

The Shaping, Enactment and Interpretation of the First Hate-Crime Law in the United Kingdom - An Informative and Illustrative Lesson for South Africa*

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Abstract

Hate crimes are crimes that are motivated by personal prejudice or bias. Hate-crime laws criminalise such conduct and allow for the imposition of aggravated penalties on convicted perpetrators. This article examines the historical, social and political factors which influenced the shaping and enactment of the first British hate-crime law. The South African context is also considered since the Department of Justice has recently released the *Prevention and Combatting of Hate Crimes and Hate Speech Bill* for public commentary and input.

While Britain has had a long historical record of criminal conduct that was motivated by the race and the ethnicity of victims, it was only in the twentieth century that civil society first drew attention to the problem of violent racist crimes. Nevertheless, successive British governments denied the problem of racist crimes and refused to consider the enactment of a hate-crime law. Following a high-profile racist murder and a governmental inquiry, a British Labour Party-led government eventually honoured its pre-election commitment and passed a hate-crime law in 1998.

Some parallels are apparent between the British and the South African contexts. South Africa also has a long historical record of racially motivated hate crimes. Moreover, in the post-apartheid era there have been numerous reports of racist hate crimes and hate crimes against Black lesbian women and Black foreigners. Despite several appeals from the academic and non-governmental sectors for the enactment of a hate-crime law, and the circulation for public commentary of the *Prevention and Combating of Hate Crimes and Hate Speech Bill*, such a law has hitherto not been enacted in South Africa. This article posits that the enactment of a hate-crime law is a constitutional imperative in South Africa in terms of the right to equality and the right to freedom and security of the person. While the enactment of a hate-crime law in South Africa is recommended, it is conceded that enacting a hate-crime law will not eradicate criminal conduct motivated by prejudice and bias.

Keywords

Hate crime; hate-crime laws; United Kingdom; Crime and Disorder Act of 1998; South Africa; constitutional imperative.

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1 Introduction

This article examines the factors that shaped the enactment of the first hate-crime law in the United Kingdom and includes a brief overview of its contents and interpretation. The South-African context is also considered, since the Department of Justice has recently released a hate-crime bill for public commentary and scrutiny.¹ Hate crimes² were first recognised as a specific category of criminal conduct worthy of an enhanced penalty in the United States of America.³ The enactment of hate-crime laws⁴ in the United States of America has had an influence on the enactment of hate-crime laws in a

* The "United Kingdom", which is a shortened form of reference to the "United Kingdom of Great Britain and Northern Ireland", refers to three distinct jurisdictions, namely, England/Wales, Scotland and Northern Ireland. However, reference to the United Kingdom in this article is to the first jurisdiction, England/Wales. Hence, the hate-crime law that will be discussed in this article is the hate-crime law that is applicable to England and Wales. The term "Britain", which is also used in this submission, is an appellation that is commonly used to refer to the United Kingdom of Great Britain and Northern Ireland. See Vick 2002 *Tex Int'l LJ* 329.

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¹ Refer to the *Prevention and Combatting of Hate Crimes and Hate Speech Bill, 2016*, which was released for public commentary in late 2016. It is the author's submission that in the light of the fact that the Republic of South Africa was once a British colony reference to the British context is appropriate, since some of the substantive law and much of the procedural law of South Africa have been influenced by the British common law.

² Hate crimes are crimes which are motivated by the perpetrator's prejudice or bias towards personal characteristics of the victim such as race and ethnicity. The perpetrator's motivation is referred to as a "bias motivation". See further Lawrence *Punishing Hate* 9; Gerstenfeld *Hate Crimes* 25. While hate crimes generally refer to crimes committed by a single perpetrator or by a small group of perpetrators, it should be noted that in the historical examples of hate crimes that are briefly referred to in this submission, there is an element of state or government complicity. The historical examples of hate crimes were also perpetrated on a larger scale. This is indeed true of slavery, genocide and the crime of apartheid. See Gerstenfeld *Hate Crimes* 290.

³ There is some consensus that the USA was the first country to enact hate-crime laws. See Levin 1999 *J Contemp Crim Justice* 6; Gerstenfeld *Hate Crimes* 31-32; Hall *Hate Crime* 18. Consequently, much of the legal and social-sciences literature relating to hate crimes is of American origin. Therefore, reference to the USA in this submission, which focuses on the British and South-African contexts, is unavoidable.

⁴ Hate-crime laws criminalise conduct motivated by the perpetrator's prejudice or bias towards personal victim characteristics such as race, ethnicity and sexual orientation. Once convicted of such conduct, a perpetrator is usually subjected to an enhanced or aggravated penalty. See for example the American federal hate-crime statute, the *Matthew Shepherd and James Byrd Junior Hate Crimes Prevention Act, 2009* (codified as 18 USC §249). S 7(a)(1) of this statute creates a specific crime of wilfully causing bodily injury to a person because of that person's actual or perceived race, colour, religion or national origin.

number of other jurisdictions, particularly those in democratic western nations.⁵

This submission commences with a broad overview of the most significant historical, social and political factors that shaped the enactment of the *Crime and Disorder Act* of 1998 in the United Kingdom. Included in the historical overview is the debunking of a myth that the British⁶ were historically a peaceful and tolerant nation. After a brief overview of the contents and the judicial interpretation of the *Crime and Disorder Act* of 1998 has been provided, the South-African context is examined. The perpetration of hate crimes in the post-apartheid era, which culminated in the publication of the *Prevention and Combatting of Hate Crimes and Hate Speech Bill*, is considered. Also interrogated are recent social and political developments that have contributed to a delay in the enactment of a hate-crime law in South Africa. The article concludes with a consideration of why such an enactment is a constitutional imperative in South Africa. In the conclusions and recommendations, some parallels are drawn with the context which obtains in the United Kingdom.

2 Britain

2.1 Debunking a British myth

The British have historically been portrayed as a peaceful, tolerant and fair nation.⁷ Waters⁸ refers to a widespread "fiction" which captured the popular British imagination in the 1930's and 1940's at a time of increasing European Fascism and writes:

The Britons were reinvented as members of an essentially unassuming nation ... a quiet, private and ordinary people, defined by their modesty, kindness to others, loyalty, truthfulness, straightforwardness and simplicity.

However, this myth is shattered by the historical accounts of foreign peoples, both light and dark-skinned, who have arrived in Britain since time

⁵ See, for example, the hate-crime law that was passed in France in 2003 that is commonly referred to as *La loi no 2003-88 du 3 février 2003*.

⁶ The term "British" presently refers to the inhabitants of England, Wales, Northern Ireland and Scotland, who could belong to different racial groups. In the historical examples of hate crimes that are referred to in this submission, however, the terms "British" and "Britons" refers to White persons. It should also be noted that most of the historical literature refers to the perpetration of hate crimes in England.

⁷ Several writers have alluded to a myth of British fairness, tolerance, and non-violence. See for example Panayi "Anti-Immigrant Riots in Nineteenth and Twentieth-Century Britain" 1-2; Lawrence 2003 *J Mod Hist* 559 refers to a "myth of British peaceableness"; Jackson 1998 *Geography* 203 writes of a "British notion of fair-play"; Waters 1997 *J Br Stud* 238 refers to a "myth of British tolerance".

⁸ Waters 1997 *J Br Stud* 211.

immemorial and who have been subjected to discrimination and violent conduct that would presently be considered as hate crimes.⁹ The post-Second World War period is significant since this is when Britain became a veritable multiracial and multicultural society.

2.2 *Post-Second World War Britain*

Of significance in the period after the Second World War were several anti-Semitic riots which erupted in 1947 in the cities of Manchester and Liverpool when Jews¹⁰ and Jewish-owned businesses were targeted for acts of violence and vandalism.¹¹ During the post-Second World War period British colonial subjects from the Caribbean, India, Pakistan and Africa immigrated to Britain *en masse*.¹² Most of the early immigrants were people of colour who contributed to a diverse British society in which sporadic incidents of racially and ethnically-motivated hate crimes have occurred.¹³ Bowling¹⁴ has chronicled the violent London and Nottingham race riots against Jamaicans and Asians in 1958.¹⁵ There were also several subsequent outbreaks of racist violence against Asians, who were referred to by the

⁹ See for example Panayi "Anti-Immigrant Riots in Nineteenth and Twentieth Century Britain" 5 and Bowling *Violent Racism* 24 for some of the historical accounts of British hostility towards Jews which included a massacre of 30 Jews in London in the 12th century. Also see: Breauly "Persecution of Gypsies in Europe" 354-355 for the historical accounts of how Gypsies or "Travellers" were persecuted and punished in England. Also refer to Fryer *Staying Power* 8-18 and Hiro *Black British, White British* 4 for a history of Blacks in Britain. It should be noted that the term "Black" is used in a narrow sense in this article to refer to persons of African origin. Despite a prohibition on slavery in Britain, Blacks were employed as household slaves and were subjected to corporal punishment until the 19th century. In the 20th century, a "colour bar" was in effect throughout Britain from the period of the First World War to the 1950s. The "colour bar" referred to a socially sanctioned form of discrimination in terms of which non-white persons were refused admission to hotels, restaurants, boarding houses, public houses, dance halls and public swimming pools. See further Bowling *Violent Racism* 26 and Hiro *Black British, White British* 32-34 and the case of *Constantine v Imperial Hotels Ltd* [1944] KB 693, which was one of the few legal challenges to the British "colour bar".

¹⁰ It should be noted that Jews do not constitute a distinct racial group and could be White or Black. See D'Souza 1995 *American Scholar* 522. However, most British Jews were and still are White. The perpetration of hate crimes against Jews in Britain could therefore be considered as a form of ethnically or religiously-motivated hate crime.

¹¹ See Kushner "Anti-Semitism and Austerity" 149.

¹² See Hiro *Black British, White British* (1971) 8 and Fryer *Staying Power* 372.

¹³ See Gerstenfeld *Hate Crimes* 265.

¹⁴ See Bowling *Violent Racism* 30-43.

¹⁵ While nine White youths were charged with inciting the 1958 riots and received sentences of four years each for their role, the official government response was that the riots were not caused by racists, but were caused by hooligans who had no respect for law and order. See Bowling *Violent Racism* 32. It should be noted that reference to "Asians" in this submission is to persons whose origins lie in the Indian sub-continent, which includes India, Pakistan and Bangladesh.

derogatory term "Pakis".¹⁶ The post-Second World War period is also significant since Blacks and Asians, as opposed to Jews, became the targets of white-British hostility and violence.¹⁷

2.3 The enactment of an anti-discrimination law

Despite the enactment of the *Race Relations Act* in 1965¹⁸, hate crimes, and in particular crimes motivated by race and ethnicity, were still not recognised as a specific category of criminal conduct in Britain. However, British judges had some discretion to consider a racist motivation as an aggravating factor at sentencing.¹⁹ In several cases, the British Court of Appeal alluded to the importance of considering a "racial element" as an aggravating factor at sentencing in crimes of violence.²⁰

2.4 Racial violence from the 1970s to the 1980s

Bowling²¹ attributes the increase in racial violence in Britain in the early 1970s to the moral panic on immigration that had been caused by Enoch Powell, a Conservative member of parliament, the influence of the Skinheads²² and the growth of the National Front, an openly racist and fascist British political party whose literature espoused anti-Semitism, anti-miscegenation and the possible loss of White British identity.²³ Bowling²⁴ refers to 150 racially-motivated assaults in the east of London in the early 1970s, the racially-motivated murders of five Asians and Blacks across Britain in the period from 1970 to 1973, several arson attacks on Black homes and "Paki-bashing" and "nigger-bashing" becoming the norm in

¹⁶ Horobin 1972 *Police Journal* 184.

¹⁷ Panayi 1991 *Social History* 142.

¹⁸ The *Race Relations Act* of 1965 was the first anti-discrimination law in Britain. See ss 1 to 5 of the *Race Relations Act*, 1965, in terms of which discriminating against a person by refusing access to public places such as hotels, public houses, cinemas, restaurants and public transport on the grounds of colour, race, or ethnic or national origin became a civil offence. S 6 of the *Race Relations Act*, 1965 criminalised "incitement to racial hatred". According to Lawrence "Memory, Hate and the Criminalization of Bias-Motivated Violence" 143, the incitement to racial hatred-provision in the *Race Relations Act*, 1965 was significant since this was the first British law to specifically address the problem of racial violence.

¹⁹ Malik 1999 *MLR* 409. According to Malik there was thus some potential to deal with racially-motivated crimes prior to the enactment of a British hate crime law.

²⁰ See for example the cases of *R v Whalley* (1989) 11 Cr App R (S) 405, CA; *R v Alderson* (1989) 11 Cr App R (S) 301, CA.

²¹ Bowling *Violent Racism* 42-44.

²² The Skinheads were a youth sub-cultural group who were often involved in violent attacks on Asians. These attacks were colloquially referred to as "Paki-bashing". See Campbell and Muncer 1989 *Deviant Behaviour* 274.

²³ Billig 1978 *Race and Class* 161; Edgar 1997 *Race and Class* 111-120.

²⁴ Bowling *Violent Racism* 43.

several London schools. A racial motive was presumed in almost all the cases of murder, since the victims had not been robbed.²⁵

In the absence of any official commitment from the British government to address the issue of violent racist crimes until the early 1980s, several community organisations led mass campaigns against racist crimes.²⁶ After meeting with several anti-racist organisations, the British Home Office announced in February 1981 that it would launch an inquiry into racist organisations and racist crimes and would consider the possibility of establishing special police units to deal with racist crimes.²⁷ The report commissioned by the Home Office in 1981 into racist organisations and racist crimes focussed on areas in Britain with high concentrations of immigrants and on incidents against persons and property where there was some indication of a racist motive.²⁸ Released in late 1981, the report established that ethnic-minority communities²⁹ lacked confidence in the police, that they were subjected to police harassment, that the police were unresponsive to their needs, that White suspects were often released with a mere warning, and that the police underestimated the seriousness of violent racist crimes.³⁰ The report also found that Asians were 50 times more likely than Whites to be the victims of racist crimes and that Blacks were 36 times more likely than Whites to be the victims of racist crimes.³¹ The publication of this report resulted in several positive outcomes. From 1986 the police began to recognise the problem of violent racist crimes and began recording incidents of a racist nature.³² According to Gadd,³³ the Home

²⁵ Moreover, the perpetrators of the murders were never identified. See further Ramamurthy 2006 *Race and Class* 42; Bowling *Violent Racism* 43-44.

²⁶ Ramamurthy 2006 *Race and Class* 55. The Newham Monitoring Group from the East of London and the Southall Monitoring Group from a predominantly Asian area in the West of London led such campaigns.

²⁷ See Runnymede Trust date unknown <http://www.runnymedetrust.org/histories/race-equality/82/inquiry-into-racist-groups-and-attacks.html>.

²⁸ See Layton-Henry 1982 *Patterns of Prejudice* 9; Bowling *Violent Racism* 75-77.

²⁹ There is a trend in some British literature to refer to all communities with foreign origins as "ethnic minority communities" or "ethnic minority groups". It should be noted, however, that the description "ethnic minority" could transcend skin colour since it could refer to White minority groups in Britain with foreign origins.

³⁰ Bowling *Violent Racism* 75-77.

³¹ Layton-Henry 1982 *Patterns of Prejudice* 9. The report also found that racist crimes consisted of verbal assaults, harassment, damage to property and more serious physical assaults which involved grievous bodily harm and murder.

³² Webster "England and Wales" 78. However, Webster writes that Black and Asian communities underreported racist incidents to the police. Moreover a racial incident was vaguely defined in the Metropolitan Police Force Orders as "any incident, whether concerning crime or not which is alleged by any person to include an element of racial motivation or which appears to the reporting or investigating officer to include such an element". A racial incident thus depended on the highly subjective decision of the police officer or "any person".

³³ Gadd 2009 *Br J Criminol* 755-756.

Office report marked the official endorsement of more comprehensive research by the Home Office on racially-motivated violence. The issue of racial violence was also accorded priority by a number of government bodies including the Metropolitan Police, the Association of Chiefs of Police, the Home Office and the House of Commons.³⁴ The reality, however, was that most rank and file police officers were reluctant to ascribe a racist motive to crimes, and considered lower-level, less violent racist crimes as unworthy of investigation.³⁵ A significant legal development in the 1980s was the reformation of the offence of incitement to racial hatred³⁶ and its inclusion in the new *Public Order Act* of 1986.³⁷ A two-year period of imprisonment or a fine could be imposed for a conviction of incitement to racial hatred.³⁸

2.5 The murder of Stephen Lawrence

Despite the increased public awareness of racially-motivated crimes after the publication of the 1981 Home Office report on racist violence, the British government was still reluctant to introduce a specific crime of racial violence, or a law that was comparable to an American hate-crime law. In 1994 the Home Secretary rejected calls by the Home Affairs Committee to introduce a hate-crime law since he was of the view that all violent crimes, irrespective of motivation, could be adequately addressed by the existing criminal law.³⁹

The 1993 murder of Stephen Lawrence led to significant changes in official attitudes towards racist violence. On April 22, 1993 Stephen Lawrence, an 18-year old Black teenager, was accosted by a group of five White youths who directed racist insults at him and stabbed him twice.⁴⁰ The attackers fled the scene and Lawrence died a short while later.⁴¹ The subsequent police investigation of Lawrence's murder has been described as flawed

³⁴ Bowling and Phillips "Racist Victimisation in England and Wales" 164.

³⁵ Bowling and Phillips "Racist Victimisation in England and Wales" 164; Bowling, Parmar and Phillips "Policing Ethnic Minority Communities" 542.

³⁶ Malik 1999 *MLR* 415.

³⁷ Ss 17-18 of the *Public Order Act* of 1986 describes racial hatred on the basis of race, nationality, citizenship, ethnicity or national origin. The offence of incitement to racial hatred includes acts likely to stir up racial hatred, including threats, insults, words, behaviour, displays and written materials which could be committed in public or certain private places.

³⁸ Refer to s 27 of the *Public Order Act*, 1986.

³⁹ Malik 1999 *MLR* 409.

⁴⁰ Webster "England and Wales" 69; Bowling and Phillips "Racist Victimisation in England and Wales" 154.

⁴¹ Webster "England and Wales" 69; Bowling and Phillips "Racist Victimisation in England and Wales" 154.

and incompetent.⁴² The police were aware that the five identified suspects had a history of racist violence in the area⁴³ but postponed surveillance of the five youths for two days.⁴⁴ Moreover, the Stephen-Lawrence murder was not identified as a racially-motivated crime.⁴⁵

While the perpetrators of Stephen Lawrence's murder were never convicted despite a five-year investigation, the persistence of the victim's parents, the considerable media coverage and political support eventually resulted in a government decision in 1998 to hold a public inquiry into the murder, headed by Lord Macpherson.⁴⁶ The most significant finding of the Macpherson Report was that institutional racism existed in the Metropolitan Police and in most British police departments.⁴⁷ The report also recommended that the recording and investigation of racist crimes should be improved.⁴⁸ The report further recommended that all government agencies across the criminal-justice system should adopt the same approach to racist crimes and that all role players in the criminal justice system should undergo antiracism and diversity-awareness training.⁴⁹

2.6 The enactment of the Crime and Disorder Act of 1998 and its interpretation by British courts

One of the commitments of the British Labour Party in its 1998 election manifesto was that it would ensure the passing of a new law to criminalise racially-motivated violence and harassment.⁵⁰ The impetus for such legislation had come from the increase in racist incidents which had been reported to police since the 1980s and an increase in anti-Semitic incidents that were reported to the Board of Deputies of British Jews.⁵¹ Shortly after coming to power in 1998, the new labour government passed the *Crime and Disorder Act*.⁵² The *Crime and Disorder Act of 1998*⁵³ creates several "racially-aggravated" crimes and allows for enhanced sentences to be imposed for convictions of racially-aggravated crimes.⁵⁴ The crimes that are capable of racial aggravation are assault, criminal damage, public-order

⁴² Webster "England and Wales" 69; Bowling and Phillips "Racist Victimisation in England and Wales" 154.

⁴³ McLaughlin and Murji 1999 *Crit Soc Pol* 64; Bridges 1999 *J Law & Soc* 313-314.

⁴⁴ Bridges 1999 *J Law & Soc* 298-299.

⁴⁵ Lea 2000 *Howard J Crime Justice* 221.

⁴⁶ Foot 1991 *Socialist Review* 3; Dixon and Ray 2007 *Probation Journal* 111.

⁴⁷ Bridges 1999 *J Law & Soc* 304; McLaughlin and Murji 1999 *Crit Soc Pol* 61; Lea 2000 *Howard J Crime Justice* 219-220.

⁴⁸ Bridges 1999 *J Law & Soc* 315.

⁴⁹ Bridges 1999 *J Law & Soc* 315-319; Lea 2000 *Howard J Crime Justice* 224.

⁵⁰ Malik 1999 *MLR* 409.

⁵¹ Iganski 1999 *Crit Soc Pol* 129-130.

⁵² Iganski 1999 *Crit Soc Pol* 129-130.

⁵³ Hereinafter referred to as the *Crime and Disorder Act*.

⁵⁴ Section 28 of the *Crime and Disorder Act*, 1998.

offences and harassment.⁵⁵ The racially-aggravated crimes in the *Crime and Disorder Act* were the first time that crimes in Britain were specifically characterised by a racist motive.⁵⁶ According to Taylor,⁵⁷ the racially-aggravated crimes are "all parasitical on existing offences ... but with the added ingredient of racial aggravation". The *Crime and Disorder Act* thus subjects a select group of crimes to enhanced penalties provided that these crimes were motivated by "racial hostility" as set out in the Act.⁵⁸ A "racial group" in this act includes race, colour, nationality and the ethnic or national origin of the victim.⁵⁹

In practice, many of the cases that have been prosecuted under the *Crime and Disorder Act* have involved the crime of racially-aggravated harassment.⁶⁰ In the case of *R v Jacobs*⁶¹ the White defendant had told an Asian policewoman who was attempting to conduct a search: "I don't want you (*sic*) ... filthy Paki hands on me!" The defendant continued to verbally abuse the policewoman. The Court of Appeal confirmed her conviction for racially-aggravated harassment and held that although the defendant had not actively gone out looking to victimise another person, it was the duty of the court to protect police officers on duty and in particular Asian police officers who should not be spoken to in such a manner.⁶² In *R v White*⁶³ the defendant had referred to an African female bus conductor as an "African bitch".⁶⁴ He was convicted of racially-aggravated harassment. In *DPP v Woods*⁶⁵ the defendant was convicted of racially-aggravated harassment

⁵⁵ Sections 29-32 of the *Crime and Disorder Act*. According to parliamentary debates on the *Crime and Disorder Act*, 1998, these crimes were specifically chosen because they represented the most frequently reported racist crimes.

⁵⁶ See Walters 2006 *UTSLR* 67.

⁵⁷ See Taylor date unknown http://www.ucian.ac.uk/research/environment/projects/assets/Racial_Aggravation_final_paper.pdf.

⁵⁸ It should be noted that s 82 of the *Crime and Disorder Act* enables a court to consider an accused's hostile motives as an aggravating factor at sentencing for any offence not listed in the Act.

⁵⁹ Iganski *Hate Debate* 3.

⁶⁰ The crime of "racially aggravated harassment" is created by s 32 of the *Crime and Disorder Act*. The actual crime of harassment, however, is to be found in the *Protection from Harassment Act* of 1997, which creates offences relating to stalking and putting people in fear of violence. According to the definition of harassment in s 1 of the *Protection from Harassment Act*, 1997, "a person must not pursue a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment". It has to be shown that the defendant had undertaken a "course of conduct" which led the victim to fear that violence would be used against him. See Herring *Criminal Law* 356. However, the fear of violence requirement neither requires "imminence" nor the need to show that a psychological injury was inflicted. See Ashworth and Horder *Principles of Criminal Law* 328.

⁶¹ *R v Jacobs* [2001] 2 Cr App R (S) 174, CA.

⁶² *R v Jacobs* [2001] 2 Cr App R (S) 175 CA.

⁶³ *R v White* [2001] EWCA Cri 216, 1 WLR 1352, CA.

⁶⁴ In *hoc casu*, both the defendant and the victim were Africans.

⁶⁵ *DPP v Woods* (2002) EWHC 85.

for referring to the doorman of a nightclub as a "black bastard". In the case of *DPP v Pal*⁶⁶ the court was faced with a man of Asian appearance who had been verbally abused by the defendant, who was also Asian and had called him, *inter alia*, "a Brown Englishman". However, the court found that the state had not shown that the racial hostility was materially based on the victim's ethnicity and thus found that the offence was not shown to be racially aggravated.

In *Johnson v DPP*⁶⁷ the court recognised the principle that the racially-aggravated offences in the *Crime and Disorder Act* may be committed by minority ethnic-group members against members of the majority White population. In this case, a Black man had verbally threatened two White parking-lot attendants and told them to return to a "White area". His conduct was held to be sufficient to convict him of a racially-aggravated public order offence. The court held that reference to the skin colour of the parking-lot attendants constituted racial hostility.

While the cases prosecuted under the *Crime and Disorder Act* that have been referred to above would seem to suggest that hate crimes in Britain most often involve racist verbal abuse and are thus not serious crimes, a 2010 study published by the London-based Institute of Race Relations suggests otherwise.⁶⁸ The study by the Institute of Race Relations found that between 1993, the year in which Stephen Lawrence was murdered, and 2009, "89 people lost their lives to racial violence".⁶⁹ In more than half the incidents, young White men had attacked and killed Asians, Blacks and people of colour in "random acts of unprovoked violence". The victims were often taxi drivers, workers at takeaway food outlets, and shop workers who worked alone at night and were therefore more susceptible to violence.⁷⁰ One shortcoming of the Institute of Race Relations study is that case citations of the prosecutions are not included.⁷¹ However, from the study's reference to the imposition of aggravated penalties in the discussion of some of the cases, it is possible to gauge that the convicted perpetrators were sentenced in terms of the *Crime and Disorder Act*.⁷² Reference is made to the murder of Anthony Walker, a Black teenager who was killed

⁶⁶ *DPP v Pal* [2000] Crim LR 756.

⁶⁷ *Johnson v DPP* [2008] EWHC 509 (Admin).

⁶⁸ Athwal, Bourne and Wood *Racial Violence* 3-6.

⁶⁹ Athwal, Bourne and Wood *Racial Violence* 3. According to the findings of the study, political parties in Britain deny the seriousness of racial violence in the United Kingdom.

⁷⁰ Athwal, Bourne and Wood *Racial Violence* 6.

⁷¹ Reference to case law and case citations could have facilitated access to the court reports.

⁷² Under s 82 of the *Crime and Disorder Act*, a racist motive can serve as an aggravating factor in the prosecution of any offence not listed in the Act.

with an axe by a racist gang of Whites in Merseyside in July 2005.⁷³ The murder was recorded as a racially-motivated crime by the police. In December 2005 Paul Taylor pleaded guilty to the murder and was sentenced to a 25-year period of imprisonment. His accomplice, Michael Barton, a teenager, was sentenced to an 18-year period of imprisonment. In another case referred to in the study, Mohammed Pervaiz, an Asian taxi driver, died from head injuries following a racially-motivated attack.⁷⁴ At the January 2007 trial of the four teenagers who were charged with Pervaiz's murder, the court found that the perpetrators had planned the attack and had used racist language. Two of the perpetrators, who the court established were the ringleaders of the attack, were found guilty of racially-aggravated murder and sentenced to periods of 25 and 21 years of imprisonment. The Institute of Race Relations study also found that British police had improved their handling and investigation of racist murders.⁷⁵

2.7 Britain: preliminary conclusions

Within the British context, several ethnic-minority community organisations first raised the issue of the problem of racial violence. This led to greater public awareness of racially-motivated crimes and to the 1981 Home Office report on Racial Attacks. The high profile racially-motivated murder of Stephen Lawrence in 1993 and the subsequent Macpherson Report may be considered as the catalysts for the enactment of the *Crime and Disorder Act*. However, it was the British Labour Party which fulfilled its pre-election commitment to ensure the passing of a hate-crime law. The ultimate decision to pass a hate-crime law in Britain was therefore a political one which was made by the Labour Party, the majority political party at the time. While race and ethnicity were the most significant victim characteristics which influenced the shaping of the first British hate-crime law, further hate-crime laws have been passed in Britain, which recognise other victim characteristics.⁷⁶

⁷³ Athwal, Bourne and Wood *Racial Violence* 5.

⁷⁴ Athwal, Bourne and Wood *Racial Violence* 6.

⁷⁵ Athwal, Bourne and Wood *Racial Violence* 8.

⁷⁶ After an increase in attacks on British Muslims following the September 11, 2001 terrorist attacks on the World Trade Centre in the USA, the British government passed the *Anti-Terrorism, Crime and Security Act* of 2001. This Act amended the *Crime and Disorder Act* to include religiously-motivated crimes. See Bleich 2007 *Am Behav Sci* 157. The enactment of the *Criminal Justice Act* of 2003 allows for the consideration of homophobia and physical and mental disability as victim characteristics that may be considered as aggravating factors at sentencing. See Iganski *Hate Debate* 3.

3 South Africa

3.1 Background

South Africa has a long historical record of racially-motivated crimes, which includes crimes against indigenous peoples,⁷⁷ slavery⁷⁸ and the policy of apartheid, which was explicitly based on race.⁷⁹ Apart from institutionalising racial segregation⁸⁰ and denying the most basic human rights to the majority of the population, the apartheid policy also prevented meaningful interracial relationships and socialising between the races and perpetuated a colonial system of tribalism between African peoples.⁸¹ It is submitted that the perpetration of hate crimes in South Africa more than twenty years after the birth of democracy could be regarded as a vestige of the system of apartheid.

In the post-apartheid era, there have been sporadic reports of crimes that have been motivated by race.⁸² However, the perpetration of hate crimes against Black-lesbian women⁸³ and Black foreigners⁸⁴ in post-apartheid

⁷⁷ See Adhikari *Anatomy of a South African Genocide* 39-44 and Matthias 1980 *Paideuma* 123-128, which refers to the genocide of the Khoi and San peoples in the Cape from the 16th century onwards.

⁷⁸ See Worden 2007 *Kronos* 15-17 for a discussion of some of the types of punishment that were imposed on Cape slaves, who were mostly Asians and Africans.

⁷⁹ Apartheid was declared a crime against humanity by the General Assembly of the United Nations in 1973. See:the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973).

⁸⁰ The classification of South Africans into races predates the commencement of the apartheid-era in the late 1940's. However, until the apartheid era there were no real legislative efforts to define race groups. See Posel 2001 *Afr Stud Rev* 88-90.

⁸¹ Mangcu *Sunday Times* 21.

⁸² See Naidoo *Historical and Comparative Legal Study* 486-487 for some of the accounts of racist crimes in the post-apartheid period. For example, in 2001 four White teenagers, referred to as the "Waterkloof Four", were convicted of murder after they had killed a homeless Black man. In 2015 Andre van Deventer assaulted his Black domestic helper and called her a "kaffir". He was convicted of assault and *crimen iniuria*.

⁸³ See Naidoo and Karels 2012a *Obiter* 243-250 for the accounts of "corrective rape" that have been perpetrated against Black lesbian women. "Corrective rapes" refer to rapes in which lesbian women are specifically targeted by heterosexual men in order to change or correct the sexual orientation of the victims. It is impossible to quantify the number of "corrective rapes" in South Africa due to a culture of non-reporting. Moreover, Naidoo and Karels estimate that at least ten Black lesbian women were murdered in South Africa between 2006 and 2009.

⁸⁴ Apart from the perpetration of sporadic crimes against Black foreigners, there have been 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 murdered and thousands were displaced. See Breen and Nel 2011 *SA Crime Quarterly* 43. 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. See: Nair, Savides and Hosken 2015

South Africa prompted calls from the academic and non-governmental sectors for the enactment of a hate-crime law.⁸⁵ The perpetration of such conduct has also contributed to the formation of the South African Hate Crimes Working Group in 2009.⁸⁶ The Hate Crimes Working Group has made several submissions to the South African Department of Justice and numerous public calls recommending the enactment of a hate-crime law in South Africa.⁸⁷ In 2013 a National Task Team consisting of government departments, chapter 9 institutions⁸⁸ and civil-society organisations was established by Jeff Radebe, the former Minister of Justice, in order to address the issue of hate crimes in South Africa.⁸⁹ After intensive research and consultation the National Task Team formulated a draft policy document entitled "Combatting Hate Crimes, Hate Speech and Unfair Discrimination".⁹⁰ After the Draft Policy had been presented to government in 2014 the cabinet decided that a debate on hate crime had the potential to cause further racial divisions in South Africa and refused to consider the Draft Policy.⁹¹

3.2 Recent developments which have contributed to further delays in the consideration of a hate crime law

The consideration of a hate-crime law was further delayed because of a recent public debate on hate speech⁹² and the government's publicised

<http://www.timeslive.co.za/thetimes/2015/04/15/flames-of-hate>. It is the writer's submission that Black foreigners are specifically targeted by Black South Africans because of their ethnicity.

⁸⁵ See further Breen and Nel 2011 *SA Crime Quarterly* 33; Naidoo and Karels 2012b *Obiter* 624; Mollema and Van der Bijl 2014 *Obiter* 679; Harris 2004 <http://www.csvr.org.za/docs/racism/arrangingprejudic.pdf>.

⁸⁶ 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 (LGBTI) community, xenophobic hate crimes and hate crimes motivated by race, religion and disability. Several civil-society organisations and non-governmental organisations are members of this organisation. See Hate Crimes Working Group <http://hwcwg.org.za/about/>.

⁸⁷ See Nosarka *The Citizen* 4.

⁸⁸ Chapter 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.

⁸⁹ Jeffrey 2015 http://www.justice.gov.za/m_speeches/2015/2050211_HateCrimes.html.

⁹⁰ Hereinafter referred to as the "Draft Policy". See Radebe 2013 http://www.justice.gov.za/m_speeches/2013/20130825-hate-speech.html.

⁹¹ Forde 2016 <http://www.financialmail.co.za/coverstory/2016/01/21/racism-hate-law>.

⁹² The recent public debate on hate speech commenced in January 2016 when Penny Sparrow, a White South-African woman, referred to Black South Africans as "monkeys" on her Facebook page. See Anon 2016 <http://www.timeslive.co.za/local/2016/04/01/Law-to-criminalise-hate-speech-nearly-ready>.

intention to include hate-speech provisions⁹³ in a future hate-crime law.⁹⁴ In 2016 the government and the Hate Crimes Working Group reconsidered and amended the Draft Policy to include hate speech provisions.⁹⁵ The amended Draft Policy which, since late 2016, is referred to as the *Prevention and Combating of Hate Crimes and Hate Speech Bill*⁹⁶ has since late 2016 been subjected to a process of broad public consultation.⁹⁷ The *Hate Crimes Bill* provides that any existing offence may be regarded as a hate crime⁹⁸ when it is motivated by one of the recognised victim characteristics.⁹⁹

To date, therefore, a hate-crime law has not been passed in South Africa. While hate crimes are not recognised in South-African criminal law, criminal conduct that is motivated by bias or prejudice towards the personal characteristics of a victim could still be prosecuted in terms of the existing common-law or statutory crimes.¹⁰⁰ If for example an accused has committed a racially-motivated murder, he/she could still be charged with the common-law crime of murder. In cases where a perpetrator has violated the dignity of his victim by using derogatory terms or racial epithets, courts could prosecute and convict such a perpetrator of the common-law crime of *crimen iniuria*.¹⁰¹ An accused who has committed the crime of rape that was

⁹³ Hate speech is presently prohibited by the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereinafter referred to as the *Promotion of Equality Act*). S 10(1) of the *Promotion of Equality Act* provides: "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 *Promotion of Equality Act* provides a civil remedy for hate speech in the form of damages.

⁹⁴ See Peterson *The Star* 4. The government intends criminalising hate speech and subjecting those found guilty of hate speech to a harsher criminal sanction.

⁹⁵ Jeffrey 2016 http://www.justice.gov.za/m_speeches/2016/20160330_HateCrime.

⁹⁶ And hereinafter referred to as the *Hate Crimes Bill*.

⁹⁷ Jeffrey 2016 http://www.justice.gov.za/m_speeches/2016/20160330_HateCrime.

⁹⁸ Refer to s 3(1) of the *Hate Crimes Bill*. This is extremely wide. In the British *Crime and Disorder Act* of 1998, only a select number of crimes may be regarded as hate crimes when a bias motivation is present. Refer to fn 55 and 56 above.

⁹⁹ Section 3(1) of the *Hate Crimes Bill* contains an extensive list of victim characteristics that includes, *inter alia*, race, ethnicity and sexual orientation. Given the long history of racial discrimination in South Africa there can be no doubt about the inclusion of race as a victim characteristic in the *Hate Crimes Bill*. The inclusion of albinism as a victim characteristic is laudable in the light of the fact that several South Africans living with albinism have fallen victim to crimes of violence. Similarly, the inclusion of a victim's HIV status as a victim characteristic is commendable in the light of the fact that several HIV-positive South Africans have been victimised because of their HIV status.

¹⁰⁰ In other words, specific crimes that are motivated by bias or prejudice towards personal victim characteristics are not recognised in South African criminal law.

¹⁰¹ The crime of *crimen iniuria* was referred to earlier in a case in which a White employer referred to his Black domestic worker as a "kaffir" (refer to fn 83 above).

motivated by the sexual orientation of the victim could be charged with the statutory crime of rape.¹⁰² The bias motivation of the perpetrators of these crimes may be considered as an aggravating factor at sentencing.¹⁰³

Apart from an ostensible lack of political will to enact a hate-crime law in South Africa, the recent South-African debate on hate speech has also diverted some attention away from the issue of hate crimes.¹⁰⁴ Nevertheless, it is the writer's submission that there are compelling constitutional reasons for the enactment of a hate-crime law in South Africa.

3.3 The enactment of a South African hate-crime law: a constitutional imperative

Within the American context¹⁰⁵ hate crimes are said to violate the right to equality, which protects the most cherished ideal in American society.¹⁰⁶ Equality is therefore the main prudential reason for the enactment of federal hate-crime legislation in the United States of America. Delgado¹⁰⁷ believes that if the law does not specifically take cognisance of racist crimes and racist violence, minority groups become demoralised, since they receive a message that equality is not a fundamental principle. It is submitted that Delgado's argument could be extended to the perpetration of crimes, particularly violent crimes that are motivated by the sexual orientation, the ethnicity and other personal characteristics of the victims.

Crimen iniuria is defined as "... the unlawful, intentional and serious violation of the dignity or the privacy of another". See: Snyman *Criminal Law* 461.

¹⁰² Refer to s 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

¹⁰³ See Mollema and Van der Bijl 2014 *Obiter* 672. However, the consideration of a perpetrator's motive as an aggravating factor at sentencing is left to the discretion of the sentencing officer. See for example the case of *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.

¹⁰⁴ It is submitted that some confusion presently exists in South Africa between the terms "hate speech" and "hate crime". While the hate-speech provisions in the *Promotion of Equality Act* could apply, *inter alia*, to the dissemination and publication of racist words and expressions, they would neither apply to a racially-motivated murder nor to a rape that was motivated by the sexual orientation of the victim. The hate-speech provisions of the Draft *Hate Crimes Bill* are therefore not considered in this submission.

¹⁰⁵ While this section focuses on South Africa, as has been stated in the introduction (refer to fn 4 above), reference to the American context and to American literature is unavoidable, particularly on the subject of the constitutionality of hate-crime legislation. It is therefore necessary to use the American context as a point of departure and as a point of comparison.

¹⁰⁶ Lawrence 1998-2000 *Nat'l Black LJ* 164. Lawrence regards equality as one of the most important ideals in the USA since racial inequality was the catalyst for the American Civil War and the Civil-Rights Movement.

¹⁰⁷ Delgado 1982 *Harv CR-CL L Rev* 140.

In the light of the constitutional commitment to equality in South Africa, the non-recognition of hate crimes is lamentable.¹⁰⁸ South Africa has an oppressive history which was based on racial, ethnic and gender inequality. It could therefore be argued that the right to equality protects a sacrosanct ideal in South Africa. It could further be argued that the state's failure to specifically criminalise conduct motivated by race, ethnicity, sexual orientation and personal victim characteristics could demoralise certain victim groups and that these victim groups would be unable to achieve their full potential in society. This would negatively impact on their self-worth, their self-esteem and ultimately on their dignity.¹⁰⁹ Since dignity is a founding value of the South African Constitution¹¹⁰ and a value that has informed the equality jurisprudence of the South-African Constitutional Court,¹¹¹ the enactment of a hate-crime law in South Africa should be regarded as a constitutional imperative in terms of the value of dignity and the right to equality.

The enactment of a hate-crime law should 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 violent crimes against the individual is a serious violation of personal security, it has been suggested that the state has a duty under section 12(1)(c) of the South African Constitution to protect individuals by restraining itself and by restraining private individuals from violating personal security.¹¹² There are no compelling reasons why the duty

¹⁰⁸ The right to equality is enshrined in s 9 of the *Constitution of the Republic of South Africa*, 1996. Equality is also recognised in s 1(a) of the Constitution as one of the values upon which the Republic of South Africa is founded.

¹⁰⁹ Several 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. See Levin 1992-1993 *Stan L & Pol'y Rev* 167-168 and Scotting 2000-2001 *Akron L Rev* 862. Moreover, according to Lawrence *Punishing Hate* 150, hate-crime victims are attacked for personal and often unchangeable reasons. They cannot change their race, ethnicity or sexual orientation in order to avoid future victimisation.

¹¹⁰ See s 1(a) of the *Constitution of the Republic of South Africa*, 1996.

¹¹¹ See for example 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 *Jordan v S* 2002 6 SA 642 (CC), wherein the right to equality was interpreted with reference to the value of dignity.

¹¹² See Currie and De Waal *Bill of Rights Handbook* 281. Also refer to the cases of: *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).

on the state to protect individuals from violence should not be extensively interpreted to include the protection of individuals from acts of racial, ethnic, and homophobic violence. This constitutional duty could be fulfilled to some extent by the enactment of a hate-crime law.

4 Conclusion and recommendations

Apart from South Africa's long historical record of racially-motivated crimes, in the post-apartheid period there have been reports of crimes motivated by the race, the ethnicity and the sexual orientation of victims. In this regard there are some similarities between South Africa and Britain, which also has an established historical record of crimes that were motivated by the race and the ethnicity of the victim. The efforts of the non-governmental sector in South Africa to raise awareness of hate crimes and its numerous calls to government to enact a hate-crime law are indeed laudable. Similarly, the non-governmental sector in Britain can also be commended for first raising public awareness of racist violence and racist crimes. It is lamentable that the South-African government has procrastinated with regard to the enactment of a hate-crime law, since compelling constitutional reasons were identified in this submission in terms of which the enactment of a hate-crime law in South Africa is a constitutional imperative. While no such constitutional obligation existed in Britain, successive British governments also ignored calls to introduce a hate-crime law. However, the British Labour Party eventually honoured its commitment to ensure the passing of such a law upon winning the national election in 1998. It must be conceded, however, that in the light of the fact that the *Hate-Crimes Bill* has been subjected to a process of public consultation the enactment of a hate-crime law in South Africa is quite likely.

The enactment of a hate-crime law in South Africa is therefore recommended in order that South Africa may fulfil its constitutional obligations.

It is recommended that a South African hate-crime law should criminalise conduct, particularly violent conduct that is motivated by the race, the ethnicity, the sexual orientation and other personal characteristics of the victim. In most of the post-apartheid accounts of hate crimes, the perpetrators have committed the crimes of murder, rape, robbery, assault, and damage to property.¹¹³ These are some of the violent crimes that should be subjected to enhanced penalties when they have been motivated by

¹¹³ Refer to para 3.1 above.

prejudice or bias towards personal victim characteristics.¹¹⁴ In this regard the British example is informative, since section 28 of the *Crime and Disorder Act of 1998* allows for the most commonly reported hate crimes to be subjected to enhanced penalties.

While this submission has referred to hate crimes in South Africa that were motivated by race, ethnicity and sexual orientation, as has been mentioned above, the list of victim characteristics in the *Hate Crimes Bill* is extensive and includes all the grounds of discrimination that are to be found in section 9(3) of the *Constitution of the Republic of South Africa, 1996* and several new grounds or victim characteristics such as albinism and HIV status.¹¹⁵

It is not the writer's contention that a hate-crime law will eradicate hate crimes in South Africa.¹¹⁶ However, the criminalisation of conduct motivated by personal prejudice and bigotry and the subjection of such conduct to enhanced penalties could be regarded as the ultimate means of denouncing abhorrent conduct.¹¹⁷ It is submitted that the imposition of enhanced or aggravated penalties on convicted hate crimes perpetrators is a reflection of a democratic society's denunciation of conduct motivated by bias or prejudice towards personal victim characteristics. Moreover, as has been explained earlier in this submission, if a racially-motivated crime has been committed, South-African criminal law presently allows for the perpetrator's racist bias motivation to be taken into consideration as an aggravating factor at sentencing. This is left, however, to the discretion of the sentencing

¹¹⁴ While the crimes of murder, rape, assault 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 compel 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. The present *Hate Crimes Bill* allows for any offence to be regarded as a hate crime when a bias motivation is present. According to the *Hate Crimes Bill*, once convicted of a hate crime, if the provisions of the *Criminal Law Amendment Act 105 of 1997*, as amended are inapplicable and if the victim has suffered damage to or loss of property and money, physical or other injury or loss of income and support, then these factors can be considered as aggravating factors when sentencing the hate-crime perpetrator (refer to s 6 of the *Hate Crimes Bill*).

¹¹⁵ See Jeffrey 2016 http://www.justice.gov.za/m_speeches/2016/20160330_HateCrime. The *Hate Crimes Bill* therefore recognises more victim characteristics than the British *Crime and Disorder Act of 1998*.

¹¹⁶ See for example, Gerstenfeld *Hate Crimes* 25-26, which expresses some doubts about the deterrent effects of hate-crime laws. Moreover, despite the existence of several hate crime laws in Britain, since a referendum in June 2016 in which most Britons voted in favour of Britain leaving the European Union there has been an increase in xenophobic and anti-Muslim hate crimes. See Dewan 2016 <http://edition.cnn.com/2016/07/08/europe/brexit-britain-hate-crime>.

¹¹⁷ Malik 1999 *MLR* 416.

officer. According to Malik,¹¹⁸ it is an insufficient denunciation of racist conduct to simply regard a bias motivation, and particularly a racist bias motivation, as an aggravating factor that is left to the discretion of a sentencing officer. He therefore suggests that it is necessary to create specific racially-motivated crimes. It is submitted that Malik's argument could also be extended to crimes that are motivated by the sexual orientation, the ethnicity and other personal characteristics of victims.

Hate-crime laws are therefore regarded as highly symbolic laws.¹¹⁹ The enactment of a hate-crime law in South Africa would also resonate with the approach to hate crimes that has been adopted in Britain and in a number of other western democracies.

Bibliography

Literature

Adhikari *Anatomy of a South African Genocide*

Adhikari M *The Anatomy of a South African Genocide: The Extermination of the Cape San Peoples* (University of Cape Town Press Cape Town 2010)

Ashworth and Horder *Principles of Criminal Law*

Ashworth A and Horder J *Principles of Criminal Law* 7th ed (Oxford University Press Oxford 2013)

Athwal, Bourne and Wood *Racial Violence*

Athwal H, Bourne J and Wood R *Racial Violence: The Buried Issue* (Institute of Race Relations London 2010)

Billig 1978 *Race and Class*

Billig M "Patterns of Racism: Interviews with National Front Members" 1978 *Race and Class* 161-179

Bleich 2007 *Am Behav Sci*

Bleich E "Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France" 2007 *Am Behav Sci* 149-165

Bowling *Violent Racism*

Bowling B *Violent Racism, Victimization, Policing and Social Context* (Oxford University Press Oxford 1998)

¹¹⁸ Malik 1999 *MLR* 416.

¹¹⁹ See Hall *Hate Crime* 124. Hall regards hate-crime laws as the most "symbolic message" that a government has at its disposal to change prejudiced attitudes and behaviours.

Bowling and Phillips "Racist Victimisation in England and Wales"
Bowling B and Phillips C "Racist Victimisation in England and Wales" in
Hawkins DF (ed) *Violent Crime: Assessing Race and Ethnic Differences*
(Cambridge University Press Cambridge 2003) 154-170

Bowling, Parmar and Phillips "Policing Ethnic Minority Communities"
Bowling B, Parmar A and Phillips C "Policing Ethnic Minority Communities"
in Newburn T (ed) *Handbook of Policing* (Willan Devon 2003) 528-555

Brearley "Persecution of Gypsies in Europe"
Brearley M "The Persecution of Gypsies in Europe" in Gerstenfeld PB and
Grant DR (eds) *Crimes of Hate: Selected Readings* (Sage Thousand Oaks
2004) 354-363

Breen and Nel 2011 *SA Crime Quarterly*
Breen D and Nel JA "South Africa – A Home for All? The Need for Hate-
Crime Legislation" 2011 *SA Crime Quarterly* 33-43

Bridges 1999 *J Law & Soc*
Bridges L "The Lawrence Inquiry: Incompetence, Corruption and
Institutional Racism" 1999 *J Law & Soc* 298-322

Campbell and Muncer 1989 *Deviant Behaviour*
Campbell A and Muncer S "Them and Us: A Comparison of the Cultural
Context of American Gangs and British Subcultures" 1989 *Deviant
Behaviour* 271-288

Currie and De Waal *Bill of Rights Handbook*
Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town
2013)

D'Souza 1995 *American Scholar*
D'Souza D "Is Racism a Western Idea?" 1995 *The American Scholar* 517-
539

Delgado 1982 *Harv CR-CL L Rev*
Delgado R "Words that Wound: A Tort Action for Racial Insults, Epithets
and Name-Calling" 1982 *Harv CR-CL L Rev* 133-180

Dixon and Ray 2007 *Probation Journal*
Dixon L and Ray L "Current Issues and Developments in Race Hate Crime"
2007 *Probation Journal* 109-124

Edgar 1977 *Race and Class*
Edgar D "Racism, Fascism and the Politics of the National Front" 1977 *Race
and Class* 111-128

Foot 1991 *Socialist Review*

Foot P "The Stephen Lawrence Case" 1991 *Socialist Review* 1-3

Fryer *Staying Power*

Fryer P *Staying Power: The History of Black People in Britain* 2nd ed (Pluto London 2010)

Gadd 2009 *Br J Criminol*

Gadd D "Aggravating Racism and Elusive Motivation" 2009 *Br J Criminol* 755-771

Gerstenfeld *Hate Crimes*

Gerstenfeld PB *Hate Crimes: Causes, Controls and Controversies* 3rd ed (Sage Thousand Oaks 2013)

Hall *Hate Crime*

Hall N *Hate Crime* 2nd ed (Routledge Abingdon 2013)

Herring *Criminal Law*

Herring J *Criminal Law: Text, Cases and Materials* 5th ed (Oxford University Press Oxford 2012)

Hiro *Black British, White British*

Hiro D *Black British, White British* (Eyre and Spottiswoode London 1971)

Horobin 1972 *Police Journal*

Horobin A "'Paki-Bashing' in Coventry" 1972 *Police Journal* 184-197

Iganski 1999 *Crit Soc Pol*

Iganski P "Legislating against Hate: Outlawing Racism and Anti-Semitism in Britain" 1999 *Crit Soc Pol* 129-141

Iganski *Hate Debate*

Iganski P *The Hate Debate: Should Hate be Punished as a Crime?* (Profile Books London 2002)

Jackson 1998 *Geography*

Jackson P "Beneath the Headlines: Racism and Reaction in Contemporary Britain" 1998 *Geography* 202-207

Kushner "Anti-Semitism and Austerity"

Kushner T "Anti-Semitism and Austerity: The 1947 Riots in Britain" in Panayi P (ed) *Racial Violence in Britain: 1840-1950* (Leicester University Press Leicester 1993) 146-168

Lawrence 1998-2000 *Nat'l Black LJ*

Lawrence FM "The Case for a Federal Bias Crime Law" 1998-2000 *Nat'l Black LJ* 144-168

Lawrence *Punishing Hate*

Lawrence FM *Punishing Hate: Bias Crimes under American Law* (Harvard University Press Cambridge 1999)

Lawrence "Memory, Hate and the Criminalization of Bias-Motivated Violence"

Lawrence FM "Memory, Hate and the Criminalization of Bias-Motivated Violence: Lessons from Great Britain" in Minow M and Rosenblum NL (eds) *Breaking the Cycles of Hatred: Memory, Law and Repair* (Princeton University Press Princeton 2002) 140-153

Lawrence 2003 *J Mod Hist*

Lawrence J "Forging a Peaceable Kingdom: War, Violence and Fear of Brutalization in Post First World War Britain" 2003 *J Mod Hist* 557-589

Layton-Henry 1982 *Patterns of Prejudice*

Layton-Henry Z "Racial Attacks in Britain" 1982 *Patterns of Prejudice* 3-13

Lea 2000 *Howard J Crime Justice*

Lea J "The Macpherson Report and the Question of Institutional Racism" 2000 *The Howard Journal of Crime and Justice* 219-233

Levin 1992-1993 *Stan L & Pol'y Rev*

Levin B "Bias Crimes: A Theoretical and Practical Overview" 1992-1993 *Stan L & Pol'y Rev* 165-181

Levin 1999 *J Contemp Crim Justice*

Levin B "Hate Crimes: Worse by Definition" 1999 *J Contemp Crim Justice* 6-21

Malik 1999 *MLR*

Malik M "Racist Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998" (Part II) 1999 *MLR* 409-424

Mangcu *Sunday Times*

Mangcu X "Ours is the Postmodern Face of a New Xenophobic Tribalism" *Sunday Times* (26 April 2015) 21

Matthias 1980 *Paideuma*

Matthias GG "From 'Brutal Savages' to 'Harmless Peoples': Notes on the Changing Western Image of the Bushmen" 1980 *Paideuma* 123-140

McLaughlin and Murji 1999 *Crit Soc Pol*

McLaughlin E and Murji K "After the Stephen Lawrence Report" 1999 *Crit Soc Pol* 60-65

Mollema and Van der Bijl 2014 *Obiter*

Mollema N and Van der Bijl C "Hate Crimes: The Ultimate Anathematic Crimes" 2014 *Obiter* 672-679

Naidoo *Historical and Comparative Legal Study*

Naidoo K *A Historical and Comparative Legal Study of Hate Crimes Motivated by Race and Ethnicity* (LLD-thesis University of South Africa 2015)

Naidoo and Karels 2012a *Obiter*

Naidoo K and Karels M "Hate Crimes against Black Lesbian South Africans: Where Race, Sexual Orientation and Gender Collide" (Part I) 2012 *Obiter* 236-260

Naidoo and Karels 2012b *Obiter*

Naidoo K and Karels M "Hate Crimes against Black Lesbian South Africans: Where Race, Sexual Orientation and Gender Collide" (Part II) 2012 *Obiter* 600-624

Nosarka *The Citizen*

Nosarka A "Plea for Hate Crimes Legislation" *The Citizen* (5 July 2013) 4

Panayi 1991 *Social History*

Panayi P "Middlesbrough 1961: A British Race Riot of the 1960's" 1991 *Social History* 139-153

Panayi "Anti-Immigrant Riots in Nineteenth and Twentieth Century Britain"

Panayi P "Anti-Immigrant Riots in Nineteenth and Twentieth Century Britain" in Panayi P (ed) *Racial Violence in Britain: 1840-1950* (Leicester University Press Leicester 1993) 1-25

Peterson *The Star*

Peterson C "Racism will be a Criminal Offence" *The Star* (1 December 2016) 4

Posel 2001 *Afr Stud Rev*

Posel D "Race as Common Sense: Racial Classification in Twentieth Century South Africa" 2001 *Afr Stud Rev* 87-113

Ramamurthy 2006 *Race and Class*

Ramamurthy A "The Politics of Britain's Asian Youth Movements" 2006 *Race and Class* 38-60

Scotting 2000-2001 *Akron L Rev*
Scotting TA "Hate Crimes and the Need for Stronger Federal Legislation"
2000-2001 *Akron L Rev* 853-892

Snyman *Criminal Law*
Snyman CR *Criminal Law* 6th ed (LexisNexis Durban 2014)

Vick 2002 *Tex Int'l LJ*
Vick DW "The Human Rights Act and the British Constitution" 2002 *Tex Int'l LJ* 329-372

Walters 2006 *UTSLR*
Walters M "Changing the Criminal Law to Combat Racially-Motivated Violence" 2006 *UTSLR* 66-86

Waters 1997 *J Br Stud*
Waters C "Dark Strangers in our Midst: Discourses of Race and Nation in Britain, 1947-1963" 1997 *J Br Stud* 207-238

Webster "England and Wales"
Webster C "England and Wales" in Winterdyk J and Antonopoulos G (eds) *Racist Victimisation: International Reflections and Perspectives* (Ashgate Aldershot 2008) 67-88

Worden 2007 *Kronos*
Worden N "New Approaches to VOC History in South Africa" 2007 *Kronos: South African Historical Journal* 3-18

Case law

Britain

Constantine v Imperial Hotels Ltd [1944] KB 693

DPP v Pal [2000] Crim LR 756

DPP v Woods (2002) EWHC 85

Johnson v DPP [2008] EWHC 509 (Admin)

R v Alderson (1989) 11 Cr App R (S) 301, CA

R v Jacobs [2001] 2 Cr App R (S) 174, CA

R v Whalley (1989) 11 Cr App R (S) 405, CA

R v White [2001] EWCA Cri 216, 1 WLR 1352, CA

South Africa

Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC)

Harksen v Lane 1997 11 BCLR 1489 (CC)

Jordan v S 2002 6 SA 642 (CC)

Minister of Safety and Security v Van Duivenboden 2002 6 SA 431 (SCA)

Minister of Safety and Security v Hamilton 2004 2 SA 216 (SCA)

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 1 SA 6 (CC)

President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC)

S v Matela 1994 1 SACR 236 (A)

Legislation**Britain**

Anti-Terrorism, Crime and Security Act, 2001

Crime and Disorder Act, 1998

Criminal Justice Act, 2003

Protection from Harassment Act, 1997

Public Order Act, 1986

Race Relations Act, 1965

France

Loi n. 2003-88 du 3 février 2003

South Africa

Constitution of the Republic of South Africa, 1996

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Criminal Law Amendment Act 105 of 1997, as amended

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

United States of America

Matthew Shepherd and James Byrd Junior Hate Crimes Prevention Act, 2009 (codified as 18 USC §249)

Government publications

South Africa

Draft Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016

International instruments

International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)

Internet sources

Anon 2016 <http://www.timeslive.co.za/local/2016/04/01/Law-to-criminalise-hate-speech-nearly-ready>

Anon 2016 *Law to Criminalise Hate Speech Nearly Ready*
<http://www.timeslive.co.za/local/2016/04/01/Law-to-criminalise-hate-speech-nearly-ready> accessed 11 July 2016

Dewan 2016 <http://edition.cnn.com/2016/07/08/europe/brexit-britain-hate-crime>

Dewan A 2016 *Hate Crime Reports Surge in Britain in Weeks around Brexit*
<http://edition.cnn.com/2016/07/08/europe/brexit-britain-hate-crime>
accessed 12 July 2016

Forde 2016 <http://www.financialmail.co.za/coverstory/2016/01/21/racism-hate-law>

Forde 2016 *Racism: Hate Law Delay*
<http://www.financialmail.co.za/coverstory/2016/01/21/racism-hate-law>
accessed 25 January 2016

Harris 2004 <http://www.csvr.org.za/docs/racism/arrangingprejudic.pdf>

Harris B 2004 *Arranging Prejudice: Exploring Hate Crime in Post-Apartheid South Africa*
<http://www.csvr.org.za/docs/racism/arrangingprejudic.pdf>
accessed 21 June 2016

Jeffrey 2015 http://www.justice.gov.za/m_speeches/2015/2050211_HateCrimes.html

Jeffrey J 2015 *Speech by the Honourable Deputy Minister of Justice and Constitutional Development* http://www.justice.gov.za/m_speeches/2015/20150211_HateCrimes.html accessed 1 December 2015

Jeffrey 2016 http://www.justice.gov.za/m_speeches/2016/20160330_HateCrime

Jeffrey J 2016 *Speech by the Honourable Deputy Minister of Justice and Constitutional Development* http://www.justice.gov.za/m_speeches/2016/20160330_HateCrime accessed 11 July 2016

Nair, Savides and Hosken 2015 <http://www.timeslive.co.za/thetimes/2015/04/15/flames-of-hate>

Nair N, Savides M and Hosken G 2015 *Flames Engulf Durban* <http://www.timeslive.co.za/thetimes/2015/04/15/flames-of-hate> accessed 12 March 2015

Radebe 2013 http://www.justice.gov.za/m_speeches/2013/20130825-hate-speech.html

Radebe J 2013 *Speech by the Honourable Former Minister of Justice and Constitutional Development* http://www.justice.gov.za/m_speeches/2013/20130825-hate-speech.html accessed 1 December 2015

Runnymede Trust date unknown <http://www.runnymede-trust.org/histories/index.php?mact=OralHistories,cntnt01,default,1&cntnt01qid=82&cntnt01returnid=15&page=15>

Runnymede Trust date unknown *An Oral History: Inquiry into Racist Groups and Attacks* <http://www.runnymedetrust.org/histories/index.php?mact=OralHistories,cntnt01,default,1&cntnt01qid=82&cntnt01returnid=15&page=15> 30 September 2017

Taylor date unknown http://www.ucian.ac.uk/research/environment/projects/assets/Racial_Aggravation_final_paper.pdf

Taylor R date unknown *The Role of Aggravated Offences in Combating Hate Crime 15 Years after the Crime and Disorder Act 1998* http://www.ucian.ac.uk/research/environment/projects/assets/Racial_Aggravation_final_paper.pdf accessed 1 April 2016

List of Abbreviations

Afr Stud Rev

African Studies Review

Akron L Rev

Akron Law Review

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|------------------------|--|
| Am Behav Sci | American Behavioral Scientist |
| Br J Criminol | British Journal of Criminology |
| Crit Soc Pol | Critical Social Policy |
| Harv CR-CL L Rev | Harvard Civil Rights-Civil Liberties Law Review |
| Howard J Crime Justice | Howard Journal of Crime and Justice |
| J Br Stud | Journal of British Studies |
| J Contemp Crim Justice | Journal of Contemporary Criminal Justice |
| J Law & Soc | Journal of Law and Society |
| J Mod Hist | Journal of Modern History |
| LGBTI | Lesbian, gay, bisexual, transgender and intersex |
| Kronos | Kronos: South African Historical Journal |
| MLR | Modern Law Review |
| Nat'l Black LJ | National Black Law Journal |
| OJLS | Oxford Journal of Legal Studies |
| SA Crime Quarterly | South African Crime Quarterly |
| Stan L & Pol'y Rev | Stanford Law and Policy Review |
| Tex Int'l LJ | Texas International Law Journal |
| UTSLR | University of Technology, Sydney Law Review |