



THE (IN) JUSTICE OF SANCTIONING HATE

INAUGURAL LECTURE

by

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ABSTRACT OF LECTURE

Hate crime and hate speech legislation have emerged worldwide to punish perpetrators who a) commit crimes where victims are selected based on group “hatred” and b) where speech is used to marginalise and denigrate members of out-groups. The Prevention and Combating of Hate Crimes and Hate Speech Bill B9-2018, which introduces hate crimes and the offence of hate speech into South African law and provides for the prosecution and sentencing for such offences, was recently passed by both Houses of Assembly and signed by the President on 6 May 2024. The Bill then became Act 16 of 2023 (the Hate Act), but there is no indication yet of its date of commencement.

Hate crimes and hate speech are distinct legal concepts, but both punish acts committed because the perpetrator is actuated by hate or, in the case of a hate crime, is biased or intolerant towards the victim, based on the latter’s group characteristics. The Act lists sixteen group-based characteristics, including race, gender, age, culture, language, nationality, sexual orientation and religion. Despite the use of terms like bias, intolerance and prejudice in the definition of a hate crime and the Act’s first stated objective, namely to give effect to the Republic’s international obligations to counter prejudice and intolerance, “hate” is dominant: it appears twice in the Act’s title and is the common denominator between a hate crime and a hate speech.

Hate speech is also regulated as a human rights’ violation in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), but the definition of hate speech in that Act has recently been amended following the Constitutional Court’s judgment in *Qwelane v South African Human Rights Commission*. Here, the Court held that it was unconstitutional to regulate hurtful speech as hate speech – even as a human rights’ violation. Significantly, the Court commenced its unanimous judgment by quoting the words of one of the first hate scholars ever, Mari Matsuda, to the effect that “It is a truth universally acknowledged that “[t]o be hated, despised, and alone is the ultimate fear of all human beings”. Even more significantly, the definition of hate speech in the amended Act is identical to the offence of hate speech in the Hate Act.

Given these developments, this lecture explores the normative basis of hate, not only as a legal concept, but also with reference to its meaning in other disciplines. This is an important matter. The regulation of hate is closely connected to other fields of study, including linguistics, philosophy, criminology, sociology and psychology. Certainly, the question of what we perceive and experience as hate at an emotional or psychological level is much debated and we cannot address inter-group hate effectively if we work in silos. Thus, to advance our understanding of how hate regulation can best be implemented in the legal system, it is necessary to identify what hate means, to define its core characteristics and to appreciate why people hate. Potential answers to these questions are interrogated in this lecture and are coupled both with law's role generally and why the criminal law, in addition to human-rights based discrimination laws, is needed to regulate inter-group hate.

In the South African context, it is important that we appreciate the implications of the criminalisation of hate on the criminal law, constitutional principles and the Constitution's transformative agenda. It is also critical that we explore the meaning of intentionality and consciousness in relation to the "acting out" of hatred for both hate speech and a hate crime. In turn, the enquiry aims to enable an appreciation of the moral limits of the law, its symbolic value and the reality that legal certainty is instrumental in ensuring that people understand the law and are able to circumscribe their behaviour appropriately, thus justifying the imposition of sanctions upon hate offenders.

Keywords: hate; hate crimes; hate speech; criminal law; discrimination