

# HATE SPEECH AND BINARY EXCLUSIONS IN EUROPE: A DIGITAL AND COMMUNICATIVE APPROACH\*

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**Abstract:** Hate speech targeting homosexuals, transgender people and other sexual orientations, as well as gender identities that deviate from the prevailing traditional binary system pervades social networks and digital communication channels. As a result, it is causing the exclusion of these groups, which often opt for invisibility in order to survive. Freedom of expression is an essential and preferential right in Western democratic systems. Based on this premise, this paper delves into the European legal and jurisprudential framework on hate speech –especially, acts of transphobia, homophobia and violence based on sexual orientation and gender identity– as a limit to freedom of expression, when other fundamental values, such as dignity, are at stake. Based on an analysis of the main normative instruments that have attempted to define the concept, as well as recent case law on hate speech, the aim of this article is to outline a consensus and to establish stable parameters to configure a legal response –valid in the European context– to cases of homophobic or transphobic speech.

**Keywords:** Hate speech, freedom of speech, dignity, binarism, transphobia, homophobia, social networks, digital communication.

**Summary:** 1. PRELIMINARY CONSIDERATIONS: TOLERANCE, SPEECH AND DISCRIMINATION IN A RIGHTS FRAMEWORK. 2. HATE ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY: EXPLORING THE DISCOURSE ON SOCIAL NETWORKS. 2.1. Homophobia, transphobia and LGBTI-phobia: a brief semantic approach. 2.2. Sexual orientation and identities: myths, ignorance and prejudice in the *era of digital communication*. 3. HATE SPEECH AS A LIMIT TO FREE SPEECH: THE EUROPEAN PARADIGM. 3.1. What is hate speech? Concept and weighting criteria. 3.2. Hate speech on the basis of sexual orientation or gender identity: vulnerable groups. 4. HATE SPEECH AGAINST SEXUAL MINORITIES AND THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS. 4.1. ECtHR judgment of the 9th of February 2012, the case of *Vejdeland and others v. Sweden*. 4.2. ECtHR judgment of the 14th of January 2020, the case of *Beizaras and Levickas v. Lithuania*. 5. CLOSING THOUGHTS: CHALLENGES AND OPPORTUNITIES IN THE *DIGITAL ERA*.

## 1. PRELIMINARY CONSIDERATIONS: TOLERANCE, SPEECH AND DISCRIMINATION IN A RIGHTS FRAMEWORK

“Dawn of the 28<sup>th</sup> of June 1969. The usual clients of the Stonewall Inn –a darkened bar of the New York mafia, located in the west of Manhattan– rise up against the police raids, with a brickbat. Each projectile, a piece of a memory. The Stonewall Inn was one of the few venues where queers were allowed in. Lesbians, drag queens, trans youth and sex workers turned the premises into a night-time haven. The peace never lasted too long” (Mauri, 2020). It was not an isolated event; raids and assaults for corrective purposes were frequent.

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\*Article published as part of the Grant I+D+i (PID2019-107025RB-I00) *Ciudadanía sexuada e identidades no binarias: de la no discriminación a la integración ciudadana* / Sexed citizenship and non-binary identities: from non discrimination to citizenship integration (Binasex), funded by MCIN/AEI/10.13039/501100011033. Some ideas developed in this paper have been previously discussed in a recent publication (Galdámez Morales, 2022).  
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Nowadays, as seen from a distance, it might seem that the episode –recounted with these words in a recent publication– is far behind us<sup>1</sup>; that the violence is anecdotal and that the actual reality is different. But the blows have only changed shape. Today the battle of identities is discursive and fought on social networks. Every tweet –every tag– reinforces a myth, reproduces a prejudice or consolidates a representation. Hatred towards difference –that which does not fit into our normative society and the structures that order it<sup>2</sup>– is often trivialised in this new infinite communicative space that is the digital stage, paving the way to words that synthesise the discourse of hate, exclusion and fear; that which erects the walls of language and turns the world into a more “divided and dangerous” place. According to Amnesty International, 2016 was a year marked by the “cynical use of rhetoric”<sup>3</sup> aimed at specific groups of people. Five years have since passed and the situation has not improved. New virtual communication channels are the perfect vehicle for transmitting messages that then expand on a global scale and perpetuate the endemic discrimination that is present in a society that is already steeped in –and divided by– classic structures that favour the consolidation of a predominant binary system of gender, a system that excludes those that intend to distance themselves from the established canons. Frequently, and more often than we might think, this exclusion turns into aggression, through a discourse that goes viral, promoting rejection and violence on the basis, simply, of sexual orientation or gender identity.

We all know –and I am aware of how obvious this is– that humans are social beings; we need to develop within a society and, in that regard, we do so through interactions between subjects; in short, communication is key. A society cannot sustain itself if it does not rest on the pillar of tolerance. John Locke himself stated it in his Letter<sup>4</sup> to those who professed a different religion –as faith cannot be imposed– and we can now translate this to the realm of discursive aggressions that are made on the basis of sexual and gender identity. However, if we approach discrimination from the starting point of tolerance, as a cardinal element of all democratic societies, we still cannot overlook the fact that it is an absolute value (Spigno, 2017: 182); “unlimited tolerance leads to the disappearance of tolerance itself and, as a result, the destruction of society” (Popper, 2011), which is why its limits can be found in the extent to which it can be confronted; colliding with another pillar of a democratic system: the right to free speech.

This is a freedom which encompasses many components –which, as such, must be guaranteed– and that is placed, in western systems, as a backbone of democracy<sup>5</sup>. It is of course necessary for the creation of the free public opinion, which in turn sustains

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<sup>1</sup> However, it is brought back to the present in the testimonies of those who lived it, such as Donoso (2010) and Feinberg (2003), amongst others.

<sup>2</sup> It is not in vain that “the patriarchal masculine thought has placed ethics at the core of the value of the law and of justice” (Vázquez García and Sánchez Fernández, 2017: 27).

<sup>3</sup> “The situation of human rights in the world. Annual report 2016/17”, Amnesty International [online]: <https://www.amnesty.org/es/latest/news/2017/02/amnesty-international-annual-report-201617/> [Accessed: 09/02/2021].

<sup>4</sup> “It is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the world” (Locke, 1689).

<sup>5</sup> In the renowned *Handyside* judgement, the ECtHR contends that freedom of speech not only safeguards those messages or discourses that are inoffensive or well-received, but “also those that shock, worry or offend”. See judgement of the ECtHR in the case of *Handyside v. United Kingdom*, December 7 1976, § 49.

the bedrocks of all processes of legitimation<sup>6</sup>. However, it is through the communication and transmission of messages –opinions, ideologies and value judgments– that together we build our imaginary; consolidating structures and social patterns, prejudices and stereotypes that often segregate, exclude and perpetuate the existing discrimination, which means that the dignity of a person, as a legal asset that should be protected, is shattered.

In the face of these expressions of hatred, respect for diversity –as is stated in the UNESCO Declaration on Tolerance<sup>7</sup>– is also a guarantee of freedom on which to base the establishment of limits, which are necessary in order to harmonise the exercise of freedom of speech with other constitutionally protected legal assets, such as dignity. These legal goods are the ones used by Professor Jeremy Waldron to justify that the regulation of hate speech is possible within the legitimate margins of freedom of speech (Waldron, 2012: 11 ff.). He represents, in the American context, the minority voice that counters the predominant classical liberal position. He denies the absolute and unlimited character of these freedoms, considering that such an affirmation would imply the impossibility of guaranteeing these other rights with which they could collide<sup>8</sup>.

In the opposite corner are those who defend freedom of speech from the point of view of its practice in complete autonomy by those who express themselves, within a protected marketplace of ideas<sup>9</sup> in which any kind of discourse is allowed, regardless of its content. This implies a duty of abstention from the State and, at the same time, of acceptance of the principle of self-regulation of the public space in which, they claim, the weight of the argumentation and the debate itself are the determining factors that will foster the inevitable withdrawal of these messages from the public space. In line with this school of thought we can highlight the Rawlsian idea that the freedom of speech of those who are intolerant should only be restricted when it poses a threat to the security of institutions, or when it impedes institutions from operating effectively (Rawls, 1996, 2002). For the American philosopher, these *basic liberties* can only be restricted by other basic liberties. Thus, freedom of speech cannot be encroached upon by aggregative considerations, nor can it be restricted by other rights that are not basic liberties (Rawls, 1979: 82-83). Meanwhile, Dworkin –another exponent of the discussion in the United States– considers that restrictions in speech are only admissible in extreme cases where they directly incite violence (Dworkin, 1996: 218-225).

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<sup>6</sup>. On the concept of public opinion, amongst others: judgement of the Spanish Constitutional Court of STC 6/1981, of 16 March; STC 159/1986, of 16 December.

<sup>7</sup>. Declaration of Principles on Tolerance, proclaimed and signed in the 28th meeting of the UNESCO General Conference, on November 16, 1995.

<sup>8</sup>. The foundations of the restrictions are based, in the eyes of the author, on two pillars: on the one hand, the recognition of a kind of public good of inclusion or trust that is a part of social diversity and that would be undermined by hate speech; and, on the other hand, the dignity of minorities that are targeted by this speech: “Hate Speech is speech, no doubt; but not all forms of speech or expression are licit, even in America, and we need to understand why there might be a particular problem with restricting speech of this kind” (Waldron, 2012: 14).

<sup>9</sup>. The *marketplace of ideas*, a concept first used by judge Holmes, in his dissident vote in the judgement in the case of *Abrams v. United States (1919)*.

As we know, in the framework of the debate regarding the limits to freedom of speech against hate speech, “the standards are not clear, and even less so, peaceful” (Valero Heredia, 2017: 285). Two theoretical models have traditionally been distinguished and which, in parallel, have shaped doctrinal constructions with differing legal consequences. Indeed, the cultural and political tradition of liberalism<sup>10</sup> presents the paradigm of tolerating intolerance; a narrative that exists alongside other models in democracy, built on the ideal on which contractual theories are based<sup>11</sup>. These theories are focused on the common good based on shared judgments: values and principles that are not attached to doctrine, which are the basis of the ethical premises that should delimit the structure of the political debate. From this second perspective –rooted in the European continent– some discourses should not even enter the marketplace of ideas; those that impinge on the pillars on which democracy is founded: human dignity and the development of personality.

First coined by the Supreme Court of the United States, the term *hate speech* has been defined by the Council of Europe as “any form of expression that spreads, incites, promotes or justifies racial hatred, xenophobia, antisemitism and other forms of hatred based on intolerance”<sup>12</sup>. It is the type of language that uses discriminatory vocabulary to degrade, intimidate or incite violence against a distinct group, whether it be on the basis of race, sex, religion, or any other personal or social circumstance (Weber, 2009: 3-5). This inevitably leads us to a debate about the convenience, or lack thereof, of imposing limits on its exercise. The same classical debate regains its meaning when, at the height of the *Society of Information*, digital channels and tools of mass broadcasting can multiply the visibility of certain extreme messages which –it was assumed– would have stay cornered as an outcome of the debate itself (Boix Palop, 2016: 61). This has not been the case. Hate speech against homosexual and transsexual individuals and groups, or those of different sexual and gender identities, has arisen and now travels through social networks, leading to the marginalisation of these groups who –all too often– choose to remain invisible in order to survive. In this regard, it becomes necessary to study and analyse –from the perspective of Constitutional Law, although necessarily complemented with some elements derived from the criminal approach– the different discourses which, in some cases, are found to be closely linked to acts of transphobia, homophobia and violence on the basis of sexual orientation and gender identity. Furthermore, this should be done without neglecting the essential nature and central role played by freedom of speech in western democracies, despite the fact that it cannot serve as an excuse or a shield for those who promote hate and intolerance.

The article deals with a complex subject matter: it focuses on discrimination based on specific grounds, but it does so on the basis of a necessarily broad conceptual apparatus – anti-discrimination law and communication rights–, in an equally complex communicative

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<sup>10</sup> A theoretical standpoint rooted in the postulates of John Stuart Mill. According to him, silencing the expression of an opinion is an evil that affects all of humanity, for two reasons: if it is a truthful opinion, it misses the opportunity to change error for truth; and, if it is not, it impedes the clearer perception of truth that would have been produced by its collision with said error (Mill, 1984).

<sup>11</sup> Locke’s political theory is a good example of the liberal-rooted contractual tradition which defends the thesis that the limits in exercising power emanate from subjective rights that individuals possess by nature. In this regard, see Locke (1991).

<sup>12</sup> Recommendation no. 97 of the Committee of Ministers of the Council of Europe, 30 October 1997.

context –the digital one– which develops in a multilevel legal framework that is also extensive and complicated. It is certainly a challenge. It is, without a doubt, a complex debate that deserves an in-depth inquiry, starting from the convergence of the different elements at stake: the actors that take part in the communication; the minorities that are neglected or discriminated against; the content of the messages –an objective element– and the criteria that allow us to difference between hate speech and hate crime; as well as the channel or vehicle of transmission –along with its ramifications– of said speech.

What is hate speech? What discursive realities does the concept encompass? Should we tolerate hate speech targeted at identities that stray from the predominant binary system of gender? These questions are addressed in this work, from a Spanish and European normative and jurisprudential framework that frames the idea of hate speech as a possible limit to free speech. Particular attention will be paid to homophobic and transphobic speech, as well as the difficulties of reaching a consensus and establishing stable parameters of response (Valero Heredia, 2017: 287-88).

## **2. HATE ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY: EXPLORING THE DISCOURSE ON SOCIAL NETWORKS**

This is a problematic concept; hatred “refers to subjective and emotional considerations that are difficult to legally categorise” (Salazar Benítez and Giacomelli, 2016: 131), and this then complicates the task of systematising its presence on the communication scene. In order to define the object of this work –which is focussed on hate speech on the basis of sexual orientation or gender identity– we will, firstly, turn our attention to the different shapes that this speech can take.

Social networks represent the perfect channel for the construction and subsequent transmission of discursive narratives which, often, are centred around particular prejudices related to different sexual orientations or gender identities, and which are directly linked to a rejection of homosexuality and transsexuality (Rodríguez Lorenzo, 2020). In this regard, it becomes useful to begin by identifying the main phobias –the definition of which should also be clarified– that are configured on the basis of pre-existing myths and judgments, inasmuch as they are found at the origin of the most typical acts of extreme speech.

### **2.1. Homophobia, transphobia and LGBTI-phobia: a brief semantic approach**

As in other similar debates, we can start from a “determinate construct of gender”, from a “determinate view of people as being a part of a socio-legal community” (Rodríguez Ruiz, 2012: 50). The psychologist George Weinberg was the first to use the term *homophobia*<sup>13</sup> at the start of the seventies (Weinberg, 1972) to refer to “heterosexuals whose behaviour denotes a profound aversion to homosexuality; irrational fear, hatred and intolerance of those whose sexual orientation is other than heterosexual”<sup>14</sup>. Inasmuch as it

<sup>13</sup> Later coined by K.T. Smith.

<sup>14</sup> Guide on LGBTI hate crimes, Ed. Department of Equality, Social Policies and Reconciliation. Government of Andalucía. (*Guía de delitos de odio LGTBI, Ed. Consejería de Igualdad, Políticas Sociales y Conciliación*. Junta de Andalucía.)

involves a discriminatory attitude targeted towards another person for being a homosexual, it also affects lesbian women. However, in these cases the term *lesbophobia* (Viñuales, 2002) is preferred, as it is more specific and sensitive to multiple discriminations: for being a woman and for being lesbian.

Over time, the tendency has been to expand the definition of the concept. In the *Resolution on homophobia in Europe*<sup>15</sup>, this term is defined as an “irrational fear of and aversion to homosexuality and to lesbian, gay, bisexual and transgender (LGBT) people based on prejudice and similar to racism, xenophobia, anti-semitism and sexism”; a definition that is comparable to *LGBTI-phobia* which includes, generally speaking, a rejection of all diverse identities: lesbian, gay, bisexual, transexual, intersex, etc.

As for transphobia, considered to be an extension of homophobia<sup>16</sup>, it is defined as the rejection suffered by transexual people based on their transgression of the socially established system of sex/gender. Some authors place its origin in oppositional sexism (Serano, 2020), that is, the belief that the categories of masculine and feminine are rigid and mutually exclusive, with different attributes that prevent them from overlapping. This contrasts with traditional sexism, which is based on the belief of the superiority of what is masculine.

These are some of the most common *phobias* that sexual minorities suffer from, and that can take on different forms<sup>17</sup> of rejection and discrimination: persecution, physical or psychological violence, torture, unjustified restriction of their rights or verbal violence—of interest to us here—that is, discursive aggressions that reproduce myths and prejudices that are inherent to our collective imaginary and difficult to eradicate.

## 2.2. Sexual orientation and identities: myths, ignorance and prejudice in the era of digital communication

“Homosexuality is not natural”; “it is an illness and, with adequate treatment, can be cured”; “to be transexual is comparable to cross-dressing”. The examples are many: false myths and preconceived notions that are accepted, whether it be because of ignorance—in some cases— or because they are based on a particular ideological postulate, in the framework of the conventional heteronormative paradigm. In any case, it is a hatred that has been around for a long time and that, historically, has been reinforced and justified by the Law (Spigno, 2017: 188 ff.)

Homosexuality was forbidden—and criminalised— until the mid-twentieth century, at which point the trend began to reverse<sup>18</sup>, leading to a diametrically opposed phase, characterised by its recognition, the alignment of rights and the legal protection of said

<sup>15</sup> Resolution of the European Parliament on homophobia in Europe, 18 January 2006.

<sup>16</sup> The origin of the rejection can be found in the defiance of binary gender roles (Norton, 1997).

<sup>17</sup> Resolution of the European Parliament on homophobia in Europe, 18 January 2006. Consideration B.

<sup>18</sup> In the Western world.

*sexual minorities*<sup>19</sup>. Before this point of inflection, the determining factors used to justify this repression were morality and the dogmas of religion and science. In the second half of the nineteenth century, medicine and scientific debate contributed to providing *data* and results –the outcome of research– to endorse the stigma (Tardieu, 1857). Thus, homosexuals were considered mentally ill, and were offered therapies such as sterilisation or castration (Foucault, 2008). They displayed a *deviant behaviour* and a sign of *weakness* which endangered the preservation of the purity of the Aryan race. These were the arguments used to justify the Nazi strategy of persecuting and exterminating homosexuals in Germany (Pretzel, 2003).

In Europe, the gradual –and indeed slow– process of decriminalisation began timidly after the Second World War, in parallel with the depathologisation of these behaviours. Until its update in 1993, the WHO’s International Statistical Classification of Diseases and Related Health Problems (ICD) still considered homosexuality as an illness, categorised as a behavioural disorder. This was despite the fact that, in 1973, it had been removed from the list of disorders in the “Sexual deviations” section of the second edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-II). As for transsexuality, this milestone is surprisingly recent: the World Health Organisation removed transsexuality from its list of mental disorders in the ICD in July 2018, when it joined the section titled “Conditions related to sexual health”.

The journey to this development<sup>20</sup>, that some authors describe as “revolutionary”, has been –and continues to be– “slow, but steady” (Spigno, 2017: 192). It is true that criminal repression has been widely overturned, with some exceptions. However, a sentiment of social rejection is still latent –due to centuries of stigmatisation– which leads to, in far too many occasions, episodes of violence and hate. When this hate is manifested through the use of words and rhetoric, taking the shape of speech targeted at specific discriminated or vulnerable groups, it becomes fitting to ask: to what extent does this discourse fit under the umbrella of freedom of speech, and should it therefore be protected? In which cases, and according to which criteria, should hate speech limit the exercise of this fundamental right? (Teruel Lozano, 2017).

The first transgender Miss Spain, Ángela Ponce –also the first to compete for the title of Miss Universe– has recently been the target of ridicule and several offensive messages on social networks, despite being considered a reference point and despite the importance of her feat in promoting the visibility of the *trans* community (Amo, 2018). Images of her appearance in the competition have been used to create a meme referring to the size of her genitals. What is troubling and what should be the focus of our attention is the content of these messages; we could debate –based on the specific case at hand– whether we consider them instances of hate speech or mere jokes; but it is also important

<sup>19</sup> However, despite notable progress, 70 countries in the world still criminalise homosexual acts.

<sup>20</sup> Rodríguez Ruiz’s reflection on the subject is interesting. He considers the evolution of the family as a model of social organisation and which we can, by extension, translate to a new open-minded view with regards to the different sexual orientations and gender identities (Rodríguez Ruiz, 2011: 70-72).

that we pay attention to, albeit briefly, another element of the communication which, in recent times, has become a determining factor: the channel of communication; the medium through which the discriminatory, and at times hateful, content is disseminated.

Without seeking to be exhaustive –and aware of the number of doctrinal contributions that already exist on the effects of digital communication– allow me to simply note the defining characteristics of the new technological framework which, when addressing freedom of expression, oblige us to redefine the normative framework and the limits we apply to the exercise of this right (Rodríguez-Izquierdo Serrano, 2015: 151). Because, while hate speech is mainly a matter of content, with at its core the subjective element and the intent to discriminate against a particular community or social group, the legal treatment of this right cannot be the same when the medium changes; even more so when we use a channel that is tremendously invasive, and which places the recipient in an especially vulnerable position.

In any communication there is discourse–content and attributions of meaning–but also other elements: actors –subjects that take part in the communication– and channels of transmission, from which certain consequences arise. Internet, or communication in the digital era, entails a new model and paradigm of communication in which content acquires the capacity for mass diffusion (Boix Palop, 2016: 55-112). Messages that are broadcast on social networks can potentially go viral from the moment they are published, thanks to the emergence of platforms that enable the virtual contact between people and the flow of information. Content reaches even further and with a higher survival rate. Messages that are spread remain permanently stored in databases and digital archives of servers, except when we act to counter this; and this becomes especially dangerous when dealing with hate speech or discriminatory content which, in certain cases, can incite violence. This content is openly available and universally accessible for all those who have access to technology; from anywhere in the world, anyone can send or receive information, which blurs the dividing line between the creators and addressees of these messages.

The spectrum of possible subjects is now broader: until recently, the main characters were mainstream media –journalists and information professionals– on the one hand, and the recipients of said information –readers, listeners and viewers– on the other. This classic framework is complicated by the new digital platforms and broadcasting channels<sup>21</sup> (Balkin, 2018) –acting as disseminators of content– as well as ordinary citizens who can emit content through their profiles on social networks.

With such a broad casuistry, and considering the need to analyse –and resolve– each specific case based on its particular circumstances, it becomes practically impossible to establish a general solution for the constitutional deliberation of cases of hate speech. However, what we could do is extract certain common notes and unfluctuating criteria, which would be susceptible to standardisation. These could then be used with the aim of

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<sup>21</sup>. Platforms such as for-profit tech companies with stakes in the matter, but which are nonetheless granted increasing responsibility as “intervening guarantors in the management of content” (Serrano, 2019). In this regard, see also Cotino Hueso (2017).



configuring a legal response –which would be valid in the European context– to cases of homophobic or transphobic speech. In this regard, the following sections address the main normative instruments that have attempted to define the concept, as well as the recent jurisprudence in the field of hate speech on the basis of sexual orientation or gender identity.

### **3. HATE SPEECH AS A LIMIT TO FREE SPEECH: THE EUROPEAN PARADIGM**

#### **3.1. What is hate speech? Concept and weighting criteria**

We often use the phrase hate speech<sup>22</sup> to refer to actions or messages which are reprehensible due to their discriminatory or offensive meaning, and whose nature can widely vary. These events can have little to do with one another, other than being clear displays of the projection of hate towards a particular group or community. Indeed, the term has been used to label behaviours ranging from the burning of crosses in majority Black neighbourhoods<sup>23</sup>, the distribution of pamphlets with homophobic content in a secondary school<sup>24</sup>, the denial of the Jewish Holocaust<sup>25</sup> or of the extermination of the Tutsis in Rwanda (Lair, 2003). Therefore, delimiting a definition, although widely sought after, is by no means an easy task.

The phrase was coined by the Supreme Court of the United States of America, from where it has been exported to the rest of the world. In the realm of the Council of Europe –the relevant context of this work– Recommendation no. 97 of the Committee of Ministers of the Council of Europe, adopted on the 30th of October 1997, delineates the category of hate speech as:

“all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.

It would appear that the key element is the manifestation of a feeling of intolerance and hatred, regardless of the form the message adopts, of its origin or of the motive of the discrimination (Teruel Lozano, 2017: 86) –racism, xenophobia, antisemitism, nationalism...–. This is the definition that the ECtHR has endorsed and now applies

<sup>22</sup> The academic debate around the delimitation of the concept is very intense. Alcácer Guirao (2020) provides a complete overview.

<sup>23</sup> Acts of intimidation carried out by members of the Ku Klux Klan, a right-wing extremist group created in the United States in around 1866, which professes segregationist ideas (Klanwatch Project, 2011: 46).

<sup>24</sup> ECtHR, *Vejdeland and others v. Sweden*, 9 February 2012. We will examine the arguments of the Court in this case in more detail hereafter.

<sup>25</sup> Holocaust negationism is that which, under a scientific guise, openly negates the existence of the Nazi Holocaust, or relativises it, reducing the number of victims of the extermination and minimising its effect. Henry Rousso –see *Le syndrome de Vichy (1987)*– was the first to use this term to distinguish it from historical revisionism a way to re-interpret history on the basis of the analysis of new sources (Teruel Lozano, 2015; Vidal-Naquet, 1994).

as the valid limit to the exercise of freedom of speech –bearing in mind that this right also safeguards those displays that “shock, worry or offend the State or any fraction of its population”<sup>26</sup>– through two clearly defined avenues of prosecution (Valero Heredia, 2017: 289).

In some cases, the Court resorts to the abuse of rights clause –Article 17 of the ECHR<sup>27</sup>–, which deprives this type of speech of protection –without analysing its content and circumstances– when it contravenes the fundamental principles and values of the Convention itself<sup>28</sup>. The aim is to protect democracy and the constitutional order that arose after the Second World War (García Roca, 2009). In other cases, the Strasbourg Court has opted for the method of weighting in light of Article 10 of the ECHR<sup>29</sup> –freedom of speech– the second section of which contains the reasons for limiting the exercise of this right, through the laws of a State; reasons among which homophobic/transphobic speech is not expressly found. This balancing broadly responds to the conjunction of three criteria: a) the proportionality of the interference with the right to free speech in relation to the legitimate aim pursued by its restriction; b) the legal provision of said interference; and c) the need to withstand it within a democratic society.

Despite the existence of this double criterion, the current tendency is to apply the second way: the balancing test. The main consequence, linked to the necessarily casuistic nature of weighting, is that the task of reaching stable parameters for the establishment of limits becoming more difficult (Valero Heredia, 2017: 288). Constitutional weighing offers a solution applicable to the specific case, not a general answer to all conflicts.

On the other hand, it is important to differentiate this category of hate speech from those messages that could be classified as hateful speech. These are speeches which, although they may be annoying or offensive, are not sufficiently serious to constitute a limit to the exercise of freedom of expression; they are, therefore, protected by this right. It is true that it cannot be limited or censored such content by means of repression, but it is possible –and even advisable– to explore other types of preventive measures aimed at reducing the general volume of hatred in the communicative context. This idea will be examined in further detail later.

<sup>26</sup> ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, *op cit.*, § 49.

<sup>27</sup> ECHR, Article 17. Prohibition of abuse of rights. “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

<sup>28</sup> ECtHR, *Dieudonné M’Bala M’Bala v. Francia*, 20 October 2015.

<sup>29</sup> ECHR, Article 10. “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

### 3.2. Hate speech on the basis of sexual orientation or gender identity: vulnerable groups

Over the past years, the arguments of the ECtHR have contributed to the task of demarcating a concept whose meaning has progressively expanded. Hence, the *Annex of the Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* provides that:

“Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such “hate speech” should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court.” (Let. B, para. 6).

It is thus imposed upon States “to adopt measures to sanction any form of hate speech against sexual minorities” (Spigno, 2017: 196). This approach was recently transposed to the definition found in the *General Policy Recommendation no. 15 on combating hate speech, by the European Commission against Racism and Intolerance*, adopted on the 8th of December 2015, and which defines hate speech as:

“the use of one or more particular forms of expression—namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, *negative stereotyping, stigmatization or threat of such person or persons* and any justification of all these forms of expression— that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, *sex, gender, gender identity and sexual orientation*”.

This iteration does contain an explicit reference to “sex, gender, gender identity and sexual orientation” as possible causes for hate speech. The ECtHR propounds another definition that is closely linked to another particularly relevant concept, which is built upon historical, institutional and social factors (Presno Linera, 2019: 285): vulnerability. To the ECtHR, a vulnerable group is defined as:

[Any] “minority or group suffering from historical oppression or inequality, or which faces deeply rooted prejudice, hostility or discrimination, or that is vulnerable for any other reason, and which therefore, *can require a greater protection against attacks perpetrated through insults, ridicule or slander*”<sup>30</sup>.

<sup>30</sup> ECtHR, *Savva Terentyev v. Russia*, 28 August 2018, § 76. See also ECtHR, *Soulas and others v. France*, 10 July 2008.

This need for greater protection is the main argument used to justify that, when the message –the hate speech– targets one of these groups or communities which the ECtHR has identified as *vulnerable*, the tendency should be towards restricting the right to free speech, even though said message –an offence that could incite hate and discrimination– does not present a clear incitement to commit acts of violence. Thus:

“The incitement of hate does not necessarily require a call to such or such an act of violence, nor to another criminal act. The attacks that are committed against people that insult, ridicule or slander certain parts of the population and its specific groups, or the incitement to discrimination [...] are sufficient for the authorities to favour the fight against racist speech in the face of irresponsible freedom of speech and that impinges on dignity, including security, of these parts or groups of the population”<sup>31</sup>.

The Court of Strasbourg differs, at least in this regard, from the way the Supreme Court of the United States usually approaches this kind of case<sup>32</sup>. The ECtHR opts for the restriction of hate speech, in line with a systematic interpretation of the Universal Declaration of Human Rights. Indeed, although this text recognises in its Article 19 that everyone has the right to the freedom of speech and opinion, we know that this is not exempt from limitations; amongst others: the recognition of human dignity<sup>33</sup>; the guarantee of equal enjoyment of rights and liberties, with no distinction of race, colour or sex<sup>34</sup>; the protection against discrimination and against the incitement to discrimination<sup>35</sup>; as well as the existence of duties –the respect of the rights of others– that are inherent to the rights<sup>36</sup>.

<sup>31</sup> Amongst others, ECtHR, *Féret v. Belgium*, 16 July 2009, and ECtHR, *Vejdeland and others v. Sweden*, 9 February 2012. In this latter case –which will be further analysed in the following section– the discriminatory messages were targeted at the homosexual community.

<sup>32</sup> In the judgment 562 U.S. 443 (2011), in which the case of *Snyder v. Phelps* is resolved, the umbrella of the First Amendment protects the messages and the harangues against homosexuality that were issued during the funeral of a marine who had died in the Iraq war.

<sup>33</sup> Article 1 of the UDHR: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

<sup>34</sup> Article 2 of the UDHR: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.

<sup>35</sup> Article 7 of the UDHR: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

<sup>36</sup> Article 29 of the UDHR: “1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”

Before we move on, it is first useful to briefly clarify the difference between hate speech and hate crimes. Although it is true that a part of the doctrine places hate speech within a concrete typology of these crimes, such as the incitement to hate (Quesada Alcalá, 2015: 2), other authors emphasise the importance of the distinction between them (Rey Martínez, 2015). They consider the legal good to be protected in both cases: the legal restriction, that is the *ultima ratio*, is only possible if we oppose a criminal legal good that could be damaged by the abusive exercise of free speech.

The approach chosen in this paper –for the sake of brevity– focuses on the first concept, although necessarily complemented by some elements derived from the criminal law. Hate crimes based on sexual orientation or gender identity will be tangentially mentioned, but not developed in depth. With this objective in mind, we will now turn to examining the cases—one of which is very recent—in which the ECtHR has been able to specifically analyse hate speech against *sexual minorities*.

#### 4. HATE SPEECH AGAINST SEXUAL MINORITIES AND THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The allegory of the *free market of ideas* was formulated in the renowned dissident vote of Judge Oliver Wendell Holmes in the case of *Abrams v. United States*<sup>37</sup>, resolved by the Supreme Court of the United States in 1919. As we have seen, it is still recognised today as one of the arguments used to justify key importance of the right to free speech. This is the context in which hate speech arose, as a concept-reaction against a current that was conducive to the maelstrom of vicious messages that had neither limit nor control; the term was later imported across the ocean and took on a different –and much broader– meaning, including any incitement to discrimination, regardless of its basis in race, religion or sexual orientation<sup>38</sup>.

There are certain messages that have no place within the European paradigm of freedom of speech. As has already been mentioned: when in conflict with dignity, the impossible balance tends to lean towards the latter, protecting the people or groups – especially those considered as vulnerable– as well as the pillars and principles which underpin democracy. This has been the case in two occasions in which the ECtHR was

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<sup>37</sup> “Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. [...] But when men have realized that time has upset many fighting faiths, they may come to believe [...] that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. [...] While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe [...] Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants [250 U.S. 616, 631] making any exception to the sweeping command, ‘Congress shall make no law abridging the freedom of speech.’”

<sup>38</sup> In this regard, Jeremy Waldrom considers hate speech to be an attack on the dignity of the members of the communities being targeted, and who are deprived of their right to be individuals who are fit for life in society (Waldrom, 2012: 16).

confronted with cases dealing with homophobic/transphobic speech. It did so in 2012, in the case of *Vejdeland and others v. Sweden* –which has already been commented upon and analysed by the doctrine– and in 2020, in the case of *Beizaras and Levickas v. Lithuania*. In any case, it is worth reviewing the details of both judgments, with the aim of extracting the common arguments and criteria that allow us to attempt to identify a European response to hate speech on the basis of sexual orientation or gender identity.

#### 4.1. ECtHR judgment of the 9th of February 2012, the case of *Vejdeland and others v. Sweden*

This is the first pronouncement of the ECtHR on a case of hate speech on this basis. The applicants had been convicted –of inciting hate and violence against homosexuals, a criminal offence stated in Article 8 of the Swedish criminal code– for distributing homophobic pamphlets in a secondary school.

These pamphlets<sup>39</sup>, of which there were about one hundred, were distributed in the lockers and pigeonholes of students, and they claimed –amongst other things– that “homosexuality is a deviant sexual inclination”: “one of the main causes of HIV transmission and other sexually transmitted diseases”, with a “destructive moral consequence on the essence of Swedish society”. Moreover, they accused a group of teachers and professors in Sweden of being exceedingly tolerant of this type of behaviour, instead of abiding by their duty: warning students of its risks and consequences. To this, they added that “homosexual organisations are attempting to minimise the importance of paedophilia, and they are campaigning for their sexual deviance be legalised”.

The ECtHR considered that, although these statements do not imply a direct incitement to violence against homosexuals, they do constitute an offense that could incite hatred, which “does not necessarily involve the call to an act of violence, or other offences”<sup>40</sup>. In this regard, “the attacks that are committed against people by insulting, ridiculing or slandering specific groups of the population are sufficient for the authorities to favour the struggle against racist speech rather than a form of free speech that is exercised irresponsibly”<sup>41</sup>. This is an argument that was previously used in conflicts regarding xenophobia and racial hate<sup>42</sup>, and which was now translated to the present case to equate the legal treatment of sexual orientation to the other causes of extreme speech: “discrimination based on sexual orientation is equally as severe as that based on race, origin or colour”.

The choice was made in this case to apply the balancing test, in light of Article 10 of the ECHR, considering that the encroachment on the right to free speech of the applicants –as established by law– was proportional to the legitimate aim pursued (the protection of homosexuals), as well as necessary in a democratic society. Several matters

<sup>39</sup> Developed by an organisation known as National Youth.

<sup>40</sup> ECtHR, *Vejdeland and others v. Sweden*, 9 February 2012, *op cit.* § 54.

<sup>41</sup> *Ibid.*, § 55.

<sup>42</sup> Amongst others, *Féret v. Belgium*, 16 July 2009.

previously analysed by the Swedish Supreme Court were taken into account, such as: a) the fact that the distribution of pamphlets took place in a school which they did not have the authorisation to access; b) the distribution in students' lockers implies that they received the information without having the chance to oppose or refuse it; and c) the potential recipients were minors, and therefore "more prone to be influenced" (Presno Linera, 2019: 291).

Therefore, in this case, the Court moves away from the criterion of the direct incitement to violence, in dealing with discriminatory speech targeted at a vulnerable group or minority. However, despite this move, the judgment was the object of numerous critiques and was deemed a "lost opportunity" (Salazar Benítez and Giacomelli, 2016; Spigno, 2017). It was thus stated by judges Yudkivska and Villiger in their concurrent vote, as they lamented that the Court of Strasbourg had not taken advantage of this case to "strengthen a response to hate speech against homosexuals" (Presno Linera, 2019: 291).

#### 4.2. ECtHR judgment of the 14th of January 2020, the case of *Beizaras and Levickas v. Lithuania*

This judgment is especially relevant not only for how recent it is, but also because it marks the first time the ECtHR has faced a case of homophobic hate speech on the Internet. It occurred in 2014 after a photograph capturing a kiss shared by a gay couple unleashed a barrage of comments. The couple had posted the image on Facebook –which is accessible to the general public– with the aim of announcing their relationship. In response, they received over 800 messages, many of them containing markedly discriminatory content: "I'm going to throw up –they should be castrated or burnt; cure yourselves, jackasses– just saying"; "If you were born perverted and have this disorder, go and hide in basements and do whatever you like there, faggots. But you will not ruin our beautiful society, which was brought up by my mother and my father, where men kiss women and don't prick their skewers together. I genuinely hope that while you are walking down the street, one of you will get your head smashed in and your brain shaken up"; "these faggots have fucked up my lunch; if I was allowed to, I would shoot every single one of them"; "Scum!!!!!! Into the gas chamber with the pair of them"; "Fucking faggots burn in hell, garbage"; "Into the bonfire with those faggots..."; "Fags! Into the bonfire with those bitches!"<sup>43</sup>.

These are some of the comments that were not duly investigated by the Lithuanian public authorities –prosecutors and national courts– who refused to open a preliminary investigation. The applicants asserted that the reason for this refusal was, precisely, their sexual orientation. Indeed, as the regional court of Kaipėda noted, their public exhibition "was an attempt to deliberately irritate or scandalise those with differing opinions, or to encourage the publication of negative comments"<sup>44</sup>. The actions of the courts were justified, in writing, by the Lithuanian government, despite Article 170 of the Criminal

<sup>43</sup> ECtHR, *Beizaras and Levickas v. Lithuania*, 14 January 2020, § 10.

<sup>44</sup> *Ibid.*, § 23.

Code, which classifies as an offence any “declaration targeting a broad and unlimited group of people, which has the aim of inciting them against another group of people belonging to a community characterised by their sexual orientation”<sup>45</sup>. The government warranted that with their “eccentric behaviour”, “the intention of the couple had not been to announce the start of their relationship [...], but to unleash a public debate on the rights of the LGBT community in Lithuania”<sup>46</sup>.

When presented with these facts, the ECtHR convicted the State of Lithuania for failing to fulfil their obligation to investigate cases of possible discrimination –which extends to matters relating to sexual orientation and gender identity<sup>47</sup>– under Article 13 of the Convention. It considers that “one of the motives for refusing to initiate the previous proceedings was the courts’ disapproval of the applicants’ public display of sexual orientation”<sup>48</sup>, despite “the obligations of the State, inherent to the effective respect of privacy, as derived from Article 8 of the ECHR”<sup>49</sup>.

Regarding the potential virality of the content, the Court asserts that, “in light of its accessibility and its capacity to store and communicate enormous quantities of information, the Internet plays an important role in improving the public’s access” to content that has important repercussions<sup>50</sup>. As a result, “the publication of a single hate comment, not to mention the statements that people should be “murdered”, on the Facebook page of the first applicant was enough to be treated with the seriousness it deserved”<sup>51</sup>. Thus, the Court concludes:

“that the hateful comments including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community,”

And, secondly:

“that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants’ sexual orientation constituted incitement to hatred and violence, which confirmed that by downgrading the danger of such comments the authorities at least tolerated such comments”<sup>52</sup>.

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<sup>45</sup> *Ibid.*, § 98.

<sup>46</sup> *Ibid.*, § 92.

<sup>47</sup> See also ECtHR, *Salguiero da Silva Mouta v. Portugal*, 21 December 1999, § 28; and ECtHR, *P.V. v. Spain*, 30 November 2010, § 30.

<sup>48</sup> ECtHR, *Beizaras and Levickas v. Lithuania*, 14 January 2020, *op. cit.* § 121.

<sup>49</sup> *Ibid.*, § 110.

<sup>50</sup> ECtHR, *Magyar v. Hungary*, 2 February 2016, § 56.

<sup>51</sup> ECtHR, *Beizaras and Levickas v. Lithuania*, 14 January 2020, *op. cit.* § 127.

<sup>52</sup> *Ibid.*, § 129.



Therefore, the Court considers it proven that the applicants suffered from discrimination –in the form of hate comments and the refusal of an effective national avenue for legal recourse– based on their sexual orientation.

## 5. CLOSING THOUGHTS: CHALLENGES AND OPPORTUNITIES IN THE *DIGITAL ERA*

With a first semantic observation we realise that the term “hate speech” encloses a dichotomy; it brings together two antagonistic concepts. On the one hand is the idea of speech –the process of building discourse necessarily implies a rational and logical process of attributing meaning– whose nature lies essentially in reason. This is juxtaposed to the irrationality that underpins all feelings of hate; something we cannot logically explain and which, in principle, is at odds with the idea of speech. Hate has its roots in the depths of the subject, with no need for any kind of reason or veneer to justify it.

It appears that, through a structure of opposites, the term attempts to convey that hate can be reasonable; that hate could possibly be made attractive by the use of verbal strategies by the person who is being intolerant. However, in the words of the philosopher Adela Cortina, “those who use hate speech are convinced that, from the start, there is a relationship of structural inequality with regards to the group that supports the discourse, and we cannot state that we live in an authentic democracy if the relationship between individuals is one of structural inequality” (Cortina Orts, 2017: 10).

We can begin by acknowledging that “opinions are not harmless” (Alcácer Guirao, 2012: 28); they soak through the suit worn by society, no matter how waterproof its coat. Debate is a formidable tool to develop democratic societies: it is only through dissent and dialectical confrontation that we can achieve its essential function of shaping public opinion. As the ECtHR has often reiterated, “freedom of expression [is] applicable not only to “information” or “ideas” that [are] favourably received [...], but also to those that offended, shocked or disturbed”<sup>53</sup>. Therefore, “it is precisely when ideas are confronted with one another, when they clash or reject the established order, that free speech is most valuable”<sup>54</sup>. In this regard, the more speech resembles political –or ideological– deliberation, strictly speaking, the broader the space should be in order to allow its effective transmission. It is undeniable, if we assume this premise, that in the context of digital communication there is a higher risk that certain messages could provoke an inevitable social destabilisation, especially when their content affects those we consider to be vulnerable (Rodríguez-Izquierdo Serrano, 2015: 156).

As electronic platforms have become more widespread, they have also become the driving force of interpersonal communication and of the inclusion of all citizens –at least those who have access to new technologies– in the public debate. This entails an obvious extension of communicative spaces, which grow increasingly broader while the domains

<sup>53</sup> ECtHR, *Beizaras and Levickas v. Lithuania*, 14 January 2020, *op cit.*, § 91.

<sup>54</sup> ECtHR, *Otegi Mondragón v. Spain*, 15 March 2011.

of privacy dwindle<sup>55</sup>. Thus, for the past few years, the use of mobile phones has brought unsuspected possibilities into reach: we can send and receive information from almost anywhere in the world; ideas and opinions can fly at great speed to reach any person at the mere click of a button. But this capacity is not risk-free; indeed, certain comments that used to remain within a more limited space now have a much further reach.

This situation reveals the disjunction between the free exchange of ideas, regardless of their content –in which the critical conscience of citizens is the tool used to neutralise xenophobic and discriminatory messages– and the alternative of restriction, which considers the social impregnation provoked by certain racist, xenophobic or discriminatory messages, and how they can silence the voices defending those minorities, whose boundaries tend to blur. This is the position defended by Owen Fiss, who justifies limiting free speech with the aim of protecting free speech itself, because “sometimes we need to lower the voices of some in order to hear the voices of others”<sup>56</sup>.

When we post a comment on social networks, we are aware of the magnitude of its reach –in a dimension that is three-fold: physical, temporal and subjective– as well as its effect. Messages reach a higher number of people, further distances, for longer periods of time and with a greater impact<sup>57</sup>. In the caselaw analysed, the Court asserts that, “in light of its accessibility and its capacity to store and communicate enormous quantities of information, the Internet plays an important role in improving the public’s access” to content that has important repercussions<sup>58</sup>. In this regard, the viral potential of every tweet justifies that –when facing a case of hate speech against sexual minorities, or against any vulnerable group in general– we resort to applying the analogy of the same legal treatment that the Spanish Constitutional Court applies in the context of print media, because of its greater dissemination and capacity for impact, as “its readers are far more numerous and impressionable than those of the news itself”. This is also the case in the universe of Twitter: the home of short and high-impact messages, that spread at high speed and that, often, are accompanied by images and audio-visual content.

However, this is something that can also be used in a positive way, as an opportunity to define the blurred silhouette of those who need visibility. It is not in vain that “the Internet is not only an effective medium to preserve and promote democratic principles. It is, moreover, a powerful tool that is capable of undermining them”. In Cass Sunstein’s deliberations on the matter we can see the two sides of the coin: the Web as a vehicle for transmitting content that perpetuates stereotypes and that discriminates and, simultaneously, as an instrument capable of the exact opposite: promoting tolerance and those superior values that deserve to be protected, such as dignity.

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<sup>55</sup>. Among the consequences of this transformation: the enrichment of pluralism, the increase in possibilities of receiving information and being an active member of a political community (Boix Palop, 2016: 55-57).

<sup>56</sup>. On the silencing effect of hate speech, see Fiss (1996: 28-30).

<sup>57</sup>. These ideas have been developed in a recently published work (Galdámez Morales, 2021: 82-85).

<sup>58</sup>. ECtHR, *Magyar v. Hungary*, 2 February 2016, § 56.

The notion of dignity is traditionally linked to values or rights such as equal treatment, non-discrimination or social recognition. It acts in the face of conflict that arises when freedom of speech is opposed –in the context of hate speech– as an argument in favour of its legitimate restriction. As we have seen, it was asserted as such by the ECtHR in its jurisprudence and, in the same vein, by the Spanish Constitutional Court:

[...] “neither the exercise of ideological freedom nor of freedom of speech can safeguard displays or expressions intended to disparage or generate feelings of hostility against particular ethnic, foreign or immigrant, religious or social groups, for in a State such as the Spanish State, which is social, democratic and governed by the rule of law, the members of such communities have the right to coexist peacefully and be fully respected by other members of the social community”<sup>59</sup>.

It is a complicated balance to strike. The umbrella of freedom of speech cannot be a haven for messages of hate that promote intolerance and the rejection of people who are homosexual, transsexual or have a different sex orientation or gender identity. The protection of *sexual minorities*, vulnerable groups and sectors that are excluded or made invisible by society, justifies the enforcement of limits to the exercise of this right when it translates into violence simply on the basis of sexual orientation or gender identity. Because, even if the statements do not imply a direct incitement to violence against homosexuals, they “may constitute an offense that may incite hatred”. This argument serves the ECtHR to equate the treatment it has already applied to conflicts related to xenophobia and racial hatred to the legal treatment of sexual orientation as a cause of extreme speech<sup>60</sup>. Yet, hate speech only acts as a limit in cases where there is an offense is committed or there is a legal good to protect, “without the pure defence of an idea being considered as such” (Teruel Lozano, 2018: 13). Also, the necessarily casuistic nature of constitutional balancing difficults to reach general parameters for the establishment of limits. Another avenue of response needs to be explored: preventive measures such as education, the promotion of an inclusive discourse –from public and private institutions–, proactive and pedagogical policies to combat hate speech at its source. The concrete assaults must be –according to the adequate weighting– expelled from the debate, while avoiding the restrictive inertia that could arise as a response to these types of speech – which would be equally as concerning (Teruel Lozano, 2018: 15)– and that would make us forget the importance of the right to free speech in a democratic society.

## REFERENCES

- ALCÁCER GUIRAO, R. (2012). “Discurso del odio y discurso político”. *Revista Electrónica de Ciencia Penal y Criminología* 14 (2), 1-32.
- ALCÁCER GUIRAO, R. (2020). *La libertad del odio, discurso intolerante y protección penal de las minorías*, Madrid: Marcial Pons.

<sup>59</sup>. Judgment of the Spanish Constitutional Court 214/1991, 11 November 1991, FJ 8.

<sup>60</sup>. ECtHR, *Vejdeland and others v. Sweden*, 9 February 2012, *op cit.* § 54.

- AMO, S. del. (2018). “Los duros ataques a Ángela Ponce, la transexual española candidata a Miss Universo”. *El País*, November 9.
- BALKIN, J. M. (2018). “Free Speech is a Triangle”. *Columbia Law Review* (118), 2011-2056.
- BOIX PALOP, A. (2016). “La construcción de los límites a la libertad de expresión en las redes sociales”. *Revista de Estudios Políticos* (173), 55-112. <https://doi.org/10.18042/cepc/rep.173.02>
- CORTINA ORTS, A. (2017). “Prólogo” in Vázquez Alonso, V. J. and Alonso Sanz, L., *Sobre la libertad de expresión y el discurso del odio* (pp. 9-14). Sevilla: Athenaica. <https://doi.org/10.2307/j.ctv9hvtjv.3>
- COTINO HUESO, L. (2017). “Responsabilidad de intermediarios y prestadores de servicios de internet en Europa y Estados Unidos y su importancia para la libertad de expresión”. *Revista de Derecho, Comunicaciones y Nuevas Tecnologías* (17), 1-32.
- DONOSO, J. (2010). *El lugar sin límites*. Madrid: Ediciones Cátedra.
- DWORKIN, R. (1996). *Freedom's Law: The Moral Reading of the American Constitution*. OUP Oxford.
- FEINBERG, L. (2003). *Stone Butch Blues*. New York: Alyson.
- FISS, O. M. (1996). *The irony of free speech*. 2ª Ed. London: Harvard University Press.
- FOUCAULT, M. (2008). *Historia de la sexualidad. La voluntad de saber*. Buenos Aires: Siglo XXI.
- GALDÁMEZ MORALES, A. (2021). “Derecho a la verdad y cánones de veracidad”, *Estudios de Deusto: revista de Derecho Público*, 69 (2), 77-110. [https://doi.org/10.18543/ed-69\(2\)-2021pp77-110](https://doi.org/10.18543/ed-69(2)-2021pp77-110)
- GALDÁMEZ MORALES, A. (2022). “Discurso de odio y discriminación sexo-género en el ágora digital: una aproximación europea”, *Revista General de Derecho Constitucional* (36).
- GARCÍA ROCA, J. (2009). “Abuso de los derechos fundamentales y defensa de la democracia (art. 17 CEDH)” in *La Europa de los Derechos: el Convenio Europeo de Derechos Humanos* (pp. 797-828) edited by García Roca, J. and Santolaya Machetti, P. Madrid: Centro de Estudios Políticos y Constitucionales.
- KLANWATCH PROYECTO (2011). *Ku Klux Klan. A History of Racism and Violence*. Montgomery, Alabama: Southern Poverty Law Center.
- LAIR, E. (2003). “Reflexiones acerca del terror en los escenarios de guerra interna”. *Revista de Estudios Sociales* (15), 88-108.
- LOCKE, J. (1689). *Carta sobre la tolerancia*. Tecnos.
- LOCKE, J. (1991). *Segundo ensayo sobre el gobierno civil*. Madrid: Espasa Calpe.
- MAURI, A. (2020). “Memoria en llamas”. *El País*, August 21.
- MILL, J. S. (1984). *Sobre la libertad*. Madrid: Alianza Editorial.

- NORTON, J. (1997). “Brain says you’re a girl, but I think you’re a sissy boy: Cultural Origins of Transphobia”. *Journal of Gay, Lesbian and Bisexual Identity* (2), 139-164.
- POPPER, K. (2011). *The open society and its enemies*. London and New York: Routledge.
- PRESNO LINERA, M. (2019). “El discurso del odio contra las minorías sexuales: respuestas penales y administrativas en España” in Matía, F. J., Elvira, A., Arroyo, A., (coords.), *La protección de los derechos fundamentales de personas LGTBI* (pp. 279-311). Tirant lo Blanch. <https://doi.org/10.36592/9786587424347-4>
- PRETZEL, A. (2003). “Inducción y complicidad en el asesinato de homosexuales. Delitos nazis de la justicia berlinesa”. *Orientaciones: revista de homosexualidades* (5), 55-72.
- QUESADA ALCALÁ, C. (2015). “La labor del Tribunal Europeo de Derechos Humanos en torno al discurso de odio en los partidos políticos: coincidencias y contradicciones con la jurisprudencia española”. *Revista Electrónica de Estudios Internacionales* (30), 1-33.
- RAWLS, J. (1979). *Teoría de la justicia* (ed. María Dolores González), Fondo de Cultura Económica.
- RAWLS, J. (1996). *Sobre las libertades*. Paidós.
- RAWLS, J. (2002). *Justicia como equidad: Materiales para una teoría de la justicia*. Tecnos.
- REY MARTÍNEZ, F. (2015). “El discurso de odio a través de Internet” in Revenga Sanchez, M., (dir.), *Libertad de expresión y discursos del odio* (pp. 51-88). Universidad de Alcalá, Servicio de Publicaciones.
- RODRÍGUEZ-IZQUIERDO SERRANO, M. (2015). “El discurso de odio a través de Internet” in Revenga Sanchez, M., (dir.), *Libertad de expresión y discursos del odio* (pp. 149-186). Universidad de Alcalá, Servicio de Publicaciones.
- RODRÍGUEZ LORENZO, P. (2020). “Subjetividad identitaria y su relación con el cuerpo trans: ensayo interpretativo en YouTube y Twitter” in *Construcciones culturales y políticas del género* (pp. 136-153) edited by Hernández Martínez, E., López Agulló Pérez Caballero, J. M., and Marín Conejo, S. Madrid: Dykinson. <https://doi.org/10.2307/j.ctv153k46c.11>
- RODRÍGUEZ RUIZ, B. (2011). “Matrimonio, género y familia en la Constitución Española: trascendiendo la familia nuclear”. *Revista Espanola de Derecho Constitucional* 31 (91), 69-102.
- RODRÍGUEZ RUIZ, B. (2012). “Género en el discurso constitucional del aborto”. *Revista de Estudios Políticos* (156), 49-83.
- SALAZAR BENÍTEZ, O. and GIACOMELLI, L. (2016). “Homofobia, Derecho penal y libertad de expresión: un estudio comparado de los ordenamientos italiano y español”. *Revista de Derecho Constitucional Europeo* (26), 125-164.

- SERANO, J. (2020). *Whipping girl. El sexismo y la demonización de la feminidad desde el punto de vista de una mujer trans*. Ménades.
- SERRANO, M. R. I. (2019). “Las empresas tecnológicas en Internet como agentes de seguridad interpuestos”. *Revista Espanola de Derecho Constitucional* (117), 77-100.
- SPIGNO, I. (2017). “Homofobia y transfobia: los discursos de odio contra las “minorías sexuales” en el ágora europea” in *Sobre la libertad de expresión y el discurso del odio* (pp. 177-201) edited by Vázquez Alonso, V. J. and Alonso Sanz, L., Athenaica.
- TARDIEU, A. (1857). *Etude médico-légale sur les attentats aux moeurs*.
- TERUEL LOZANO, G. M. (2015). *La lucha del derecho contra el negacionismo: una peligrosa frontera. Estudio constitucional de los límites penales a la libertad de expresión en un ordenamiento abierto y personalista*. Madrid: Centro de Estudios Políticos y Constitucionales.
- TERUEL LOZANO, G. M. (2017). “El discurso del odio como límite a la libertad de expresión en el marco del convenio europeo”. *Revista de Derecho Constitucional Europeo* 27 (14), 81-106.
- TERUEL LOZANO, G. M. (2018). “Cuando las palabras generan odio: límites a la libertad de expresión en el ordenamiento constitucional español”. *Revista Española de Derecho Constitucional* (114), 13-45. <https://doi.org/10.18042/cepc/redc114.01>
- VALERO HEREDIA, A. (2017). “Los discursos del odio. Un estudio jurisprudencial”. *Revista Española de Derecho Constitucional* (110), 283-312. <https://doi.org/10.18042/cepc/redc.110.11>
- VÁZQUEZ GARCÍA, R. and SÁNCHEZ FERNÁNDEZ, M. (2017). “Antropo (andro) centrismo y especie. Ideología y naturalización del especismo en tiempos liberales”. *EUNOMÍA. Revista en Cultura de la Legalidad* (12), 26-38.
- VIDAL-NAQUET, P. (1994). *Los asesinos de la memoria*. Madrid: Siglo XXI.
- VIÑUALES, O. (2002). *Lesbofobia*. Bellaterra.
- WALDROM, J. (2012). *The harm in hate speech*. Cambridge, Massachusetts: Harvard University Press. <https://doi.org/10.4159/harvard.9780674065086>
- WEBER, A. (2009). *Manual on hate speech*, Council of Europe Publishing, Strasbourg.
- WEINBERG, G. H. (1972). *Society and the healthy homosexual*. New York: St. Martin’s Press.

Received: November, 30<sup>th</sup> 2021

Accepted: February, 23<sup>rd</sup> 2022

