SELECT ESSAYS ON GOVERNANCE AND ACCOUNTABILITY ISSUES IN PUBLIC LAW

EDITORS
HENNIE STRYDOM
JOANNA BOTHA

2

A HATE-CRIME MODEL FOR THE SOUTH AFRICAN CONTEXT

Joanna Botha*

2.1 INTRODUCTION

This chapter explores the appropriate legal framework to regulate the phenomenon of hate crimes in South Africa. South Africa is yet to enact a legislative hate-crime offence. Instead, evidence of group-based hatred during the commission of an offence is considered as an aggravating factor only during sentencing.¹ Following years of social activism by numerous nongovernmental organisations and the intervention of international human rights monitoring bodies,² the first version of the Prevention and Combating of Hate Crimes and Hate Speech Bill (the Hate Bill)³ was introduced in 2016. The second version of the Bill was published in March 2018, but unfortunately lapsed in early May 2019. Although revived in October 2019 by the National Assembly, there have been no further legislative developments.⁴

- 1 Terblanche *The Guide to Sentencing in South Africa* (2016) par 6.3.3 and 6.4.4; Mollema and Van der Bijl "Hate crimes: The ultimate anathematic crimes" 2014 35 3 *Obiter* 672; Naidoo "The *raison d'être* of hate-crime laws" 2016 29 *SACJ* 158-160. Also see *S v Zinn* 1969 2 SA 537 (A) confirming that during sentencing the court has a wide discretion and must consider the triad of sentencing principles, namely the circumstances of the crime, the position of the offender and the interests of society; *S v Combrink* 2012 1 SACR 93 (SCA) and *S v Matela* 1994 1 SACR 236 (A) where the respective courts used the hate-crime label and took hatred into account when determining sentence. Additionally, s 28(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) 4 of 2000 provides that if unfair discrimination on the grounds of race, gender or disability played a part in the commission of any offence, this must be treated as an aggravating circumstance for sentence. This section, however, has not been promulgated.
- 2 See Naidoo "The Shaping, Enactment and Interpretation of the First Hate-Crime Law in the United Kingdom – An informative and Illustrative Lesson for South Africa" 2017 *PER* 12-15, who discusses the history of hate crime activism in South Africa.
- 3 Prevention and Combating of Hate Crimes and Hate Speech Bill B-2016 and B9-2018. All references hereafter are to the 2018 Hate Bill.
- 4 Sabinet law [https://legal.sabinet.co.za/articles/prevention-and-combating-of-hate-speech-bill-to-be-revived/\(2019-07-30\)](https://legal.sabinet.co.za/articles/prevention-and-combating-of-hate-speech-bill-to-be-revived/(2019-07-30)). According to the Parliamentary Monitoring Group, the Bill was revived on 29 October 2019, see [https://pmg.org.za/bill/779/\(2020-04-20\)](https://pmg.org.za/bill/779/(2020-04-20)).

* BA LLB (Rhodes); LLD (NMMU); Associate Professor, Faculty of Law, Nelson Mandela University.

Various possibilities have been advanced for the legislative delay. These include: the awkward coupling of hate crime regulation with the criminalisation of hate speech;⁵ the broad definition of the hate speech offence;⁶ the extended lists of victim groups for both hate crimes and hate speech;⁷ and the suggestion that restorative justice be considered as an alternative to criminalisation.⁸ A more fundamental problem, however, is the contested meaning of the “hate-crime” concept, coupled with the model of criminalisation used in the Hate Bill, and the underlying basis for the regulation of such conduct by way of the criminal law.⁹

The impasse presents an opportunity to address the framing of the regulatory model in the Hate Bill and some of the critiques of hate-crime laws. These aspects of hate-crime regulation are unpacked in this chapter in order to provide clarity and spearhead the finalisation of South Africa’s legislative process. It is critically important that the hate-crime project be finalised, especially in light of the unacceptably high hate-crime commission rate in South Africa. Examples of recent hate crimes abound and include xenophobic violence, the targeting of people belonging to religious groupings, crimes committed against the LGBTI+ community, and race-based crimes.¹⁰ The harm caused to hate-crime victims, their communities, and the achievement of the constitutional mandate, is profound and cannot be ignored.

The chapter begins by introducing the typical elements of a hate crime, followed by a discussion of the hate-crime offence as framed in the Hate Bill. Thereafter, “hate crime” as a modern conceptual problem is presented, moving to the reasons why hate crimes should be specifically regulated by the criminal law. From here, the chapter explores the various hate-crime legislative models used in other domestic

5 The Hate Bill is two-pronged. It criminalises hate speech and introduces hate crimes into our law. The dualist approach has probably delayed the enactment of the Bill unnecessarily, because the criminalisation of hate speech is highly contentious. In its submission to the Department of Justice and Constitutional Development on the first draft of the Hate Bill, the SAHRC recorded that it did not approve this approach. See <https://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20to%20DOJCS%20re.%20Hate%20Crimes%20&%20Hate%20Speech%20Bill-31.1.17%20FINAL.pdf> (2019-07-21).

6 This issue is a separate problem and is not addressed here.

7 The listed group characteristics for the hate offence number 17, more extensive than any other jurisdiction. See Gerstenfeld *Hate Crimes: Causes, Controls and Controversies* (2017) 57-70; Schweppe “Defining characteristics and politicising victims: A legal perspective” 2012 *Journal of Hate Studies* 173 177-178; Schweppe and Haynes “Protecting commonly targeted groups in the context of ‘new politics’: the case of Ireland” 2019 *Crime, Law and Social Change* 307 309-310; Mason “The symbolic purpose of hate crime law: Ideal victims and emotion” 2014 *Theoretical Criminology* 75 79 For a South African response see Botha “The selection of victim groups in hate-crime legislation” 2019 *SALJ* 781.

8 See <https://www.parliament.gov.za/press-releases/justice-and-correctional-committee-updated-hate-crimes-and-hate-speech-bill> (2019-06-15).

9 It is clear that for hate crimes laws to transcend the black-letter law, and form part of the social fabric, clarity is required for the law to be efficient and well-received. This ensures “precision, transparency, legitimacy, and accountability”. See Brax “Hate Crime Concepts and their Moral Foundations: A Universal Framework” in Schweppe and Walters (eds) *The Globalization of Hate* (2016) 49 50.

10 For a detailed account of hate-crime incidents in South Africa, see generally The Hate and Bias Crimes Monitoring Form Project <http://hwcg.org.za/wp-content/uploads/2018/02/Report-Hate-Bias-Crimes-Monitoring-Form-Project-SCREEN.pdf> (2020-04-20); Gordon “Understanding xenophobic hate crime in South Africa” 2020 *Journal of Public Affairs* 2076.

law systems, linking these to the hate-crime rationales. The chapter responds to the current legislative hold-up by proposing recommendations for the regulation of hate crimes for the South Africa context, with specific reference to the hate-crime model (encompassing the question of motive) and the type of sanction to be imposed on perpetrators. The chapter also demonstrates that an effective criminal law response to hate crimes requires clear laws, buttressed by an understanding of the normative basis for hate crime and an appreciation of how these laws work in practice.¹¹ The legislative framework cannot be addressed in a vacuum and without reference to its effective implementation.

2.2 ELEMENTS OF A HATE CRIME

Hate-crime legislation is emerging worldwide as a means to punish perpetrators who commit crimes where victims are selected because of group “hatred”.¹² Although hate-crime laws can take various forms,¹³ a hate crime is generally defined as a crime which is motivated by intolerance or bias towards the victim of the crime, because of the victim’s group-based identity characteristics.¹⁴ There are two main criteria, namely the underlying criminal act, such as murder, assault or rape (the base offence), and a requirement that the perpetrator select the victim based on group status (the bias or prejudice requirement).¹⁵ Group victimhood is key,¹⁶ with commonly protected characteristics in hate-crime legislation including race, ethnicity, gender, disability and religion.¹⁷ Unlike the victims of parallel crimes, hate-crime victims are not selected because of their individual identity, but rather for what they represent, usually depicted as “the other”.¹⁸ This is why hate crimes are often described as “message” or “symbolic” crimes.

The essential characteristic of a hate crime and the type of legal intervention needed are, however, difficult to formulate.¹⁹ Typical challenges include whether motive is

11 Brax (n 9) 50.

12 See generally Schweppe and Walters “Introduction: The globalization of hate” in Schweppe and Walters (eds) *The Globalization of Hate* (2016) 1.

13 See the detailed discussion in section 2.6 below.

14 Hall *Hate Crime* (2013) 1-3; Gerstenfeld (n 7) 5-6; Craig “Retaliation, fear, or rage: An investigation of African American and White reactions to racist hate crimes” 1999 *Journal of Interpersonal Violence* 138 139; Goodall “Conceptualising ‘Racism’ in Criminal Law” 2013 *Legal Studies* 215 222-3; ODIHR *Hate Crime Laws: A Practical Guide 2009* <https://www.osce.org/odihr/36426> (2019-02-01) 16-17; Bleich “The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies” 2011 37 6 *Journal of Ethnic and Migration Studies* 917 918. In South African law a biased motive is currently regarded as an aggravating circumstance for sentencing only.

15 ODIHR (n 14) 16-17.

16 Despite a wide discrepancy in victim groups in domestic hate crime legislation, an issue which falls beyond this contribution. See note 7 above.

17 Hall (n 14) 1-3; Gerstenfeld (n 7) 5-6; Craig (n 14) 139; Goodall (n 14) 222-3.

18 Perry “The Sociology of Hate: Theoretical Approaches” in Perry et al (eds) *Hate Crimes* (2009) 55-56.

19 Walters “A general theories of hate crime? Strain, doing difference and self control” 2011 *Critical Criminology* 313; Garland and Funnell “Defining Hate Crime Internationally: Issues and Conundrums” in Schweppe and Walters (eds) *The Globalization of Hate* (2016) 15-27.

an element of the crime; if the offender must actually hate the victim; and the type of legal model to use in the legislative framework. Some sceptics also question whether the criminalisation of hate with an enhanced sanction is an appropriate legal response to criminal acts committed with a biased motive.²⁰ The hate-crime offence in South Africa's Hate Bill is not immune to these types of conceptual problems.

2.3 THE HATE SPEECH OFFENCE IN THE HATE BILL

Clause 3(1) of the 2018 Hate Bill creates the hate-crime offence, defined as follows:

[A]n offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics.

The victim is defined as a person, including a juristic person, or group of persons, against whom a hate crime has been committed. Seventeen protected characteristics are then listed in alphabetical order. These are: age; albinism; birth; colour; culture; disability; ethnic or social origin; gender or gender identity; HIV status; language; nationality, migrant or refugee status; occupation or trade; political affiliation or conviction; race; religion; sex, which includes intersex;²¹ or sexual orientation.²²

Clause 3(2) of the Bill provides that any person who commits a hate crime will be guilty of an offence and liable on conviction to a sentence as contemplated in clause 6(1).²³ Clause 6 of the Bill sets out the penalties which a court may impose. Clause 6(1) provides that, subject to sub-clause (2), any person who is convicted of a hate crime is liable to any of the ordinary forms of sentencing usually available to a court in terms of sections 276 or 297 of the Criminal Procedure Act, such as imprisonment, correctional supervision and/or a fine. Clause 6(2) provides specifically:

If a person is convicted of an offence referred to in section 3, the court that imposes the sentence must—

- (a) if section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), is not applicable; and

20 Gerstenfeld (n 7) 45.

21 Defined as a congenital sexual differentiation which is atypical, to whatever degree.

22 The reader will note that the constitutionally protected grounds of marital status, pregnancy, conscience and belief in s 9 of the Constitution have been omitted. The following grounds have been added: albinism; HIV status; nationality, migrant or refugee status; occupation or trade; political affiliation or conviction; intersex; and gender identity.

23 Cl 3(3) contains prosecutorial safeguards. Prosecutions must be authorised by the Director of Public Prosecutions having jurisdiction. Cl 5 of the Bill requires prosecutors to produce a victim impact statement when adducing evidence or addressing the court on sentence. Such a statement is "a sworn statement or affirmation by the victim ... which contains the physical, psychological, social, economic or any other consequences of the offence for the victim and his or her family member or associate".

(b) in the case of—

- (i) damage to, the loss of, or the destruction of, property or the loss of money;
- (ii) physical, or other injury; or
- (iii) loss of income or support,

suffered by the victim as a result of the commission of the offence, regard the fact that the person has been convicted of a hate crime as an aggravating circumstance.

A reading of clauses 3 and 6 together demonstrates that the drafters of the Hate Bill have used the uncommon hybrid hate-crime model to frame the South African hate-crime offence. This model is a combination of the “discriminatory selection” hate-crime model (where victims are selected because of their identity), the penalty enhancement model (where an enhanced sentence is imposed on perpetrators), and the so-called *animus* model (where the perpetrator’s prejudice towards the victim becomes an element of the offence).²⁴ It seems that the drafters intended to give the courts the authority to declare an existing offence committed with a biased motive as aggravated both in law *and* at the sentencing phase.²⁵ While this approach may enhance the law’s symbolic effects, it could impact negatively on the implementation and understanding of the law.

Before analysing the merits of these provisions, a brief overview of the objectives of the Hate Bill follows, focusing specifically on the regulation of hate crimes (as opposed to the criminalisation of hate speech).

2.4 OBJECTIVES OF THE HATE BILL

The preamble to the Hate Bill records the constitutional promise, namely the establishment of a society that is based on the democratic values of social justice, human dignity, equality and the advancement of human rights and freedoms, non-racialism and non-sexism. The preamble proceeds to recognise the relevance of the unfair discrimination measures in section 9 of the Constitution for the enactment of a hate crime offence.²⁶ It then acknowledges the severity of the harm caused by hate crimes,²⁷ both to the victim and to his or her group, and states that South Africa’s

24 The differences between these models are explained in further detail below.

25 Goodall and Walters “Legislating to Address Hate Crimes against the LGBT Community in the Commonwealth” *Report prepared for Equality and Justice Alliance* (2019) <https://www.humandignitytrust.org/wp-content/uploads/resources/Legisating-to-Address-Hate-Crimes-against-the-LGBT-Community-in-the-Commonwealth-Final.pdf> (2019-08-03); SAHRC Submission (n 5) stating that “The SAHRC notes from section 3(1) that the elements of the crime of ‘hate crime’ are not easily identifiable from the section and would welcome clarity on the elements which would need to be proved for a crime of ‘hate crime’, as noted from section 3(2)(a) of the Bill that ‘hate crime’ is a separate offence in and of itself.”

26 The Preamble also acknowledges the constitutional right to dignity (s 10) and the obligations cast on the State in terms of ss 7(2) and 8 of the Constitution.

27 The Bill defines harm to mean: “any emotional, psychological, physical, social or economic harm”.

obligations in terms of the International Convention on the Elimination of all Forms of Racial Discrimination (“ICERD”)²⁸ require the criminalisation of acts of violence based on race or ethnic origin.²⁹

Clause 2 of the Hate Bill sets out its objectives. With reference to hate crimes specifically, these are to give effect to the Republic’s obligations regarding prejudice and intolerance as contemplated in international instruments and to provide for: the prosecution and sentencing of hate offenders; the prevention of hate crimes; effective enforcement measures; coordinated implementation, application and administration of the Act; combating of hate crimes and hate speech in a coordinated manner and the gathering and recording of hate data.³⁰ The Bill’s objectives focus on the practical aspects of hate-crime regulation and show a sound appreciation of the need to link the regulation of hate crimes to their prevention and prosecution and the collection of data and reporting.³¹ It is critical, however, that the objectives of the Bill be better aligned with the hate-crime construct and specifically the harm caused to vulnerable groups by hate crimes. A rational connection between the hate-crime framework and the objective of hate-crime regulation is needed, an issue which is addressed below.

2.5 THE HATE-CRIME CONSTRUCT AND THE RATIONALE FOR HATE-CRIME REGULATION

The term “hate crime” was first used in the United States (the “US”) in the 1980s when the federal Hate Crime Statistics Act obliged the US Department of Justice to gather and publish data on the nature and prevalence of crimes committed where there was an element of prejudice on the grounds of race, religion, sexual orientation or ethnicity.³² Since then, most modern democracies have introduced hate-crime

28 The ICERD, adopted 21 December 1965, entered into force 4 January 1969, ratified by South Africa 10 December 1998. Art 4 of the ICERD places a positive obligation on States parties to criminalise the forms of racist speech identified therein and acts of violence and incitement thereto on the grounds of race. The preamble to the Bill also mentions South Africa’s undertakings in terms of the UN World Conference against Racism, Racial Discrimination, Xenophobia, held in Durban, 2001. It is concerning that the preamble refers only to international instruments and agreements which address the harm caused by racism.

29 It is clear that the Bill extends beyond the grounds of race and ethnic origin.

30 cls 2(c) to (g).

31 Cl 7 provides directives to assist the prosecuting authority in achieving the Act’s objects. The Hate Crimes Working Group has criticised this. It suggests that cl 7 be amended to require training for other stakeholders, including SAPS. Cl 8 casts the responsibility for the collection of data and reporting on the Minister of Justice and Correctional Services. While the Minister has an important role to play, cl 8 should also give responsibility to the Minister for Police. In addition, the interplay between the roles of the SAPS and the NPA in the collection and dissemination of relevant data should be addressed in cl 8, specifically the obligation to publish such data. See http://hwcg.org.za/wp-content/uploads/2019/02/HCWG-submission-HCB-2019.02.15_fin.pdf (2019-04-20).

32 Mason “Not Our Kind of Hate Crime” 2001 *Law and Critique* 252 256-7; Mason “The Hate Threshold: Emotion, Causation and Difference in the Construction of Prejudice-motivated Crime” 2014 *Social and Legal Studies* 293 295 referring to the recognition of anti-discriminatory laws and the need to advance identity politics.

laws, either by creating a new self-standing crime, or by enhancing the penalties for existing crimes committed on the basis of a victim identity characteristic.³³

However, the hate-crime concept remains highly contested worldwide. There is little consensus regarding its key characteristics.³⁴ The debates concerning what type of conduct counts as a hate crime and how hate crimes should be regulated are well documented and ongoing.³⁵ The position is further complicated by the reality that the hate-crime field, including law-making, policy development and academic scholarship, is an interdisciplinary one involving *inter alia* criminologists, sociologists, politicians and lawyers. For this reason, and in order to transcend the disciplinary divisions and create an acceptable legislative model, a sound normative framework encompassing hate crime as a social construct is a necessary starting point.

2.5.1 Hate crimes as a conceptual problem

Researchers categorise hate crimes as crimes that are aimed at groups of persons who are not valued by society, and who are considered an “out-group” and marginalised.³⁶ Barbara Perry’s hate crime scholarship has been influential here. She defines a hate crime from a sociological and criminological perspective as “a mechanism of power intended to sustain somewhat precarious hierarchies” through violence and verbal or physical threats of violence directed at groups of persons who are different and “traditionally stigmatized and marginalized”.³⁷ This understanding of hate crimes treats the phenomenon as a social construct and one which is not static, but is “historically and culturally contingent, the experience of which needs to be seen as a dynamic social process involving context, structure and agency”.³⁸ As Perry explains, hate crimes occur in order to remind those targeted, and their broader social groups, of their “proper” position in society and are a means to perpetuate social inequalities.³⁹ For this reason, Perry’s highly influential hate-crime theory has been described as one that contextualises “doing difference”.⁴⁰ The challenge facing

33 Walters “Repairing the harms of hate crime: towards a restorative justice approach?” 2, paper presented Jan 2019 at UNAFEI 171st International Senior Seminar, Tokyo; Hall (n 14) 19; Gerstenfeld (n 7) 271. South Africa is the only commwealth country not to legislate against hate crimes.

34 Garland “Difficulties in defining hate crime victimization” 2011 *International Review of Victimology* 25 26-27.

35 For a recent critique, see Duff and Marshall “Criminalizing hate?” in Brudholm and Johansen (eds) *Hate, Politics, Law: Critical Perspectives on Combating Hate* (2018).

36 Chakraborti “Framing the Boundaries of Hate Crime” in Hall et al (eds) *The Routledge International Handbook on Hate Crime* (2014) 13.

37 Perry *In the Name of Hate: Understanding Hate Crimes* (2001) 3.

38 Chakraborti and Garland *Hate Crime: Impact, Causes and Responses* (2009) 6. Also see Lawrence “The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes” 1994 *Michigan Law Review* 320 343 *et seq* for a detailed account of the impact of hate crimes on the victim, target community and society as a whole.

39 Perry (n 37) 10.

40 Walters (n 19) 318.

the drafters of the Hate Bill is to connect the hate-crime regulatory framework to the objective that the law be able to protect vulnerable groups of persons who are the regular targets of criminal conduct motivated by group hostility. It is also important that the Bill be aligned with the rationales for hate-crime regulation.

2.5.2 Hate-crime rationales

The rationales underlying the need to introduce hate-crime legislation and increased punishment for perpetrators align with Perry's framework of hate crimes.⁴¹ These rationales are categorised into three broad types, namely: retribution, symbolic effects and utilitarian.⁴² The specific purpose of this chapter is to analyse the hate-crime model introduced by the Hate Bill, so the theories underlying the rationales for hate crimes regulation are not dissected. Instead, they are introduced to demonstrate that the hate-crime model used in the Hate Bill must align with the hate-crime construct and the need to punish persons who commit criminal acts against vulnerable "outgroups".⁴³

The crux of the retributive theory for hate-crime regulation is that hate crimes are more serious than ordinary (or parallel) crimes,⁴⁴ justifying a stricter punishment for the perpetrator. Hate crimes are argued to be especially bad, because the perpetrator's biased motive against members of marginalised groups is morally reprehensible, rendering the perpetrator more blameworthy.⁴⁵ Additionally, hate crimes cause greater harm (to the victim, his or her group, and society as a whole)⁴⁶ and may spark

41 Hall (n 14) 164-183; Gerstenfeld (n 7) 12; Naidoo (n 1) 158; Naidoo "Hate crimes: Some theoretical considerations and their possible application to the South African context" 2016 *Acta Criminologica: Southern African Journal of Criminology* 37-52.

42 The rationales are aligned with the usual theories of punishment. See generally Terblanche (n 1) par 9.3-9.6; Terblanche "Sentencing Guidelines for South Africa: Lessons from Elsewhere" 2003 *SALJ* 858.

43 Naidoo (n 1) 160.

44 A parallel crime refers to a crime which is not committed with a bias motive, for example, assault versus assault on the grounds of race or rape versus the sometimes incorrectly named corrective rape. Goodall and Walters (n 25) explain that the term is a misnomer for the targeted rape of lesbian and bisexual women with the purpose of "correcting" the victim's sexual orientation.

45 Hurd and Moore "Punishing hatred and prejudice" 2003 *Stanford Law Review* 1081 1087.

46 Iganski "Hate crimes hurt more" 2001 *American Behavioral Scientist* 626. These are the three levels of harm traditionally identified. Iganski extends these to 5 waves: the victim; the victim's group; the victim's immediate group; other targeted communities; and harm to societal norms. Iganski and Lagou "Hate crimes hurt some more than others: implications for the just sentencing of offenders" 2015 *Journal of Interpersonal Violence* 1696 have conducted extensive empirical research. The authors analysed data from 3 years of the Crime Survey for England and Wales. They found that victims of racially motivated crimes were twice as likely as the victims of ordinary crimes to say that they had been affected "very much" by the incident. Plus, the hate-crime victims (targeted on the basis of race) reported a significant number of aggravated emotional effects after the incident. They concluded that this "demonstrates that as a group, victims of racist crime collectively experience greater emotional and psychological harms compared with victims of parallel crimes". Also see McDevitt, Balboni, Garcia and Gu "Consequences for victims: A comparison of bias and non-bias motivated assaults" 2001 *American Behavioral Scientist* 697 709; Perry and Alvi "'We are all vulnerable' The in terrore effects of hate crimes" 2012 *International Review of Victimology* 57; Pezzella and Fetzer "The likelihood of injury among bias crimes: An analysis of general and specific bias types" 2017 *Journal of Interpersonal Violence* 703. Pezzler and Fetzer used data from the 2013 US National Crime Victimization Survey (NCVS). They analysed 4,645,961 violent crimes –

intergroup retaliation and conflict.⁴⁷ Thus, it is correct that the offender be ordered to pay a higher price to society and receive his or her just punishment. Moreover, enhanced penalties are needed to uphold the system of law and to vindicate the hate-crime victim.⁴⁸

One of the more frequent criticisms of hate-crime laws, however, is that crimes committed on the basis of group bias are no worse than ordinary crimes and that all victims of crime experience similar harmful effects.⁴⁹ This critique is often aligned with the assertion that there is insufficient empirical evidence to demonstrate that hate crimes actually cause more harm and that the biased motive of the hate criminal is no more blameworthy than the ordinary criminal.⁵⁰ These criticisms notwithstanding, and despite related difficulties with the practical implications of the enactment of hate-crime laws, on balance, criminalisation serves a valuable purpose in democracies which value social cohesion, multiculturalism, the advancement of social justice, and respect for those who are different.⁵¹ Thus, persons who deny hate-crime victims the equal respect they deserve should be more severely punished for their increased culpability. The enactment of hate-crime laws ensures that this culpability is “reflected in law”.⁵²

The second rationale underlying the introduction of hate-crime laws is that they send a symbolic message that crimes committed on the grounds of group bias are condemned and not tolerated. These laws signify to vulnerable target groups that they will be protected from victimisation by dominant groups and that there is state support for their plight (the “fair protection paradigm”).⁵³ In this manner, hate-crime laws have both a symbolic purpose and a denunciatory effect. They are

4,343,475 of which were non-bias motivated and 302,486 of which were bias motivated. They concluded that when an assault was motivated by bias, the likelihood of the victim suffering traumatic feelings was 150% greater than for an assault not motivated by bias. The criticism of this view is acknowledged, some scholars claiming that all victims suffer emotional harm, regardless of the crime. This criticism began in Jacobs and Potter *Hate Crimes: Criminal law and Identity Politics* (1998) 83. Also see Lawrence *Punishing Hate: Bias Crimes under American Law* (1999); Naidoo “Are the perceived greater harms caused by hate crimes a plausible justification for the existence of hate-crime laws?” (2016) *Stell LR* 634.

47 Gerstenfeld (n 7) 18; ODIHR (n 5) 20.

48 Naidoo (n 1) 162, who explains that the argument from retribution is used to symbolise that the perpetrator must pay a price to society either to vindicate law or to avenge the victim. Plus, the offender must pay for his or her wrongdoing. If the wrongdoer were not punished, this would undermine state law and the “laws of a higher moral order”. Punishment restores the balance. Also see Snyman *Criminal Law* (2008) 14; Feinberg *The Expressive Function of Punishment* (1965) 76.

49 See generally Gerstenfeld (n 7) 16-17. See, however, the research set out in n 46 above. Another argument is that hate is no worse than other bad motives, such as greed and revenge. See Al-Hakim and Dimock “Hate as an aggravating factor in sentencing” 2012 *New Criminal Law Review* 572 588.

50 Jacobs and Potter (n 46); Blee “Racial violence in the United States” 2005 *Ethnic and Racial Studies* 599 608.

51 The link to the South African constitutional mandate is clear.

52 Goodall and Walters (n 25) 14.

53 Walters (n 33) 3; Blake “Geeks and Monsters: Bias Crimes and Social Identity” 2001 *Law and Philosophy* 121. In this way hate-crime laws act as a public vindication of the values of tolerance, equality and respect for vulnerable groups in society.

symbolic, because the extra punishment imposed on offenders informs victims that they are worthy of the law's protection, with the law designed to be reflective of the injury caused.⁵⁴ They are denunciatory, because they align with the moral norms of society and are intended to inculcate those norms in society.⁵⁵ So, hate-crime laws serve as a denunciation of acts of violence motivated by group bias.⁵⁶ It is worth noting, however, that hate-crime legislation has been criticised for being highly politicised,⁵⁷ and for serving as a vehicle of state policy, with punitiveness used as a means to achieve the "remoralisation" agenda.⁵⁸ This is why it is critical that South Africa's hate-crime legislative model align with the constitutional paradigm, where human dignity, equality and non-racialism are foundational values,⁵⁹ and that the sanction imposed be reflective of the harm suffered by victims and the need to secure marginalised communities.⁶⁰

The utilitarian rationale in support of hate-crime laws is an extension of the consequentialist theory of punishment. It postulates that regulation is needed as a means to eliminate or reduce the harm caused to hate-crime victims, and ultimately to ensure a positive outcome for society.⁶¹ In terms of this theory, enhanced penal legislation is argued to be justifiable on at least five grounds. Firstly, because an increased sanction will deter would-be offenders from committing the crime;⁶² secondly, because an enhanced sanction should prevent the offender from harming society again;⁶³ thirdly, because punishment serves as a means to rehabilitate

54 In the UK hate crime penalty enhancement laws "were enacted primarily in order to address the denial of equal respect and dignity to minorities and people who are generally seen as 'other'". See UK Law Commission "Hate Crime: Should the Current Offences be Extended?" Law Commission No 348 (2014) 81-82.

55 The South African Equality Act (n 1) has a similar object, but has been criticised for being idealistic. The reality is that the Equality Act has no chance of achieving its objectives until Chapter 5 of the Act is enacted.

56 See the criticism of Jacobs and Potter (n 46) 27 who argue that the regulation of discrimination does not warrant a criminal law response.

57 Schweppe (n 7) 178-179. This criticism applies specifically to the selection of victim groups.

58 Mason (n 32 (2014)) 294; O'Malley "Volatile and Contradictory Punishment" 1999 *Theoretical Criminology* 175. The Organization for Security and Co-operation in Europe (OSCE) claims that hate crime laws "both express the social value of equality and foster the development of these values". See ODIHR (n 5) 7.

59 Section 1 of the Constitution entrenches the foundational values, which shape the course of South African constitutional and human rights discourse.

60 Mason (n 7) 76; Mason (n 32 (2014)) 295-6 referring to Moran "'Invisible minorities': Challenging community and neighbourhood models of policing" 2007 *Criminology and Criminal Justice* 417, who explains that one of the main factors influencing the introduction of hate crime laws in western democracies was the need to introduce better and more effective laws to protect minority communities from acts of hostility.

61 Naidoo (n 1) 166. The criminalisation of hate offences also plays an important role for the effective implementation of justice interventions to monitor and prevent hate crime. See ss 7-9 of the Hate Bill. Also see the discussion in Walters, Awusa-Bempah and Wiedlitzka "Hate Crime and the 'Justice Gap': The Case for Law Reform" 2018 *Criminal Law Review* 961.

62 Naidoo (n 1) 166.

63 Morris "Paternalistic Theory of Punishment" in Sartorius (ed) *Paternalism* (1983) 238; Von Hirsch and Ashworth *Principled Sentencing* (1998) 54; Cohen "Incapacitation as a strategy for crime control: Possibilities and pitfalls" 1983 *Crime and Justice* 1 2.

the offender;⁶⁴ fourthly, because hate crimes have retaliatory effects and must be prevented;⁶⁵ and finally because hate-crime laws have an educative deterring effect.⁶⁶ It is also worth mentioning that in the recent independent review of hate-crime legislation in Scotland, it was recorded that one of practical benefits of enacting hate-crime legislation is that such laws require the courts to consider and record the aggravation when sentencing offenders. The aggravation then forms part of the offender's criminal record and is considered in the event of repeated offending. Plus, the maintenance of records and collection of data provides statistical information which allows the authorities to monitor the hate-crime problem and put further interventions in place.⁶⁷

There are, however, a number of credible counter-arguments to the utilitarian rationale justifying hate-crime laws. These include the critique that persons who commit a crime on the grounds of identity bias are unlikely to be deterred by an increased punishment. They already have prejudiced views, which are usually intensively experienced.⁶⁸ Additionally, if the base crime attracts a sanction, then the pre-existing sanction should serve as the underlying deterring factor. If the base sanction cannot do its work, then why would an enhanced sanction play an additional deterring role?⁶⁹ It is also argued to be highly unlikely that a prison term will serve a rehabilitative function and reform hate offenders. Consequently, a number of prominent theorists, including Mark Walters, propose that restorative practices be used to address the harm caused by hate crimes.⁷⁰

Notwithstanding these objections, and even if a restorative approach is introduced, whether on its own or as a supplement to the more usual forms of punishment, there are sound reasons justifying the introduction of a hate-crime law in South Africa to address the harm caused to vulnerable groups.⁷¹ The rationales and critiques discussed also demonstrate that South Africa's proposed hate-crime legislative framework must be closely connected to the normative principles underlying the

64 Snyman (n 48) 21.

65 Gerstenfeld (n 7) 18-19. The OSCE reported in 2012 that hate crimes "can escalate rapidly into broader social unrest, are often severely under-reported, and they can be exacerbated by or take place in a context of intolerant discourse".

66 Linking to the symbolic value of the law. See Mason (n 7) 78; Walters (n 33) 3. Mason explains that hate crime laws can achieve their purpose by placing discriminatory violence on the public agenda as a recognisable social problem and inculcating new norms into society.

67 Scottish Government "Independent Review of Hate Crime Legislation in Scotland: Final Report" (May 2018) <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/3/> (2019-08-06).

68 Gerstenfeld (n 7) 20; Walters (n 33) 4, arguing that it is unlikely that a harsher punishment will make the offender hate the victim less.

69 Gerstenfeld (n 7) 20-21.

70 See Walters *Hate Crime and Restorative Justice: Repairing Harms, Exploring Causes* (2014) for a full account.

71 In particular, the law will serve the important purpose of denouncing criminal behaviour motivated by group bias and also demonstrates that vulnerable groups exposed to such harm are protected. This aligns with the constitutional imperative. See Naidoo (n 2) 18, who expresses a similar view.

hate-crime concept as a socio-legal construct and the underlying basis justifying hate-crime regulation, including blameworthiness and the criminalisation of hate. The challenge is to translate this research into a working legislative model for our context. As demonstrated below, the choice of hate-crime model plays a crucial role in the process as it forces the drafters to engage with the problematic issues of motive, the hate threshold and type of sanction. It is to this analysis that the chapter now turns.

2.6 HATE-CRIME MODELS

There are two main forms of hate-crime legal models, namely the discriminatory selection model and the *animus* model.

In the discriminatory selection model, the victim is chosen by virtue of, or *because of*, a protected identity characteristic.⁷² Despite the use of the term “hate”, actual hatred or hostility against the victim or his or her group is not needed to found the offence. However, the “because of” requirement makes it necessary to prove a causal link between the accused’s conduct and the selection of the victim.⁷³ Many hate-crime laws in the US make use of this model, the classic example being the Violent Crime Control and Law Enforcement Act of 1994. Here, a hate crime is defined as one “in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived” identity of the victim.⁷⁴

Hate crimes falling within the ambit of the discriminatory model usually take the form of sentence (penalty) enhancement legislation.⁷⁵ These laws increase sentences for crimes where the perpetrator selected the victim based on bias, prejudice or hate. The base crime attracts the initial penalty, but the sentence is supplemented if the

72 Goodall (n 14) 222-3; Breen and Nel “South Africa – A home for all? The need for hate crime legislation” 2011 *SA Crime Quarterly* 33 35. The definition of a hate crime in the ODIHR Guide (n 5) is based on the discriminatory selection model.

73 Breen and Nel (n 72) 37; Naidoo and Karels “Hate Crimes against Black Lesbian South Africans: Where Race, Sexual Orientation and Gender Collide (Part 11)” 2012 *Obiter* 600 607. The Australian decision of *R v Aslett* [2006] NSWCCA 49 124 is a good example of victim selection based on expedience. The accused targeted an Asian family for a burglary because Asians are apparently most likely to keep valuables in their homes. There was no evidence of hostility towards Asian people. The family was targeted merely because of an exploitable characteristic. Lawrence, in his seminal work, *Punishing Hate: Bias Crimes under American Law* (1999), provides further examples, such as the purse-snatcher who selects women as his target because it is easier to steal from them compared to men. The criminal has selected his victim on the basis of gender, but does not hate women. There is no gender hatred.

74 Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009. Later extended to include disability, gender identity and sexual orientation in terms of the Hate Crimes Prevention Act.

75 Bleich (n 14) 918; Goodall (n 14) 224. A distinction is also drawn between sentence aggravation laws and penalty enhancement laws. Penalty enhancement models usually alter the maximum (and sometimes the minimum) penalty applicable to the offence. Sentencing aggravation models do not increase the maximum penalty for the crime, but identify the hate aspect of the offence as an aggravating factor. They require that the court take this into account when sentencing. See Mason “Legislating against hate” in Hall et al (eds) *The Routledge International Handbook on Hate Crime* (2015) 59-60.

crime is committed with a biased motive.⁷⁶ The element of hate or bias only becomes relevant during the sentencing stage after the perpetrator has been convicted. Furthermore, the way in which the sentence is enhanced can either be general or specific. A general penalty enhancement provision applies to a broad range of criminal offences.⁷⁷ Specific penalty enhancement provisions are narrower and apply only to named crimes.⁷⁸ Further permutations include penalty enhancement laws which specify the degree of increased sentence by imposing a new maximum (or minimum) sentence, whereas other laws leave this to the court's discretion (called sentence aggravation laws, as opposed to sentence enhancement laws).⁷⁹

An example of a penalty enhancement hate-crime law is the US Hate Crime Sentencing Enhancement Act,⁸⁰ which provides for enhanced sentencing for federal crimes on the grounds of race, colour, religion, national origin, ethnicity or gender. Many other countries have followed the lead of the US by enacting sentence enhancement legislation for bias crimes.⁸¹

The other frequently used model for hate-crime laws is the “*animus* model”, also known as the “hostility model”.⁸² The focus is on the moral culpability of the offender.

76 Bleich (n 14) 918. The penalty enhancement is therefore derivative of another crime. Lawrence (n 73) 696.

77 ODIHR (n 5) 33-35. Within the OSCE region, 23 countries list some form of bias motive as a factor that can lead to a penalty enhancement for *all* crimes.

78 ODIHR (n 5) 33-35. Within the OSCE region, 25 countries list some form of bias motive as a factor that can lead to a penalty enhancement for *specific* crimes. For example, Belgium doubles the sentence for hate crimes committed with a biased motive for a few specific crimes, including indecent assault, rape, manslaughter, intentional injury, and arson.

79 In Malta arts 222A(2), 251D and 325A of the Criminal Code specify that punishments for selected offences on the grounds of group hatred are to be increased by one to two degrees. See Goodall and Walters (n 25) 29. Also see ODIHR (n 5) 34, explaining that some laws require the court to state explicitly the reasons for applying the penalty enhancement. Also, most jurisdictions require prosecutors to investigate any factor that might increase the sentence and to bring such facts to court. For example, in the UK, the Crown Prosecution Service requires prosecutors to lead admissible evidence of group aggravation. South Africa has also adopted this approach in the Hate Bill.

80 USC 994, enacted into law as Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994. In *Wisconsin v Mitchell* 508 US 476 (1993) the US Supreme Court upheld a hate-crime statute which enhanced maximum penalties where the offender intentionally selected the victim “because of” a listed ground. The court reasoned that the provision was constitutional as it penalised the offender’s conduct and not his thought or expression.

81 Although these countries tend to use the *animus* model, requiring that the offender be motivated by bias. Examples include Italy (s 3 Italian Law No 205/1993), the UK (ss 145 and 146 Criminal Justice Act of 2003), France (Law 2003-88 of 3 February 2003, expanded by Law 204 of 9 March 2004), Germany (s 46 *Strafgesetzbuch* or German Penal Code), Canada (s 718.2(a)(i) Criminal Code, 1996) and Australia (e.g., s 6A Sentencing Act 1995 of the Northern Territory, Australia). For Australia, see further Mason “The Penal Politics of Hatred” 2009 *The Australian and New Zealand Journal of Criminology* 275. Note that in 2008 the EU adopted a Framework Decision on Racist and Xenophobic Crime and Hate Speech requiring EU States to adopt hate crime laws. The ODIHR has assisted many EU States to draft appropriate hate-crime legislation (although there are numerous variations). See Garland and Chakraborti “Divided by a common concept? Assessing the implications of different conceptualizations of hate crime in the European Union” 2012 *European Journal of Criminology* 38 44. The purpose of the Framework was to ensure the “harmonization” of “clear and comprehensive legislation” across the EU for hate crimes – ODIHR (n 5) 27.

82 Goodall (n 14) 222; Breen and Nel (n 72) 35.

The hatred or prejudice in question becomes an element of the offence and is part of the determination of guilt.⁸³ So, the prosecution must show that there was an element of hatred or prejudice when the offence was committed. New free-standing crimes are usually created and the offender is sentenced for a named hate-crime offence.⁸⁴ It is, however, possible for the *animus* model to be used in combination with penalty enhancement laws.

In the *animus* model, the “hate” threshold in the offence differs between jurisdictions, with some laws requiring that the perpetrator be motivated by hatred or hostility, whereas others ask for mere prejudice or intolerance.⁸⁵ As Goodall and Walters point out, hate-crime laws “vary along a spectrum”.⁸⁶ For this reason, the “hate” in hate crimes is often a misnomer.⁸⁷ Another variance is that some laws require that the perpetrator be motivated by *animus* (the subjective *animus* model),⁸⁸ whereas other laws are worded to capture the mere *demonstration* of hostility or prejudice (the objective *animus* model). The latter approach is far broader, and has been criticised,⁸⁹ as it includes cases where the offender may not have actually intended to commit the offence with a hostile motivation, but nevertheless demonstrated hostility during the commission of the offence.⁹⁰ The advantage, however, is that the objective test renders the law more capable of achieving its aim.

A law combining both the subjective and objective *animus* model is the hate crime enacted in terms of the UK’s 1998 Crime and Disorder Act. An offence will be regarded as racially or religiously aggravated if the offender commits a pre-existing

83 Goodall (n 14) 222; Goodall and Walters (n 25) 35.

84 Lawrence “The Hate Crimes/Hate Speech Paradox” 1993 *Notre Dame Law Review* 673 696. Note, however, that Lawrence explains that the majority of the US bias crimes statutes (which he calls the “because of” model) evade easy classification in terms of either the *animus* or discriminatory models. The ODIHR states (n 5) 32-33 that these types of hate-crime laws are relatively rare. In the OSCE region, for instance, only the Czech Republic and the US have introduced substantive hate crimes. But, compare Goodall and Walters (n 25) stating that most of the commonwealth countries include *animus* in their laws

85 Garland and Chakraborti (n 81) 42; Goodall and Walters (n 25) 35. The ODIHR (n 5) 16 offers a broad conception of hate crimes using the *animus* model. Hate related prejudice is defined as “pre-conceived negative opinions, intolerance or hatred directed at a particular group”. Canada uses “motivated by bias, prejudice or hate”. New South Wales in Australia uses similar terminology – “motivated by hatred for or prejudice against”. However, Chakraborti and Garland point out that a number of other EU States insist on “hatred”. Similarly the Council of Europe’s Cybercrime Protocol, intended to regulate and restrict racism on the Internet, uses the term “hate” repeatedly.

86 Goodall and Walters (n 25) 35.

87 Brax “Motives, Reasons and Responsibility in Hate/Bias Crime Legislation” 2016 *Criminal Justice Ethics* 230 233.

88 Goodall and Walters (n 25) 34-35.

89 See the discussion below.

90 Walters, Wiedlitzka and Owusu-Bempa “Hate crime and the legal process: options for law reform” *Project Report University of Sussex* (2017). Prosecutions in terms of these laws are much easier as they focus on the expression of hatred or hostility, as opposed to actual motive.

listed offence,⁹¹ and demonstrates, or was motivated by, hostility on the grounds of race or religion during the commission of that offence.⁹²

A third hate-crime model sometimes used is the so-called hybrid model, which is a combination of the discriminatory selection and *animus* models. Here, any ordinary crime can be aggravated both in law and at the sentencing stage.⁹³ Instead of enacting new substantive offences with new enhanced sentences for each offence, the law adds the hate component to the basic offence, using the *animus* model. Thereafter, if the hate crime is proven, the judge must enhance the offender's punishment. This model works similarly to the sentence enhancement laws explained earlier, but with the key distinction that the offence is re-labelled in law upon conviction and must be recorded as a hate crime.⁹⁴

Scotland uses a hybrid approach in its current hate-crime legislation (which comprises a number of separate pieces of legislation).⁹⁵ The crux of these laws is that any existing offence can be aggravated by prejudice in respect of a protected characteristic. This approach does not involve the creation of new offences. Instead, a crime will be treated as a hate crime where the offender "evinces malice and ill will towards the victim based on the protected characteristic" or "if the offence is motivated (wholly or partly) by malice and ill will" towards a group member.⁹⁶ Where a person is convicted of a hate crime a number of consequences follow. First, the aggravation is recorded and considered during sentencing. Secondly, the crime records must be updated to record the conviction. This allows statistics and trends to be identified and monitored. Thirdly, the aggravation appears on the offender's criminal record. If the offender commits another offence, the earlier aggravated conviction is considered.⁹⁷

As indicated earlier, South Africa's Hate Bill also introduces a hybrid model of hate-crime regulation. This chapter now engages with the merits of this approach. In order to do so, the advantages and disadvantages of the three hate-crime models are considered.

91 The listed offences include grievous bodily harm, assault and battery, and harassment.

92 ss 29-32. A higher sentence can then be imposed.

93 Goodall and Walters (n 25) 30.

94 Goodall and Walters (n 25) 31.

95 For a full discussion, see Scotland's Final Review (n 67). Note that the Final Review has recommended that the laws be consolidated. In November 2018 the Scottish government released a consultation paper calling for public comments in respect of the recommendations. See <https://www.gov.scot/publications/one-scotland-hate-home-here-consultation-hate-crime-amending-current-scottish-hate-crime-legislation/pages/2/> (2019-08-01).

96 Scotland's Final Review suggests that the laws should be retained, but that the language used in the hate element should be updated to require that the offender either demonstrates hostility towards the victim or was motivated by hostility (either in whole or in part).

97 Scotland's Final Review (n 67).

2.7 ADVANTAGES AND DISADVANTAGES: HATE-CRIME MODELS COMPARED

Starting with the discriminatory selection model, the first advantage is a practical one. These laws usually make use of penalty enhancement, which is generally regarded as being easier to design and apply, because it can be incorporated alongside existing penal codes.⁹⁸ Penalty enhancement can also apply to a broad range of criminal acts and failure to prove bias will not jeopardise a conviction on the base offence.⁹⁹

The second benefit is that the hate element does not form part of the offence. It must only be shown that the offender acted “because of” or “by reason of” the victim’s protected characteristic. In this way, emphasis is placed on group victimhood and the impact on the victim is specifically acknowledged.¹⁰⁰ This approach aligns with Perry’s theory that hate crimes should be treated as a consequence of systemic inequality in the societal order, which allocates status to groups of people based upon their vulnerabilities.¹⁰¹

Thirdly, when using the discriminatory selection model, the controversial hate debate and the problem of motive are side-stepped.¹⁰² The *animus* model, as we have seen, incorporates prejudice and/or hate as an element of the offence. The critics of hate-crime laws use this requirement to support their argument that hate-crime laws punish the motive of the offender and are therefore fatally flawed.¹⁰³ The basis for the argument is that motive is not traditionally included amongst the recognised forms of *mens rea*¹⁰⁴ and therefore cannot become an element of an offence.¹⁰⁵ Motive – the reason why an offender commits a crime – is irrelevant because culpability can only be considered as an aggravating factor during the sentencing phase.¹⁰⁶ Thus, the discriminatory selection model is argued to be a better legal framework, because for the offender to be guilty of the crime, evidence of subjective feelings of prejudice towards the victim is not necessary. Only objective evidence that the offender selected the victim by reason of his or her group membership is required.¹⁰⁷

98 Goodall and Walters (n 25) 29; ODIHR (n 5) 35.

99 Goodall and Walters (n 25) 29; ODIHR (n 5) 35. The South African Hate Bill incorporates this feature.

100 Goodall (n 14) 228.

101 Perry (n 38) 10; Perry (n 9) 60-61. Conversely, it is also argued that by not recognising the group-hate element, these laws undermine the symbolic value of the law. See Ashworth *Principles of Criminal Law* (2009) 76, dealing with the importance of fair labelling and Chalmers and Leverick “Fair Labelling in Criminal Law” 2008 *Modern Law Review* 217.

102 Mason (n 32 (2014)) 298.

103 For a sound South African perspective on this issue, see Naidoo “Reconsidering motive’s irrelevance and secondary role in hate crime legislation” 2017 *TSAR* 337.

104 In South African criminal law, *mens rea* is defined as “the will to commit an act or cause the prohibited result which is contained in the definition of a crime while possessing the knowledge that such conduct is unlawful”. See Snyman (n 48) 176; Naidoo (n 103) 342.

105 Brax (n 87) 234-235. The classic statement is that “*mens rea* should not be confused with motive” – *R v Moloney* 1985 AC 905 (HL). Another oft-cited quote is that “hardly any part of penal law is more definitely stated than that motive is irrelevant”, quoted by Brax (n 87) 231.

106 Motive is defined simply as the reason why a person commits an act. See Hessik “Motive’s role in criminal punishment” 2006 *Southern California Law Review* 89 95.

107 Mason (n 32 (2014)) 299; Naidoo (n 103) 337.

The reality, however, as Kamban Naidoo has convincingly argued, is that the subordinate role that motive plays in the criminal law is over-stated.¹⁰⁸ He explains that numerous crimes include motive as an element of the offence, such as those which criminalise possession for an unlawful purpose or those which require evidence of dishonesty or those which insist on “specific intent”.¹⁰⁹ Additionally, many criminal law defences take motive into account.¹¹⁰ From a philosophical perspective, one of the justifications for excluding motive from the elements of a crime is that its inclusion moves the law into a theory of punishment which focuses on thoughts and character, as opposed to one that punishes acts. So, hate-crime regulation is objectional from a moral perspective, because these laws pass a moral judgment on the offender’s values.¹¹¹ This argument is linked to the principle of legality and the claim that the criminal law should not be used to impose liability on the basis of individual ethics.¹¹² In relation to hate crimes, the answer to these critiques is simple. One of the purposes of the law is to shape public morals. Hate-crime laws demonstrate that all persons are worthy of protection regardless of their status and, from the South African perspective, respond to the need to promote the values underlying the constitutional democracy. Accordingly, there should be no objection to using motive as an element of the offence in terms of the *animus* model for hate-crime legislation.

In any event, as explained, many of the hate-crime laws framed in the mould of the *animus* model do not require subjective intention, but use terminology such as “demonstrates hostility or prejudice”.¹¹³ This is an objective form of intention, where evidence is not needed of subjectively-felt identity bias, but merely that the offender’s conduct at the time of commission of the offence reveals that he or she demonstrated bias towards the victim’s protected group characteristic.¹¹⁴ The result is that there is a fine line between laws using the discriminatory selection model and laws using the *animus* model, which explains the considerable confusion worldwide around the issue of which model is actually implemented.¹¹⁵

The discussion so far has demonstrated that although there are advantages to using the discriminatory selection model,¹¹⁶ there is a negligible benefit to excluding the

108 Naidoo (n 103) 348.

109 Naidoo refers to crimes such as treason, intimidation and abduction.

110 For example, self-defence requires an examination of the accused’s reason for defending himself or herself.

111 Brax (n 87) 232.

112 Naidoo (n 103) 346; Burchell *Principles of Criminal Law* (2016) 354.

113 Scotland and the UK’s Crime and Disorder Act 1998 use this approach. Research shows that these laws have a better successful prosecution rate. See Goodall and Walters (n 25) and Scotland’s Final review (n 67) for a full analysis.

114 Walters, Wiedlitzka and Owusu-Bempe (n 90). Prosecutions in terms of these laws are much easier as they focus on the expression of hatred or hostility, as opposed to actual motive.

115 Goodall (n 14) 225, 229.

116 The ODIHR Guide (n 5) 48-49 prefers this approach. It states that these laws “may do a better job of addressing the kind of harm that hate crime laws are intended to prevent”.

prejudiced motive from the definition. For the sake of completeness, it is important to highlight the disadvantages of the discriminatory selection laws. Firstly, some scholars claim that the model is inappropriate because it regulates cases where the perpetrator does not consciously hate the victim.¹¹⁷ As Goodall explains, “what matters is whether someone has chosen to target a person from a protected vulnerable group, not why they did so.”¹¹⁸ This undermines the essence of what the hate-crime law aims to achieve. Secondly, the model is also criticised because when hate laws are framed in a way that does not give explicit recognition to the bias motive, the hate-crime law loses its symbolism (a core aspect of the need to criminalise). This argument is an obvious advantage of the *animus* model. Thirdly, and given that discriminatory selection hate-crime laws usually take the form of penalty enhancement, it is a problem that many of these laws do not specifically require the collection of hate-crime data. To overcome this problem, the legal framework should insist that the penalty enhancement be recorded, so that an accused’s criminal history is determined at the sentencing stage and so that reliable data is gathered.¹¹⁹ So, while discriminatory selection laws may be easier to implement, their drawback is that they do not fulfil the expressive function of hate-crime laws, which specifically condemn criminal acts committed on the basis of group prejudice.

Moving now to the *animus* model, the most important advantage is that when hate crimes are elevated to substantive offences, the symbolic value of the crime is enhanced. The crime is specifically labelled and the prohibited bias motive, a key aspect, is condemned.¹²⁰ The crime also becomes more prominent, linking to the denunciatory function of law.¹²¹ Similarly, the *animus* model does well because it reflects the essence of hate crimes as expressions of prejudice or identity-based hostility against marginalised groups. The use of words such as hate, prejudice, bias, or hostility ensures that the state is clear about the exact “social mischief” it aims to regulate.¹²² A related benefit is that a substantive offence enables the policing and prosecution of the crime because the criminal justice personnel are more aware of

117 Yet, this model ensures that crimes targeting victims because they are perceived to be innately vulnerable or an “easy target” may fall within the ambit of hate-crime laws. Proponents believe that it is important to include such victims because even though not “hated” by the offender, the perpetrator still treats them as being less worthy. The offender’s decision to target the victim helps to sustain their marginalisation: i.e., selecting some victims by reason of their identity is both discriminatory and a form of prejudice.

118 Goodall (n 5) 233.

119 In states such as Germany, the reasons for enhancement cannot be recorded publicly – see ODIHR (n 5) 36.

120 Lawrence (n 73) 73; Jenness and Grattet *Making Hate a Crime: From Social Movement to Law Enforcement* (2001) 18; Perry and Perry-Kessaris “Participatory and Designerly Strategies for Sociolegal Research Impact: Lessons from Research Aimed at Making Hate Crime Visible” (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387479 (2019-08-06).

121 Goodall (n 14) 230; Mason (n 7) 78.

122 Goodall (n 14) 237-238; Duff and Marshall “Criminalizing Hate?” 2015 Research Paper No. 15-34 *Legal Studies Research Paper Series* 17.

the crime's existence and its specific elements.¹²³ The crime is therefore more likely to be used by prosecutors.

However, this model has its limits. The first is that can be extremely difficult to prove hate or prejudice. The position is worse where the offender is actually "motivated" by prejudice, but does not reveal hostility when committing the offence.¹²⁴ This makes it more difficult to secure a conviction and prosecutors may be reluctant to proceed with tough cases.¹²⁵ The "demonstrates hostility or prejudice" requirement is often added to hate-crime laws to overcome the problem. Although criticised for introducing an objective intent requirement,¹²⁶ the reality is that most successful prosecutions for hate crimes occur when there is evidence that the crime was accompanied by "hateful" conduct or words (the outward manifestations) during the commission of the crime.¹²⁷

The second disadvantage is that the wide variety of language used for the hate threshold in the various formulations of the offence is argued to undermine the hate-crime construct and to create vagueness.¹²⁸ A counter-critique is that the inclusion of terms such as "hostility", "prejudice" and "bias" highlights that hate crimes are not caused by hate *per se*,¹²⁹ but as a consequence of structural hierarchies of inequality and prejudice (linking to Perry's hate-crime construct).¹³⁰ Thus, the broader hate threshold is valuable because it acknowledges that hate-crime victims are regularly targeted, not because they are hated, but because they are regarded as being vulnerable or "different" with "outsider status".¹³¹ In fact, research shows that there is little evidence of actual hate in most recorded hate crimes.¹³² So, a definition that insists upon "hate" excludes a high percentage of offences motivated by bias or prejudice. Thus, the term "bias crime", rather than "hate crime", has become common.

123 Goodall and Walters (n 25) 34. This can increase the likelihood of these offences being used in practice. Hate crime data is also easier to collect.

124 It is clear that expressing prejudice or hatred during the course of an offence is not "incidental". This is an integral aspect of the offence and aggravates the harm. For this reason, the "demonstrates hostility" requirement is practically very attractive.

125 ODIHR (n 5) 35-36.

126 Malik "'Racist crime': Racially aggravated offences in the Crime and Disorder Act 1998 Part II" 1999 *Modern Law Review* 409-424.

127 Goodall and Walters (n 25) set this out in their comprehensive report of hate crime laws in the Commonwealth. An analysis of the cases involved falls beyond the scope of this chapter.

128 See generally Mason (n 32 (2014)) 299.

129 In *R v Keegstra* 1990 3 SCR 697 777, the Supreme Court of Canada famously defined hate (in the context of hate speech) as an "emotion of an intense and extreme nature", which implies that members of the specified group are to be "despised, scorned, denied respect and made subject to ill treatment". This definition has become trite in both international and domestic law.

130 Mason (n 32 (2014)) 304-305.

131 Garland (n 34) 27; Brax (n 87) 233-234.

132 McDevitt et al (n 46).

Finally, it is necessary to consider the merits of the hybrid model. Given that this type of law encompasses aspects of the various hate-crime models, only the distinguishing factors are mentioned. Goodall and Walters argue that the hybrid model seems to offer an effective working solution for the regulation of hate crimes.¹³³ Positives include the elimination of a dual system of sentence enhancement laws and specific substantive offences, as occurs in countries such as the UK. This approach is easier to manage, for police and prosecutors, and is less complex. Moreover, because the hate element is specifically recorded, statistics and data can be collected and monitored. A negative is that because “no new substantive offences are specifically created it is less likely that higher sentencing maxima can be set. This means that although the courts are expected to enhance the sentence, they can only sentence up to the maximum which is set for the basic offence”.¹³⁴ The result is that the law’s symbolic effect could be minimised. However, when coupled with the more fundamental criticisms discussed above, this critique is not significant.

2.8 APPLIED TO THE HATE OFFENCE IN THE HATE BILL

As indicated earlier, South Africa’s Hate Bill uses the hybrid model for hate crimes.¹³⁵ Clause 3 of the Bill defines a hate crime as *any* existing offence where the offender is motivated by prejudice or intolerance towards the victim of the crime on a protected ground. It is clear that the drafters have favoured the *animus* model encompassing prejudice, as opposed to the higher hatred-threshold. There are three main benefits to this approach. Firstly, the *animus* model emphasises blameworthiness and enhances the symbolic value of the law. Secondly, the focus on prejudice and intolerance, instead of hate, reflects the reality that victims are often targeted because of bias and structural prejudices. Thirdly, the creation of a substantive hate offence, in a specifically named law (albeit as a general offence), indicates to victims and perpetrators that the state regards criminal conduct committed on the grounds of group-based prejudice as a serious matter deserving of the law’s intervention.¹³⁶

A challenge, however, is that the drafters have relied upon the subjective *animus* test, which is likely to impact upon successful prosecutions. It is recommended that the objective “demonstrates prejudice” test be considered. As explained earlier, and despite some misgivings, this approach has many benefits. For example, in Scotland, which also uses a hybrid model and where the government has conducted an extensive review of the existing hate-crime laws, the recommendation is that the offences should be reworded to include “the demonstration of hostility” requirement.

¹³³ Goodall and Walters (n 25) 31.

¹³⁴ Goodall and Walters (n 25) 31.

¹³⁵ The SAHRC (n 5) has criticised the drafters for not making their intention concerning a new substantive offence clear. However, upon detailed analysis, this critique appears misplaced.

¹³⁶ The advantage, however, is undermined by the coupling of hate crimes and hate speech in one piece of legislation.

The reasoning is that this approach works in practice and also “highlights the context of that offending behaviour”.¹³⁷

Another problem is that the Hate Bill drafters have not made use of the phrase “in whole or in part” which may cause difficulties when there is evidence of a number of motivating factors for the crime.

Turning to sentence, the drafters have stipulated that for (i) damage to property; or (ii) physical, or other injury; or (iii) loss of income or support, suffered by the victim as a result of the offence, the court must “regard the fact that the person has been convicted of a hate crime as an aggravating circumstance”. It is clear that sentence enhancement is contemplated. The broad conception of harm to the victim, including economic harm, is welcomed. The wording of the provision, however, is complicated and difficult for the layman to understand.¹³⁸ This is exacerbated by the fact that clause 3(1) of the Bill provides that a hate crime is an offence under “any law”, yet the Schedule to the Bill refers specifically only to the crimes of murder, rape, robbery and housebreaking which are subject to the minimum sentencing provisions of the 1997 Criminal Procedure Amendment Act. The question is whether only these crimes are capable of becoming hate crimes, as opposed to a crime under “any law”. It appears, however, that the drafters intended that any offence committed on the basis of group prejudice can be aggravated and that the Schedule only relates to amendments of current legislation.¹³⁹

Finally, a positive aspect of the Hate Bill is the recognition that the mere enactment of legislative offence will not overcome the hate-crime problem in South Africa. To this end, although refinements are necessary,¹⁴⁰ the drafters are commended for inserting provisions requiring that hate-crime data be recorded and collected and that educative measures be implemented. The result is that the creation of the hate offence is coupled with the implementation of justice interventions to monitor and prevent hate crime.

2.9 CONCLUSION

The successful implementation and reception of South Africa’s proposed hate-crime legislative framework requires that the law be aligned with the normative principles underlying hate crimes as a socio-legal construct and the rationales justifying hate-crime regulation, specifically the retributive and symbolic functions

137 See Scotland’s Final Review (n 67).

138 See HCWG Comment (n 31).

139 Reference is made to cl 11: “The laws referred to in the second column of the Schedule are hereby amended to the extent indicated in the third column of the Schedule.” It seems that this means that “without taking away from the general provisions in the Act, the Schedule adds further amendments to existing legislation, where that was considered necessary”. The author is indebted to Professors Naidoo and Terblanche of UNISA who provided emailed clarity on this point.

140 HCWG Comment (n 31).

of hate-crime laws. The reality is that the mere enactment of hate-crime legislation will not eradicate criminal behaviour motivated by prejudice. People also need to understand the meaning of the hate-crime concept and a principled criminal justice response must be implemented. Clear and precise hate-crime legislation is needed to enhance the law's effectiveness, increase awareness of hate crime, and to give victims the assurance that the law will protect them.

The Hate Bill makes use of the broader hate threshold (incorporating prejudice) in conjunction with the *animus* hate-crime model and couples this with sentence enhancement for offenders. Instead of enacting additional substantive offences with new enhanced sentences, the Bill provides that any ordinary crime can be aggravated by hate both in law and during sentencing. In this way, the Bill utilises the benefits of the penalty enhancement model, creating a less complex system and one which is easier to understand and implement, but with the important refinement that the offence be recorded as a hate crime.

Moreover, on the whole, the wording of the offence in clause 3 of the Bill is sound. The inevitable criticism that the use of the *animus* model permits the inclusion of motive as an element of the offence has been shown to be an unsubstantiated and clichéd argument. To the contrary, the advantage of incorporating *animus* as an element of the offence ensures that the prohibited bias motive, a key aspect of the essence of hate crimes, is specifically labelled and condemned. In so doing, the Bill serves as a denunciation of criminal conduct motivated by group bias, with the law reflecting the need to protect vulnerable victim groups in society. Going forward, the drafters are advised nonetheless to consider extending the *animus* required to include the objective “demonstrates prejudice” requirement. The drafters are also urged to legislate hate crimes and the criminalisation of hate speech separately, because the definition of a hate speech offence is an extremely complicated matter, and one which is likely to cause unnecessary legislative delays.

Finally, government is urged to finalise the hate-crime project, which is long overdue, and to ensure that adequate state resources are employed to ensure the effective implementation of the legislative framework. Government must accept that hate crimes cause considerable harm to the victims and undermine the constitutional mandate. Indeed, as Walters and Kay Goodall have recently commented, the failure of many countries to regulate hate crimes constitutes “one of the key human rights issues of our time”.¹⁴¹

141 See (n 25).