

HATE-MOTIVATED VIOLENCE: IS IT LINKED TO HATEFUL EXPRESSION?

1 Introduction

In 1996, the late Prof JMT Labuschagne wrote an article dealing with the limits of freedom of speech and hate speech (“Menseregtelike en Strafregtelike Bekamping van Groepsidentiteitsmatige Krenking en Geweld” 1996 *De Jure* 23). He discussed freedom of expression and hate speech in the United States of America, various European countries, South Africa and also within the context of international law. He subsequently discussed the idea of updating his thoughts, taking into consideration the influence of the Constitution of the Republic of South Africa, 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000, commonly referred to as the “Discrimination Act”). Sadly, he never got around to doing so. Since his 1996 article, much development has taken place in this field including the introduction of the 2004 Draft Prohibition of Hate Speech Bill. The events of 11 September 2001 in the USA and the 2005 bombings in London (and other similar attacks all over the world) have increased intolerance and suspicion between people from different races and religions manyfold. Immediately following the London bombings, it was reported that religious hate crime (that is, attacks targeting England’s Muslim community) had increased by nearly 600% (“Religious Hate Crime Up 600%” 2005-08-02 21:14 SA <http://www.news24.com> visited 2 Aug 2005).

Hate speech is regarded as an exception to freedom of speech/expression. The notion of freedom of expression has been discussed at length by various South African writers (Johannessen “A Critical View of the Constitutional Hate Speech Provision: Section 16” 1997 *SAJHR* 136; Devenish “Freedom of Expression: The ‘Marketplace’ of Ideas” 1995 *TSAR* 442; Carpenter “Fundamental Rights: Is There a Pecking Order?” 1995 *Codicillus* 27; Johannessen “Freedom of Expression and Information in the New South African Constitution and Its Compatibility with International Standards” 1995 *SAJHR* 216; Van Rooyen “Censorship in a Future South Africa: A Legal Perspective” 1994 *De Jure* 283; Nesser “Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence” 1994 *SAJHR* 336; and Marcus “Freedom of Expression Under the Constitution” 1994 *SAJHR* 140). This note briefly touches on some aspects relating to freedom of expression and hate speech and also explores the (rather newly discovered) notion of hate crime. It asks the question whether there is any connection between hate speech and hate crime.

2 Freedom of expression

It is suggested that the term “expression” is wider than the term “speech” and that it includes non-verbal communication such as the display of flags, posters, photographs, and so on, as well as symbolic acts such as the wearing of items of clothing and even physical gestures (Currie and De Waal *The Bill of Rights Handbook* (2005) 363). Nesser (1994 *SAJHR* 344) describes the benefits of free expression as:

- Important to self-development (especially in an artistic sense), in that it unleashes creative forces and new insights.
- Advancing the search for truth – various theories/ideas can be compared and criticised.
- A crucial requirement of democratic processes.
- A safety valve, allowing people who think differently to “blow off steam”. It is argued that they will be less likely to feel repressed, ignored and/or isolated. Venting one’s feelings (and also one’s hatred) may not only be emotionally satisfying, but even self-defining and empowering.

In the USA case of *Texas v Johnson* (491 US 397, 109 S Ct 2533, 105 L Ed 2d 342 1989) the court said “if there is a bedrock principle underlying the First Amendment (the ‘freedom of speech’ clause), it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”. Devenish (1995 *TSAR* 444) indicates that for decades South Africans have lived with a myriad of draconian laws designed to restrict freedom of speech and expression. Freedom of expression is, however, not absolute but finds its limits at the interface with other competing rights and freedoms. In the end, it is a question of to what extent freedom of expression should be permitted and it becomes a balancing act of the exercise of freedom of expression against equally fundamental rights such as dignity, equality, reputation, privacy, and so on.

3 Hate speech

Labuschagne did not like the term “hate speech”, which he found unnecessarily limiting and confusing (1996 *De Jure* 24). He preferred to describe it as impairing or denying the dignity, esteem or “lebensraum” (or “bestaansruimte” as he translated it) of people who belong to a group which is worthy of protection (1996 *De Jure* 24). He was also not comfortable with the emphasis, in many instances, of hate speech only being applicable to minorities (1996 *De Jure* 35). He argued that majorities also had legitimate expectations in this regard. Racism, he argued, was not only limited to intolerance of the other’s race, but also extended to ego-racism, which is negative perceptions or intolerance towards members of one’s own race (1996 *De Jure* 37; “Ras en Rassisme: Strafregtelike Manifestasies” 1982 *THRHR* 41 43). Hate speech can take many forms, for example racist speech, minority speech, anti-foreigner speech or homophobic speech. Labuschagne indicated that, because many religions believe their own

definition of the truth to be the only truth, intolerance of other religions is often at the very core of religious belief (1996 *De Jure* 38).

What follows is a short discussion of the legislative framework concerning hate speech that has been put in place since Labuschagne wrote his article.

3.1 *Constitutional framework*

The 1993 Interim Constitution contained a freedom of expression provision, section 15, but did not directly address the issue of hate speech. In the 1996 Constitution, we do find direct reference to hate speech in section 16(2)(c), that states that the freedom of expression described in subsection (1) does not extend to *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm* (s 16(2)(c) of Constitution, 1996). Two elements must be present at the same time before an expression can be considered to be hate speech: it must constitute advocacy of hatred on one of the mentioned grounds, and the advocacy must constitute incitement to cause harm. So even if the expression is objectionable, offensive and ill-conceived, if the incitement to harm is not present, it will not rise to the level of hate speech (*Van Loggerenburg v 94.7 Highveld Stereo* 2004 5 BCLR 561 (T)). Harm is also not limited to physical harm but includes psychological and emotional harm. Currie and De Waal (363) point out that the listed grounds of section 16(2)(c) are closed and therefore exclude other grounds of hate speech frequently encountered, such as homophobic speech or anti-foreigner speech.

3.2 *Promotion of Equality and Prevention of Unfair Discrimination Act*

This act deals specifically with the prohibition of hate speech in section 10(1) that reads as follows:

“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:

be hurtful,
be harmful or to incite harm, or
promote or propagate hatred.”

This provision is much wider than the hate speech qualification in section 16 of the Constitution, specifically because the prohibited grounds are so much more encompassing. The grounds, defined in section 1 of the Act, are as follows:

“[R]ace, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or any other ground where discrimination causes or perpetuates systemic disadvantage or undermines human dignity or adversely

affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a listed ground."

3.3 *Draft Prohibition of Hate Speech Bill, 2004*

This Draft Bill has been circulated for comment. It suggests the criminalisation of hate speech, something Labuschagne (1996 *De Jure* 49) did not support. Clause 2(1) of the draft Bill indicates that any person who in public advocates hatred that is based on race, ethnicity, gender or religion against any other person or group of persons that could, in the circumstances, reasonably be construed to demonstrate an intention to:

be hurtful,

be harmful or to incite harm,

intimidate or threaten,

promote or propagate racial, ethnic, gender or religious superiority,

incite imminent violence,

cause or perpetuate systemic disadvantage,

undermine human dignity, or

adversely affect the equal enjoyment of any person's or group of person's rights and freedoms in a serious manner,

is guilty of an offence.

The term "in public" means in the sight or hearing or presence of the public. It is interesting that the draft Bill is limited to utterances of hatred or bias in public. This is similar to the English Race Relations Act of 1965, which is also limited to public racial expressions (s 6 of Race Relations Act, 1965). What is, however, disappointing about the draft Bill is that it is, once again, restrictive in the categories of grounds for prejudice, restricting it to race, ethnicity, gender and religion.

Labuschagne's article also referred to the position with regard to hate speech in Germany (1996 *De Jure* 26-29). An element of the *Strafgesetzbuch* (StGB) that may possibly be useful for South Africa and should possibly be included in the proposed Bill, is the notion to criminalising the presentation of, or making available of, discriminatory information to a person under the age of 18 (§ 130(3) StGB). It seems as if, apart from the purposes of the StGB to protect the public order and the dignity of people, the protection of the integrity of youth is given serious attention.

4 **Hate crime**

Hate crime is violent intolerance that intends to hurt and intimidate someone because of their race, ethnicity, national origin, religion, sexual orientation, disability or other ground for prejudice. Hate crimes are usually defined as crimes motivated by prejudice or hatred. The term covers a wide range of actions and it describes victims who are identified by their actual (or

perceived) membership of a hated group. The most common acts of hate crime include assaults on the person, property damage, insulting slogans, graffiti, arson or attempted arson, verbal abuse and threats of abuse (Harris "Arranging Prejudice: Exploring Hate Crime in post-apartheid South Africa" 2004 <http://www.csvr.org.za/papers/paprctp1.htm> visited on 2005-08-02 – referred to as "CSVr report").

4 1 Hate crime in the USA

The concept of crimes committed because of hatred based on race or national origin has long been part of US history, but statistical data and scientific research on hate crime is meagre (American Psychological Association *Hate Crimes Today: An Age-Old Foe in Modern Dress* 2005). Federal Bureau of Investigation statistics show that about 30% of hate crimes constitute crime against property (arson, vandalism, robbery) and about 70% involve an attack against a person. Less than 5% of perpetrators were members of organised hate groups (Dunbar "Hate Crime Patterns in Los Angeles County" paper presented at a congressional briefing, Nov 1997, Washington DC). Most hate crimes were carried out by otherwise law-abiding young people with personal prejudice, often fuelled by alcohol or drugs, and who see little wrong with their actions (American Psychological Association *Hate Crimes Today: An Age-Old Foe in Modern Dress* 2005).

4 1 1 Racial and ethnic intolerance

By far the largest group of hatred-based crime in the USA is racial intolerance, with African-Americans the group at greatest risk. Sixty per cent of reported hate crimes are based on race, and 60% of the victims are African-Americans (American Psychological Association *Hate Crimes Today: An Age-Old Foe in Modern Dress* 2005).

4 1 2 Religious intolerance

Most religiously-motivated hate crimes were acts of vandalism, with the majority (in 1996: 82%) directed against Jews (Anti-Defamation League *Audit of Anti-Semitic Incidents* 1996). The aftermath of the September 11, 2001, terrorist attacks saw an upsurge of hate crime directed at people of Arab descent. These attacks included murders and beatings and were often directed at Arabs solely because they shared or were perceived as sharing the national background of the hijackers responsible for the attacks on the Pentagon and World Trade Centre. The FBI reported a seventeen-fold increase in anti-Muslim crimes during 2001 (American Psychological Association *Hate Crimes Today: An Age-Old Foe in Modern Dress* 2005).

4 1 3 Sexual identity intolerance

Probably the most socially acceptable, and the most widespread, form of hate crime among teenagers and young adults in the USA are those who

target sexual minorities for attack (Franklin "Psychosocial Motivations of Hate Crime Perpetrators: Implications for Prevention and Policy" paper presented at a congressional briefing, Nov 1997, Washington DC). There are four categories of assaulters:

- Ideological assaults, where the attacks stem from the negative beliefs and attitudes about homosexuality;
- Thrill seekers, who commit assaults to alleviate boredom, to have fun, or for excitement;
- Peer-pressure assailants, who commit the offence to prove how tough they are; and
- Self-defence assailants, who believe homosexuals are sexual predators and are protecting themselves against sexual propositions.

4 1 4 Addressing hate crime in the USA

The Hate Crimes Prevention Act of 1998 (which has been introduced but not enacted yet) would expand federal jurisdiction over hate crimes and expand the categories of what are regarded as hate crimes to include gender, sexual orientation and disability. Extensive support programmes by federal agencies such as the Community Relations Service, an arm of the Department of Justice created by the Civil Rights Act of 1964, attempt to stem the tide of hate-based violence by, *inter alia*,

- Early intervention techniques;
- Educational efforts aiming to encourage broader intercultural understanding; and
- Early resolution of community conflicts which have the potential to spiral out of control.

4 2 *Hate crime in South Africa*

Very little research has been done, and even less written, about hate crime in South Africa. The idea of having a separate classification of crime, namely crime motivated by hatred, is new in South African criminal law. Firstly, one could ask how relevant the concept of "hate crime" is in the South African context, and secondly, if the criminal justice system needs any special strategy to deal with hate-motivated violence.

The Centre for the Study of Violence and Reconciliation (CSVR) compiled a substantial report on hate crime in South Africa. Although racially motivated hatred is the primary focus of the report, the notion of "hate crime" goes beyond racism (Harris "Arranging Prejudice: Exploring Hate Crime in post-apartheid South Africa" 2004 <http://www.csvr.org.za/papers/paprctp1.htm> visited on 2005-08-02). The researchers indicate that the term "hate crime" is not well known in South Africa. Given the history of legislated racism as well as the continuing high levels of intolerance, they regard it as rather surprising that the concept of hate crime has not received more

attention as yet. The CSVr study attempted to establish common qualities of hate crime. They found that hate crimes are usually assumed to be acts of prejudice, often seen as message crimes, commonly violent, often under-reported, motivated by right-wing ideology, sensational or dramatic, take place in small towns and rural areas, are committed by groups of young men, and alcohol or substance abuse often contribute to the perpetration. The research has, however, proven that these are only stereotyping and assumptions made about victims and perpetrators and cannot be accepted as factual. Further research on this is definitely called for. The CSVr research also indicates that within South Africa's transition to democracy, race, racism and violence have not remained static. Rather, these expressions of intolerance have found creative ways to change with the political order. The report concludes that hate crimes do not take on one, homogenous form. Rather, particular incidents must be seen as occupying a spectrum of racism and violence.

4 2 1 Should hate crimes be treated differently to other violent crimes?

What differentiates a hate crime from another act of violence is the prejudice of the perpetrator. It is also this prejudice that is instrumental in selecting the target, or victim, of a hate crime. A victim is targeted because of a particular physical feature (eg skin colour or appearance) or a quality that is perceived to be central to their identity (eg sexuality). There seems to be more than one approach to dealing with violent prejudice. One can either treat it the same as any other violent offence, or have increased penalties for offences in which prejudice is the motivation, or have specific prejudice-motivated offences. In the absence of legislative clarity, the courts in South Africa seem to move between the first and second approach: it is not a specific crime category *per se*, but where prejudice motivates the commission of the crime it can be regarded as an aggravating factor which can impact on the severity of the sentence. Labuschagne, in another article ("Rassisme as Faktor by Strafooplegging" 2001 *THRHR* 337), discussed the case of *S v Salwedel* (2000 1 SA 786 (SCA)). This case dealt with the murder of a slightly-built black man by four armed, trained and mask-wearing Afrikaner Weerstandsbeweging (AWB) supporters who viciously attacked the deceased for the simple reason that he was black and had been found in a predominantly white suburb of East London. The Supreme Court of Appeal concluded that the sentence handed down by the trial court was inappropriate for, what Mahomed CJ called, "a disgraceful exhibition of an extremely brutal kind of racism". According to him, the sentence should "give expression to the legitimate feelings of outrage which must have been experienced by reasonable men and women in the community" (794).

It is submitted that, because it may be difficult to prove that a particular violent crime was motivated by hatred, it might be best to treat hate crimes the same as general offences, but to take the prejudice, if proven, into consideration in passing sentence. The characteristics of victims are usually of little significance, except possibly as an aggravating factor (CSVr report).

There seems to be no good reason to deviate from this principle. Considering the prejudice of the offender as an aggravating circumstance that can give rise to increased penalties can sufficiently make it clear that this sort of behaviour is unacceptable and regarded in a particularly serious light.

At the moment there do not seem to be any special rehabilitation programmes or models to deal specifically with hate crime perpetrators. Similarly, there is also uncertainty whether existing victim support and empowerment mechanisms are adequate to deal with the trauma of, and provide support to, victims of hate crimes.

4 2 2 The perpetrators

The South African perpetrators of hate crime follow international trends. Some perpetrators commit hate crimes with their peers as a “thrill”, or while under the influence of drugs or alcohol; some as a reaction against a perceived threat or to preserve their “turf”, and others out of resentment over the growing economic power of a particular racial or ethnic group (Community Relations Service 2001). Racist offenders are offenders who express racist or intolerant views. There seems to be little evidence that the majority of racist offenders are members of racist organisations. The American Psychological Association suggests a link between prejudice and morality. According to the APA, deep-seated, invisible prejudice blinds aggressors to the immorality of their actions. (*Hate Crimes Today: An Age-Old Foe in Modern Dress* 2005)

4 3 *Hate-motivated violence results from hateful expression*

The controversial Dutch filmmaker Theo van Gogh, a great grand-nephew of the artist Vincent van Gogh, believed that insulting people was his right as a free citizen. He was particularly vocal against Islam, using extremely unsavoury language in the process. Last year, he made a short movie, “Submission”, about the abuse of Muslim women. The script was written by a Somali-born ex-Muslim Dutch parliamentarian, Hirsi Ali, who herself is a strong opponent of Islam’s treatment of women, calling it savage and medieval. The women in the movie were filmed in clothes that were very revealing – something that is very insulting for devout Muslims. The movie resulted in a heated media debate, death threats to Van Gogh and Hirsi Ali, and eventually the gruesome killing of Van Gogh. On 2 November 2004, in a busy street in Amsterdam, he was shot, stabbed, had his throat slit and a letter stuck to his chest with a knife by a young (Dutch-born) Muslim fanatic who claims he was acting out of religious conviction (BBC News “Life of Slain Dutch Film-maker” 2004-11-02 16:38:24 GMT <http://news.bbc.co.uk> visited 20 Aug 2005). Hateful expression on the part of Van Gogh was rewarded with hate-motivated violence on the part of his killer.

5 Conclusion

Racism, ethnicism, religious fanaticism, xenophobia and the like are world-wide phenomena and not confined to South Africa. These phenomena also seem to be on the rise. Although the term is not commonly used in South Africa, it is indeed not a new, or simple, phenomenon. The South African constitution outlaws racism and racial prejudice. However, racism still finds expression, including violent expression, in the form of racially motivated crime. We also know that the old saying of “sticks and stones can break my bones, but words can never hurt me” is simply not true. Various studies have shown that hateful and hurtful words have the potential to cause enormous psychological and moral pain (Delgado and Yun as quoted by Labuschagne 1996 *De Jure* 47). Physical assaults also often follow or accompany hateful and intolerant slurs. The question is: where (and when) do you draw the line? Hate crimes are not necessarily random, uncontrollable occurrences, but often the result of skewed upbringing and the outward manifestation of intolerance and prejudice. Labuschagne quoted sources that indicate that most intolerance is bred in the home – although there are also indications of indoctrination by literary works, music, peer pressure, and other factors. (1996 *De Jure* 47-48)

Because hate speech and hate crime target social categories, the effects thereof are often much more widespread than just restricted to a particular victim. Hate speech and hate crime often create or intensify existing tension, which can easily trigger larger community-wide conflict. It can expose long-standing community friction and hostility, or create new social divisions, leading to racial polarisation and community-wide reaction (CSVR report). Nesser indicates that insults and bias should be considered within a specific historical experience (1994 *SAJHR* 339). What may not be considered as hate speech in a particular culture may differ from the same conduct in a culture with a history of violent repression. Another question is whether one person's experience of prejudice is more or less hurtful than another's? How is this measured? These questions bring to light notions of subjectivity and personal experience.

The new South African Constitution provides a formal condemnation of racism, even in its verbal forms, and sends a powerful message, namely that society takes equality seriously and gives it primacy among its fundamental rights (Nesser 1994 *SAJHR* 350). It seems that simply prohibiting the expression of hatred has little effect on its existence. Experience elsewhere indicates that the prohibition of hate (and more specifically racial) speech has had little effect on the continued growth of neo-Nazi and “skinhead” groups in Britain and Germany. Ironically, it is argued that the prosecution of such groups actually gives them more visibility and leads to further recruitment (Nesser 1994 *SAJHR* 348).

When it comes to (highly personal) prejudice, such as racism, one should avoid the risk of reducing a highly complex history and socio-political context to a specific inter-personal incident. Labuschagne (1996 *De Jure* 48) concludes that the dilemma of racism is often more complicated than it is

held out to be, since it does not always manifest on a rational level. People commit crimes for many reasons. Prejudice is just one. Prejudice-motivated violence is also just one form of violence. An automatic assumption that prejudice is the reason for many violent actions in South Africa may indeed be completely wrong.

Labuschagne did not believe that one could change the internal workings of an individual by means of the criminal law. I believe that he would have gone along with suggestions to create a vibrant and strong human rights culture as a counter for hate-motivated expression and violence. One such method could be to encourage communities to launch educational efforts aimed at dispelling minority stereotypes, reducing hostility between groups, and encouraging broader intercultural understanding and appreciation.

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