 8 years after the publication of the article and its widespread condemnation, and following a lengthy journey through the court system, the Qwelane case was finally brought to trial in the South Gauteng High Court. The 7-day court hearing, presided over by Justice Moshidi, was a consolidation of the Equality Court matter and the constitutional challenge.

Along with PsySSA, and seeking legal remedy for the damage done by Qwelane's speech, the SAHRC, People Opposing Women Abuse (POWA), and an anonymous survivor (whose testimony was heard in-camera) presented evidence on, among other factors, the form, frequency, impact, and context of homophobic hate crimes and hate speech. Powerful testimonies were presented to the court about the effects of hate speech and hate crimes on LGBT individuals and communities and on South African society more broadly.

PsySSA's evidence focused on the necessary and transformative role of the hate speech provisions of the Equality Act in upholding the equality, dignity, and psychological and physical integrity of LGBT people by actively countering verbal and physical violence. In making this case, PsySSA's counsel argued that although the Equality Act limits the right to freedom of expression, it does so in a manner that satisfies the requirements of the Constitution.

In public and legal discourse on hate crime, the emphasis is frequently, and understandably, on the physical harm it inflicts. At the same time, however, hate crimes are enabled by contexts in

which everyday denigrations and dehumanisations render such crimes socially permissible (see Breen & Nel, 2011; Nel & Judge, 2008). This context, borne out in both the literature and in lived experience, provides the language, quite literally, through which prejudice-motivated violence is justified and legitimised.

Empirical research indicates that LGBT people are subjected to high levels of verbal assault and that physical harm is often accompanied by hate speech in the case of homophobic attacks (Breen & Nel, 2011; Nel & Judge, 2008). Furthermore, homophobic hate speech does considerable psychological harm (Polders, Nel, Kruger, & Wells, 2008). This imbrication of (hate) speech with (hate) action reflects the entanglements of the discursive and the material dimensions of homophobic violence (Judge, 2017). With this in mind, PsySSA sought to explicate the psychological dimensions of hate speech – as distinct, yet operating alongside its material manifestations – and the disproportionate impact it has on (already) marginalised sexual and gender identities. It also made the case for why the psychological hurt and harm of the Qwelane article, in its denigration, dehumanisation, and provocation to strip LGBT people of their rights, undermine constitutional principles of dignity and equality. As was put to the court by PsySSA:

It might serve the court well to know that the body of international literature that we call on when we make sense of [hate] victimisation, is that it starts with perceptions – perceptions that potentially lead to stereotypes. It's on the basis of stereotypes that prejudices take hold. It's on the basis of the prejudice that you hold against someone – in the apartheid dispensation and the category that you would fit into, that would afford you certain rights and privileges. So, the prejudice leading to exclusion, marginalisation, de-prioritisation, and, in the worst instance, victimisation – as has been said to this court repeatedly – is not just hate crime [. . .] [H]ate speech victimisation is equally important for us to take note of, and the psychological hurt and the psychological harm of hate speech is undeniable.⁴

A frame for understanding and a way of relating

The court hearing constituted a critical encounter between psychology and the law – both powerful systems of meaning-making about the substance and effects of hateful prejudice. In this encounter, psychology brings, first, a body of knowledge and frame for understanding, based on its theory and praxis. Second, it brings a way of relating – during the court process itself as well as through the substantive evidence put forward – to the impacts and implications of prejudice and their bearing on the law as a regulator of the social sphere.

It could be said that psychology creates the possibility for a particular kind of encounter with human rights given its ability to focus on how rights are forged in and through relationships. In other words, it provides a perspective on rights as forms of social recognition and negotiation (i.e., as a way of relating) rather than as solely an abstract and legal construct. In this sense, rights are imbued with meaning through social interaction. In the Qwelane case court hearing, the realities of LGBT lives – in the form of the testimonies given – were brought before the law. This bringing of life to law, or, one might say, bringing of law to life, might be viewed as an act of holding to account the perpetration of hate through the legal system. Here, it is important to note that law itself does not operate outside of the homophobia over which it adjudicates (Williams & Judge, forthcoming). The law is a means through which LGBT recognition is asserted, yet it too is imbricated with systems of violent inequality that produce LGBT vulnerability (Judge, 2017). Making sense of experience, through a psychosocial lens, can facilitate the law's capacity to engage with the systematic and subjective experiences of LGBT people and with the multiple ways in which they are rendered vulnerable to social vilification. In considering the power of (hate) speech and the imbalances at play therein, PsySSA put the following to the court:

I think we used the analogy at the outset of my expert witnessing around the ability of speech to have a healing component and we spoke about the 'talking cure'. That is the tool of my trade – the talking cure – so speech is incredibly valuable for me, and I'm hoping for my client base as well. Because, it is within the ability to tell your narrative, to tell your story, that so much of the understanding, acknowledgement and possibilities for healing and affirmation will follow. If we talk about whether one can meet speech with speech, I do think it is undeniable that some people have access to greater platforms given their specific history and status they have acquired over a period of time. What they have to say is going to have much more significance, so the reach of what they have to say would be so much more pronounced. So, we are all equal, but some are more equal than others in this regard, because some people simply cannot narrate the story in a manner that is going to be audible enough and where they are going to have the space to sufficiently articulate their experience, and of course many would not be granted the platform to narrate the story that goes to the core of their identity. So, no – more speech is not always better. It depends on the context in which that speech can happen. (see Note 4)

In giving a psychological account of the impact of hate, PsySSA's submission and those of its allies might be understood as agentic expressions of historically subjugated knowledge forms related to LGBT identities in South Africa. A remark by the presiding Justice during the trial noted the historical shift from the silencing of LGBT people to the voicing of their experience, which is enabled by democracy and its courts of law:

You have said a lot about the past repressive, oppressive regime prior to 1994 to which we were subjected, all sorts of people, including some of us on this Bench. Is it fair to say that the sexual minority groups today are in a similar position when they try to assert their existence and their rights? Because apartheid was cruel, it had no regard for dignity, as you were talking about dignity here, and human rights. Would one perceive them today, in the new democratic South Africa, to be in almost a similar situation where their rights are trampled in every turn of the corner? [. . .] LGBT communities are lucky because they have platforms to come to, like this court, I mean [during] apartheid you had no recourse at all. In fact the more you complain the more you got victimised.⁵

In viewing the courtroom as a space for (re)negotiating social power relations, this encounter of the psychological with the legal holds promise for transformation and restoration both within and outside of psychology:

The Promotion of Equality and Prevention of Unfair Discrimination Act, with the [South African] Human Rights Commission being the custodian, is something I think human rights advocates across a range of contexts, and academics who understand the importance of transformation and redress in this country, value incredibly as a mechanism. Because, it presents the opportunity for reflection and interrogation of what we are, and what the balance is between the rights that are afforded us within this constitutional project, and the vision of a transformed, democratic and open society, with the understanding that this is indeed a young democracy. [The formation of] PsySSA preceded the new South Africa by just two or three months, so the timeframe is a very similar one, and for PsySSA in particular, to redress the historic silences and the transformation of our society is an incredibly important aspect. So it is with the Equality Act, and with equality proceedings such as this, that there is an opportunity for introspection, reflection, understanding and affirmation to be forthcoming – and where, hopefully, the interventions are not aimed at criminalising, but rather at restoration. (see Note 4)

What your Lordship is dealing with today is Parliament's considered view about how to advance the attainment of equality in our fractured society. And it turned its attention to the courts, as public forums,

for these issues to be ventilated and remedies to be offered [. . .] Parliament did not have an easy task, that is clear, but it had a task that was constitutionally ordained and which it took upon itself when it enacted the Equality Act. It created the court to be a safe place for the victims of hate speech to come and to raise their own voice in response to that which has been said about them. It made the court the referee and it obliged it to move society forward in the pursuit of tolerance.⁶

Conclusion

In the court judgment, Jon Qwelane's article was found to have amounted to hate speech and to being hurtful and harmful, and propagating hatred, towards the LGBT community. The court dismissed the constitutional challenge, thus rejecting Qwelane's freedom of speech defense. Psychology has the power and the responsibility to actively challenge prevailing conditions of injustice and inequality in South Africa (Nel, 2014; Pillay, 2013). This includes counteracting systems of exclusion and violent othering, shaped by an apartheid and colonial past, on the basis of their sexuality, gender, race, and class statuses. Yet, psychology's relationship to hate cuts both ways in that psychological practices and discourses themselves are implicated in the construction of scientific and popular classifications of 'deviant' and 'abnormal' sexualities and genders, and in the raced and classed hierarchisation of humanness more broadly. In crafting powerful onto-epistemological frameworks for understanding human identity and behaviour – sometimes in ways that obscure the socio-historical and political dynamics in which these are forged – psychology has justified oppression. Moreover, in reducing social malaise to problems of the mind, the discipline has participated in producing and maintaining status quos of raced, gendered, and sexual inequality.

At the same time, psychology is diverse in form and function and offers critical epistemologies and praxes that can work against discriminatory power arrangements. A critical encounter with psychology itself, so as to bring its own knowledge forms closer to struggles for social justice, holds restorative possibilities – not only to challenge hate but also to restore psychology itself. Such restoration demands a critical engagement with the ways in which contemporary psychologists can, and should, work against and beyond hate in increasingly tangible ways.

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Notes

1. Psychological Society of South Africa (PsySSA) is a member of the Steering Committee of the Hate Crimes Working Group (HCWG), a multi-sectoral network of civil society organisations that covers a cross-section of vulnerable sectors and people at risk of hate crimes. Here, PsySSA leads research aimed at determining and describing the nature, as well as psychological and social impact, of hate crimes in South Africa.
2. Section 10(1) of the Equality Act states that, 'Subject to the proviso in section 12, 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'.
3. PsySSA's involvement in this case was made possible with the pro bono support of Webber Wentzel Attorneys and of legal counsel.
4. Evidence of Prof Juan Nel, transcript of court proceedings.
5. Justice Moshidi, transcript of court proceedings.
6. Advocate Kate Hofmeyr (PsySSA's counsel), transcript of court proceedings.

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