

HATE SPEECH

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SUMMARY - The debate in Europe on hate speech is not without controversy. Its very definition or the tools most useful to tackle it admit relevant nuances. Even the usefulness and effectiveness of this fight in a society in which a *post* on a social network can be disseminated in seconds among millions of users can be controversial. It is therefore more pertinent than ever to take a closer look at the European Union's position on this phenomenon, which will provide elements for an unhurried reflection on the matter.

I. INTRODUCTION

During 2014 to 2016, a Spanish Twitter user posted the following comments on his Twitter account¹:

- "53 murdered by gender violence so far this year, few ones if you asked me considering the number of whores on the loose"; "2015 will end with 56 murdered women, it is not a good record but we did what we could, let's see if in 2016 we double the figure".

¹ This is reflected in the proven facts of the Spanish Supreme Court Judgement No. 72/2018, of 9 February.

- I've already got the explosives ready for tonight in the Plaza del Sol, happy new year, Ala is the greatest"; "now all that's missing is an attack in Madrid with a few dead Spaniards and a fucking great 2015";
- If they are going to massacre people, let them do it in style, Ben Laden is coming back";
- Beatriz was a feminist, and she jumped into the river because women get wet for equality"; "I like to fuck against the counter and the cooker, because I put women in their place ".
- (next to the photo of a woman, for whom it is not known whether she was a victim of violent abuse) "I've already abused her, you're next".

In December 2014, a Lithuanian resident posted a photo of himself kissing his same-sex partner on his Facebook account.

They received, among others, the following comments² :

- you should be castrated or burned".
- "if you were born perverted and suffer from this disorder, then go and hide in a basement and do what you like there, "faggots". But you will not ruin our beauty.
- to the gas chamber with both of you, I'll buy you a honeymoon trip to the crematorium".
- to the stake with these faggots".
- "you fucking gays, you should be exterminated".
- because you are "faggots" and children can see pictures like that, Hitler should not only have burned Jews".
- please let me smash their heads against the wall".

Demonstrations or speeches such as these or similar ones, which are directed against certain groups because of their race, gender, sexual orientation or any other personal characteristic that defines them, provoke in the vast majority of us an almost instantaneous rejection, which leads us to ask ourselves whether we should tolerate them

² See ECHR (2nd Section) of 14 January 2020, *Beizaras and Levickas v. Lithuania*.

in our democratic societies, whether we should not interfere³ or whether the society that tolerates the intolerant is fairer⁴.

The European Parliament, in its annual report of 19 November 2020 on the situation of fundamental rights in the European Union,⁵ warned that the Union is witnessing the spread of racism, intolerance, extremism, xenophobia, Islamophobia, anti-Semitism and anti-Roma sentiments which have become normalised in certain Member States and which are embraced by opinion leaders and politicians across the Union, fostering a social climate that provides fertile ground for racism, discrimination and hate crimes.

The aim of this paper is to approach the phenomenon known as hate speech and, in particular, the general framework in which it is and/or should be dealt with in the European Union. But, above all and fundamentally, it is to provide elements for an unhurried reflection on the subject.

II. CONCEPT

The term "hate speech" is often linked to concepts such as discrimination, hostility, humiliation, intolerance, contempt, violence, incitement to violence or vulnerability, but its definition, or specifically which behaviours should be qualified as such, poses significant difficulties and is far from uncontroversial.

According to Council of Europe Recommendation No. R (97) 20, the term "hate speech" covers 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.

Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law speaks (in Article 1) of publicly inciting to violence or hatred directed against a group of persons

³ Tolerance implies non-interference and that the behaviour can, in some way, be tolerated. It does not, however, imply indifference. See, Cohen J. A. , "What toleration is?", *Ethics* 115, October (2004), pp. 68-95, p. 71.

⁴ Cruz Angeles, J., "Libertad de expresión vs. discurso de odio en internet: análisis del marco jurídico internacional", in *La prevención y represión del discurso del odio. Hacia la construcción multidisciplinar de la tolerancia*, Martín Ríos, B. (Coord.), Thomson Reuters Aranzadi, Madrid, 2019.

⁵ See the report, available at https://www.europarl.europa.eu/doceo/document/A-9-2020-0226_EN.html.

or a member of such a group, defined by reference to race, colour, religion, descent or national or ethnic origin. Also public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes.

General Recommendation No 15 on combating hate speech adopted on 8 December 2015 by the European Commission against Racism and Intolerance (ECRI), for its part, states that hate speech should be understood as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status.

It adds that hate speech can take the form of public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes.

Also interesting is the approach to the definition of hate speech found in Recommendation 1805 (2007) of the Parliamentary Assembly of the Council of Europe on blasphemy, religious insults and hate speech against persons because of their religion, which considers hate speech "manifestations calling for a person or group of persons to be subjected to hatred, discrimination or violence on the grounds of their religion or on any other grounds"⁶.

The European Convention on Human Rights, unlike the International Covenant on Civil and Political Rights, contains neither a definition nor a specific provision on hate speech⁷. And the European Court of Human Rights has in most of its decisions adopted the definition contained in Council of Europe Recommendation No. R (97) 20.

⁶ In this sense, Quesada Alcalá, C. , "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* (REEI), nº 30, 2015, p. 8.

⁷ Rollnert Liern, G., "El discurso del odio: una lectura crítica de la regulación internacional", *Revista española de Derecho Constitucional*, 115, 81-109, p. 91.

Articles 19 and 20 of the ICCPR state the following:

Art. 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In this framework, we can conclude, in a first approach, that hate speech does not refer to an internal attitude but to certain forms of expression that spread, incite, promote or justify hatred based on intolerance⁸ and thereby undermine the equality and dignity of all people in a democratic society.

Hate speech expresses discrimination, intimidation, disapproval, antagonism and/or prejudice towards certain characteristics such as gender, race, religion, ethnicity, colour, disability or national origin⁹. And their impact will not always be the same, depending on the people involved and other circumstances. Who, what and where will determine this impact and its control¹⁰.

III. THE SANCTIONING OF HATE SPEECH

1. European intolerance in the face of hate speech

At European level, and taking into account some of the legal instruments described in the previous section, intolerance towards hate speech is unquestionable.

General Recommendation No. 15 of the European Commission against Racism and Intolerance of the Council of Europe on combating hate speech and explanatory memorandum adopted on 8 December 2015 states "*that Europe derives from its history*

3. The exercise of the right provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, which must, however, be expressly provided by law and necessary to:

- a) To ensure respect for the rights or reputation of others;
- (b) the protection of national security, public order, public health or morals.

Article 20

1. All propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Some of the terms of this article 20 have been defined in the framework of the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, which, under the auspices of the United Nations High Commissioner for Fundamental Rights, was adopted in October 2012, after bringing together the conclusions and recommendations of several experts.

The proposed definitions are as follows: 1) the terms "hatred" and "hostility" refer to intense and irrational feelings of opprobrium, enmity and contempt towards the targeted group; 2) the term "advocacy" should be understood as requiring an intention to publicly promote hatred towards the targeted group; 3) the term "incitement" refers to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence towards persons belonging to those groups. See information and documents available at <https://www.ohchr.org/SP/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>.

⁸ See Judgments of the Spanish Constitutional Court No. 112/2016 of 20 June and 177/2015 of 22 July.

⁹ Cohen-Almagor, R., "Taking North American white supremacist groups seriously: The scope and challenge of hate speech on the Internet", *International Journal for Crime, Justice and Social Democracy* 7(2), 2018, págs. 38-57, pág. 40.

¹⁰ En este sentido, Naganna, C. y Sreejith, A. , "Hate speech review in the context of online social networks", *Agression and Violent Behaviour*, vol. 40, 2018, págs. 108-118.

a duty of remembrance, vigilance and combat against the rise of racism, racial discrimination, gender-based discrimination, sexism, homophobia, transphobia, xenophobia, antisemitism, islamophobia, anti-Gypsyism and intolerance, as well as of crimes of genocide, crimes against humanity or war crimes and the public denial, trivialisation, justification or condonation of such crimes ". It adds that this obligation of remembrance, vigilance and repression *"is an integral part of the protection and promotion of universal and indivisible human rights, standing for the rights of every human being"*.

For the European Commission against Racism and Intolerance, hate speech poses grave dangers for the cohesion of a democratic society, the protection of human rights and the rule of law, while simultaneously recognising the need to ensure that restrictions on hate speech are not misused to silence minorities or to suppress criticism of official policies, political opposition or religious beliefs.

The European Court of Human Rights has taken the same line of intolerance towards hate speech.

For this Court, insults, ridicule or defamation aimed at specific population groups or incitation to discrimination, sufficed for the authorities to give priority to fighting hate speech when confronted by the irresponsible use of freedom of expression which undermined people's dignity, or even their safety. Political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic States¹¹.

For the European Court it is of the utmost importance to act at European level and to maintain firm and sustained action to combat the phenomenon of racism, xenophobia, anti-Semitism or intolerance¹².

All these phenomena attack the equality that can be predicted for every human being and constitute a form of discrimination that is intimately connected with dignity, which must be understood as the respect that deserves and the value that must be given to any human being for the mere fact of being a human being¹³.

¹¹ ECHR (2nd Section) of 16 July 2009, *Feret v. Belgium* (para. 73).

¹² ECHR (2nd Section) of 16 July 2009, *Feret v. Belgium* (para. 72).

¹³ In this regard, see Circular 7/2019, of 14 May, of the Spanish State Attorney General's Office, on guidelines for interpreting hate crimes under article 510 of the Criminal Code. Available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-7771.

It should be noted here that Article 14 of the European Convention on Human Rights states that the enjoyment of the rights and freedoms recognised in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. And that Article 17 of the same Convention provides that nothing in its provisions shall be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Furthermore, Article 21(1) of the Charter of Fundamental Rights of the European Union provides that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

In contrast to Article 14 of the ECHR, the prohibition of discrimination in Article 21 of the Charter of Fundamental Rights of the European Union introduces an independent right that applies to situations that do not need to be covered by any other provision of the Charter. For its part, Article 20 of the EU Charter provides that all persons are equal before the law.¹⁴

There is also no doubt either of the European Union's commitment to the repression of hate speech.

The European Parliament resolution of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime¹⁵ underlined that intolerance and discrimination of all kinds must never be accepted in the European Union and called on the Commission, the Council and the Member States to strengthen the fight against hate crime and discriminatory attitudes and behaviour. The Parliament called for a comprehensive strategy for fighting hate crime, bias violence and discrimination.

¹⁴ Handbook published by the European Union Agency for Fundamental Rights and the Council of Europe. 2018 edition, p. 37. Available at https://www.echr.coe.int/documents/handbook_non_discri_law_eng.pdf.

¹⁵ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013IP0090&from=EN>

Several years earlier, the Council adopted Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

2. The criminal sanctioning of hate speech

At European level, criminal law appears to be one of the instruments in the fight against hate speech.

In this respect, the aforementioned General Recommendation No. 15 of the European Commission against Racism and Intolerance of the Council of Europe highlights, inter alia, the following aspects:

1) Criminal sanctions should not be resorted to if the use of hate speech can be effectively dealt with through a measure of less restrictive nature.

(2) Criminal sanctions must be proportionate, effective and dissuasive.

(3) Criminal liability should arise for the most serious conduct, i.e. where it is intended (or may reasonably be expected to have the effect) to bring about the commission of acts of violence, intimidation, hostility or discrimination and where the use of such expressions takes place in public.

4) Criminal offences can be in provisions of more general character or specifically concerned with the use of hate speech.

5) The wording of relevant provisions must be clear and precise.

Along the same lines, Framework Decision 2008/913/JHA of 28 November 2008. According to this rule, racism and xenophobia constitute a threat against groups of people which are the target of such behaviour and it is necessary to define a common criminal-law approach in the European Union to this phenomenon to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences.

These criminally relevant behaviours will be the most serious forms of hate speech, those which, according to Article 1 of the Framework Decision:

(1) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, or Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(2) publicly inciting to violence or hatred directed against a group of persons or a member of such a group, defined by reference to race, colour, religion, descent or national or ethnic origin¹⁶.

In short, several pillars should underpin the criminalisation of hate speech (apart from condoning of genocide and other war crimes or crimes against humanity), namely: the seriousness of the behaviour, the incitement to violence, intimidation, hostility or discrimination against a particular group of people, the publicity of the facts and the proportionality of the punishment.

Two other essential elements of this type of criminal offence should also be highlighted: 1) its scope; and 2) the motivation.

The impact of the offence extends beyond the actual victims. It affects the whole group with which that victim identifies himself or herself and can cause social division between the victim group and society at large¹⁷.

Secondly, the perpetrator's actions must be particularly motivated.

¹⁶ The European Parliament Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity of 4 February 2014 provided that the Commission should propose a recast of this Framework Decision to include other forms of hate crime and hate speech, including on grounds of sexual orientation and gender identity.

The only EU legal instrument that currently protects lesbian, gay, bisexual, transgender and intersex (LGBTI) victims of hate crime is the EU's Victims' Rights Directive.¹⁸⁹ It includes the grounds of sexual orientation, gender identity and gender expression when recognising the rights of victims, helping to ensure that victims of crime receive appropriate information, support and protection, and are able to participate in criminal proceedings. Moreover, states are obliged to carry out an individual assessment to identify specific protection needs of the victims who have suffered a crime committed with a bias or discriminatory motive (Article 22 of the directive). In this respect, Handbook of European Anti-Discrimination Legislation, cit.

¹⁷ Handbook of European Anti-Discrimination Law, cit. p. 91.

The Framework Decision states that each Member State shall take the necessary measures to ensure that the "*intentional conduct*" referred to therein is punishable.

Along these lines, the Spanish Constitutional Court, in its STC 112/2016, of 20 June, declared, with regard to an offence of glorification of terrorism, the following: "*in this kind of offences it is important not only the literal tenor of the words uttered, but also the meaning or intention with which they have been used, since it is clear that language ordinarily admits diverse interpretations and, for the purposes of establishing liability for an offence of glorification of terrorism, it is necessary to determine clearly in which of the possible meanings it has been used on each specific occasion*".

In this regard, and since it is a matter of determining something that belongs to the psyche of the subject, the indicators included in the Guide: Preventing and responding to hate crimes, published by the OSCE (Organisation for Security and Cooperation in Europe) in 2009 are interesting, which have been cited among others in the judgement of the ECtHR (2nd Section) of 20 October 2015, Balázs v. Hungary. According to this guide, these *Hate Crime Indicators* are objective facts that show that we may be faced with a hate crime.

These are: a) victim and witness perception; b) the conduct of the offender; c) the characteristics of the victim and the perpetrator; d) the existence of previous incidents or hate crimes; and e) the possibility of mixed motives for the conduct.

Also useful are the indications contained in the Rabat Plan of Action¹⁸, which proposes a threshold for a given expression to constitute a criminal offence.

This threshold involves the assessment of each and every one of the following elements¹⁹:

"(1) Context: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the

¹⁸ The so-called Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, sponsored by the United Nations High Commissioner for Fundamental Rights, was adopted in October 2012, after bringing together the conclusions and recommendations of several experts.

¹⁹ The document is available at [United Nations \(ohchr.org\)](http://www.unhcr.org)

context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(2) Speaker: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;

(3) Intent: Article 20 of the ICCPR anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the ICCPR, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience;

(4) Content and form: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(5) Extent of the speech act: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public; and (6) Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The

action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct."

In short, the application of criminal law and, in particular, the definition by each country, within the framework set out above, of objective and subjective offences is not without its difficulties.

Because, as the Spanish Constitutional Court points out in its ruling STC 112/2016, of 20 June, citing STC 177/2015, of 22 July, the use of *ius puniendi* in the State's response to a possible exercise of the right to freedom of expression, whether it is excessive or not, generates risks due to the disproportion that resorting to this power may entail and the discouraging effect that this may generate. The limits to which the right to freedom of expression is subject (and to which we will return below) must always be weighed with exquisite rigour, given the preferential position it occupies, when this freedom comes into conflict with other fundamental rights or interests of significant social and political importance supported by criminal law. In this respect, it is stressed that, when this happens, these limitations must always be interpreted in such a way that the fundamental right to freedom of expression is not distorted, which obliges the criminal judge to always bear in mind its constitutional content so as not to run the risk of making criminal law a deterrent to the exercise of freedom of expression, which is undoubtedly undesirable in a democratic state.

In the same vein the Criminal Chamber of the Spanish Supreme Court in its ruling STS 646/2018, of 14 December, which states the following:

"The offences of hate speech, generic and specific, require the necessary limits in order not to lead to the criminalisation of mere transgressions of freedom of expression.

The necessary weighing of the values at stake, freedom of expression and aggression through expressions that generate hatred, must be carried out on the basis of the following elements: a) firstly, the perpetrator must select his victims on grounds of intolerance, and within the vulnerable groups to which the rule refers, a requirement that also applies to the victims of terrorist offences. b) secondly, the conduct not only frightens the person to whom the message is addressed, but the whole group to which he belongs, creating feelings of harm to dignity, insecurity and threat. c) the expressions made must also attack the basic rules of coexistence based on respect and tolerance, in such a way that the whole of society is concerned by the expression of ideas that openly contradict the messages of tolerance that the legal system, as an instrument of social control, exposes to the citizens who make them their own, which would make it possible to exclude from consideration those opinions about people who are publicly known for their actions and are subject to public questioning. d) Furthermore, the messages must be serious and serious enough to incite the commission of terrorist acts (art. 579 Cp), or the generation of a feeling of hatred, aptitude and seriousness to create a feeling harmful to dignity. e)

The intention pursued by the author is to attack, which would make it possible to exclude supposedly hilarious statements and those that are made out of punctual vengeance, devoid of the necessary restraint".

The need to use criminal law to combat the most serious expressions of hate speech, but also the risks it generates, has also been recognised by the European Court of Human Rights.

The ECtHR accepts that, for the most serious cases of hatred and incitement to violence, criminal law may be used as an *ultima ratio*. In these cases, only criminal punishment can be effective in protecting the physical and moral integrity of the victims and deterring such behaviour. This will be the case, in particular, in cases of direct verbal attacks and physical threats motivated by discriminatory attitudes. The Court has recalled that it is not its role to determine what the elements of the various criminal offences should be or their application and interpretation, which is a matter for national courts. The Court's role is to verify whether in the exercise of these functions the national bodies respect the Convention²⁰.

3. Other forms of sanctioning hate speech. The European anti-discrimination framework

The criminal reaction to hate speech is reserved, as we have said, for the most serious cases because of the characteristics described above. There are, however, other types of behaviour which, while not constituting crimes, may justify a civil suit or administrative sanctions²¹.

Thus, the specific measures to combat the use of hate speech that ECRI considers necessary include, in addition to the imposition of criminal sanctions in some specific and limited circumstances, the imposition of civil and administrative liability²², which may range from the imposition of financial penalties and other sanctions aimed at repairing, where appropriate, the harm caused to the victim, to the removal and rectification of

²⁰ See ECHR (2nd Section) of 14 January 2020, *Beizaras and Levickas v. Lithuania*, citing other judgments of the Court.

²¹ See paragraph 59, under A (introduction) of General Recommendation 15, which follows the Rabat Action Plan on this point. See information available at <https://www.ohchr.org/SP/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>

²² See General Recommendation 15, which also includes other measures such as: raising public awareness; combating any use of hate speech; provide support for those targeted by hate speech; promoting self-regulation; or withdrawing support for some organisations and banning others.

content, blocking of websites or bans on dissemination²³. These measures must in all cases be proportionate to the seriousness of the conduct and, where necessary, be subject to judicial approval or authorisation. Their effectiveness, on the other hand, should be accompanied by a strengthening of victims' access to complaint and redress mechanisms.

In order to achieve these objectives, the EU Directives on discrimination²⁴ can be, within their scope of application, an effective instrument, when these expressions of hatred, without being criminally relevant, do translate or reflect discriminatory behaviour protected by this legislation. Because, just as these directives, unlike the aforementioned Framework Decision, do not oblige Member States to make use of criminal law to address acts of discrimination²⁵, they do oblige them to establish judicial and/or administrative procedures allowing individuals to enforce the rights under the directives²⁶. Moreover, it is provided that the sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The CJEU stressed on several occasions the need of effective sanctions, which is an important tool to deter and sanction cases of discrimination²⁷.

In this regard, the European Parliament, in its annual report of 19 November 2020 on the situation of fundamental rights in the European Union, urged Member States to ensure full implementation of the Racial Equality Directive (2000/43/EC), in order to combat persisting racism against black and people of colour, transphobia, antigypsyism, antisemitism and islamophobia; and condemned the fact that racial, ethnic, linguistic and religious minorities are victims of structural racism, discrimination, hate-crime and hate-speech, lack of access to justice and sustained socio-economic inequalities in areas such as housing, health, employment and education, which should be acknowledged as major

²³ See recommendations 8 and 9 of General Recommendation 15.

²⁴ These would be the following: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

²⁵ In this sense the Handbook on European Anti-Discrimination Law, cit. p. 92.

²⁶ Handbook of European Anti-Discrimination Law, cit. p. 283.

²⁷ Handbook of European Anti-Discrimination Law, cit. p. 283.

obstacles to the full enjoyment of fundamental rights and major barriers to inclusion and equality²⁸.

In short, it would be a matter, as some authors have suggested, of correctly transposing the European model for combating discrimination and, consequently, of imposing administrative sanctions for this type of offences arising from discriminatory discourse²⁹.

In this line, it also points to the need to create and strengthen autonomous anti-discrimination bodies so that they can indeed be instruments of protection against discrimination³⁰.

Self-regulation and codes of conduct, whether addressed to members of certain organisations (business or otherwise) or to certain professional groups, which may be accompanied by sanctions in case of non-compliance³¹, are undoubtedly also important as an effective tool in the fight against hate speech.

In conclusion, and in accordance with the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence³², there should be a clear distinction between different expressions of hate speech:

- (a) expression that constitutes a criminal offence;

²⁸ See the report, available at https://www.europarl.europa.eu/doceo/document/A-9-2020-0226_ES.html

²⁹ Rey Martínez F., *Derecho antidiscriminatorio*, Thomson Reuters Aranzadi, Madrid, 2019, p. 66.

³⁰ Rey Martínez F., *Derecho antidiscriminatorio*, cit, p. 66. Also, Solanes Corella, Á., "La discriminación racial o étnica: marco jurídico, formas y protección", *Eunomía. Revista en Cultura de la Legalidad*, 17, 2019, pp. 35-67, p. 58.

³¹ Article 16 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market states on codes of conduct, which Member States and the Commission shall encourage:

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the participation of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests, which shall be drawn up in accordance with paragraph 1(a). Where appropriate, in order to take account of their specific needs, associations representing the disabled and the visually impaired (*sic*) shall be consulted.

³² Available at <https://www.ohchr.org/SP/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>

(b) expression that is not criminally punishable, but which may justify a civil suit or administrative sanctions;

and (c) expression which does not give rise to criminal, civil or administrative sanctions but still raises concerns in terms of tolerance, civility and respect for the rights of others.

IV. FREEDOM OF EXPRESSION AND HATE SPEECH

The essential nature of freedom of expression in our democratic societies is beyond doubt.

This fundamental right, as recognised by the European Court of Human Rights³³, covers not only information or ideas that are favourably received, but also those that offend, shock or disturb. This is required by demands of pluralism, tolerance and broadmindedness without which there is no democratic society. Freedom of expression, according to Article 10 of the ECHR, is subject to exceptions, although these must be construed strictly and the need for any restriction must be established convincingly³⁴.

In line precisely with the jurisprudence of the European Court of Human Rights, General Recommendation No. 15 of the European Commission against Racism and Intolerance explicitly excludes from the definition of hate speech any form of expression, such as satire or objectively based news reporting and analysis, which merely offends, hurts or distresses, while recalling that, in certain circumstances, incitement to hatred can result from irresponsible insulting, holding up to ridicule or slandering of specific groups of the population, which might entail being unnecessarily offensive, advocating discrimination, or using vexatious or humiliating language or an unavoidable imposition on the audience³⁵.

The right to freedom of expression, as recognised by the Criminal Division of the Spanish Supreme Court in its rulings STS 646/2018, of 14 December and STS 72/2018, of 9 February, allows, initially, not only to assume any idea, but also to express it and even to disseminate it, always within the limits imposed by coexistence respectful of the rights of others.

³³ ECHR (Grand Chamber) of 15 October 2015, *Perincek v. Switzerland* (para. 196).

³⁴ ECHR (Grand Chamber) of 15 October 2015, *Perincek v. Switzerland* (para. 196).

³⁵ See General Recommendation 15, A (introduction), paragraph 16.

The restriction of the right, these resolutions continue, and even more so when resorting to criminal sanctions, requires a justification that can only be found when it collides with other defensible legal interests that appear to be deserving of greater protection after the necessary prior weighing up.

In order to carry out this weighing, which is absolutely necessary when the person accused of behaviour that could *prima facie* be qualified as hate speech claims that such behaviour is protected by his or her fundamental right to freedom of expression, the case law of the European Court of Human Rights highlights the following elements to be assessed³⁶:

(1) Whether the statements in question were made against a tense political or social background.

The presence of this underlying climate of tension has usually led the Court to accept that the speech in question was not covered by freedom of expression.

2) Whether the statements or expressions construed in their context could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance.

For this purpose, the ECtHR³⁷ has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups.

3) The manner in which the statements were made and their capacity - direct or indirect - to lead to harmful consequences.

In order to assess the likelihood of such damage occurring, the considerations made in General Recommendation 15 are of interest, which invites an assessment of the following factors³⁸:

³⁶ ECtHR (Grand Chamber) of 15 October 2015, *Perincek v. Switzerland* (paragraphs 205 et seq.). This judgement of the ECtHR is described as a *landmark case* in this area.

³⁷ ECHR (3rd Section) of 11 February 2020, *Atamanchuk v. Russia* (para. 51).

This element of incitement to hatred or violence is referred to in General Recommendation 15, according to which an intent to incite can be established when there is an "*unambiguous call by the person using hate speech for others to commit the relevant acts or it might be inferred from the strength of the language used and other relevant circumstances, such as the previous conduct of the speaker.*" See paragraph 15, under A (introduction), of General Recommendation 15.

³⁸ See General Recommendation No. 15, A (Introduction), paragraph 16.

(a) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked):

(b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders);

(c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination);

(d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate);

(e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a “live” event); and

(f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination).

In addition to the three elements mentioned above (possible climate of tension, direct or indirect call for violence or hatred and direct or indirect capacity for harmful consequences) and, particularly, when assessing the second and third of them, the European Court of Human Rights has also referred to the motivation or intention of the subject³⁹, although in certain cases this element loses weight given the objective tenor of the expressions in question, for example, because they are explicitly racist or negationist⁴⁰.

All these elements, on the other hand, must be dealt with together and the Court itself qualifies the approach to them as *highly context-specific*.

In short, the search for a balance between freedom of expression and the justification of the necessary interference required in a democratic society is not without its difficulties and is subject to sometimes volatile and unspecific criteria that require a detailed examination of the specific case and the circumstances involved.

³⁹ECHR (2nd Section) of 20 October 2015, *Balázs v. Hungary*.

⁴⁰ Quesada Alcalá, C., "The work of the European Court of Human Rights...", cit.

In this sense, any attempt to generalise or to establish rigid criteria is doomed to failure.

V. HATE SPEECH AND THE INTERNET

1. The specificity of *online* discourse

The Internet is one of mankind's greatest innovations that has brought people of all races, religions and nationalities together⁴¹. Social networks such as Twitter or Facebook have connected millions of people and allowed them to share ideas and opinions instantly⁴².

At the same time, thanks to the internet, hate speech, like other kinds of defamatory speech or expression, can be disseminated in a matter of seconds around the world and sometimes remain *online forever*⁴³, meaning that the potential damage that can be generated by its content and communications is higher than that associated with other media⁴⁴.

In fact, some analyses reveal that such *posts* are disseminated more widely and faster than other publications⁴⁵.

The 2001 Council of Europe Convention on Cybercrime was the first multilateral instrument to combat cybercrime through cooperation between nations, harmonisation of national legislation and investigative techniques⁴⁶.

This Convention includes an Additional Protocol on the criminalisation of acts of a racist and xenophobic nature committed through computer systems of 28 January 2003⁴⁷. According to its text⁴⁸, States parties are obliged to criminalise, when carried out "through computer systems", the dissemination of "racist and xenophobic material" (art. 3.1) - understood as that which "advocates, promotes or incites hatred, discrimination or

⁴¹ Mathew B. , Dutt R. , Goyal P. y Mukherjee A., "Spread of hate speech in online social media", *Computer Science, Sociology, WebSci*, 4 Diciembre 2018, pág. 1.

⁴² Mathew B. , Dutt R. Goyal P. and Mukherjee A., "Spread...", cit. p. 1.

⁴³ ECHR (Grand Chamber) of 16 June 2005, *Delfi v. Estonia* (para. 110).

⁴⁴ ECHR (Grand Chamber) of 16 June 2005, *Delfi v. Estonia* (para. 110).

⁴⁵ In this regard, Mathew B. , Dutt R. , Goyal P. and Mukherjee A., "Spread...", cit. p. 1.

⁴⁶ Banks, J., "Regulating hate speech online", *International Review of Law, Computers and Technology*, 24 (3), págs. 233-239.

⁴⁷ Although the United States is not a member of the Council of Europe, it was invited to ratify the Convention, which it did only after the Convention's provisions on "hate speech" had been extracted and included in this additional protocol. See Banks, J., "Regulating hate...", cit.

⁴⁸ For an updated list of countries that have ratified, see <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189>.

violence" (art. 2.1), threats to commit a serious criminal offence and public insults with a racist and xenophobic motivation (Art. 4 and 5) and the dissemination of material denying crimes against humanity (Art. 6.1). It thus extends punishable conduct beyond the dissemination of incitement material to also cover material that "advocates" or "promotes" hatred, discrimination or violence, while allowing signatory states to reserve the right not to criminalise the dissemination of non-associated discriminatory material⁴⁹.

General Recommendation 15 calls on States to use their regulatory powers with respect to the media (including internet providers, online intermediaries and social media) to promote action to combat the use of hate speech and to challenge its acceptability, while ensuring that such action does not violate the right to freedom of expression and opinion, and accordingly:

a. ensure effective use is made of any existing powers suitable for this purpose, while not disregarding self-regulatory mechanisms;

b. encourage the adoption and use of appropriate codes of conduct and/or conditions of use with respect to hate speech, as well as of effective reporting channels;

c. encourage the monitoring and condemnation of the use and dissemination of hate speech;

d. encourage the use, if necessary, of content restrictions, word filtering bots and other such techniques;

e. encourage appropriate training for editors, journalists and others working in media organisations as to the nature of hate speech, the ways in which its use can be challenged;

f. promote and assist the establishment of complaints mechanisms; and

g. encourage media professionals to foster ethical journalism;

Aware of this reality and that the medium through which the alleged interference takes place is not indifferent, for the European Court of Human Rights the protection of fundamental rights and the general principles of its doctrine must also be extended and applied to *online* publications.

⁴⁹ Rollnert Liern, G., "Hate Speech: A Reading...", cit.

In the ECHR (2nd Section) of 14 January 2020, *Beizaras and Levickas v. Lithuania*, the Court condemned Lithuania for failing to investigate the possible criminal relevance of certain comments posted on the social network Facebook after a user, as described above, posted a photograph of him kissing his same-sex partner⁵⁰.

For the Court, although criminal law should be considered as an *ultima ratio* measure, in this case, its application was justified given that the calls to attack the physical integrity of the applicants were clear. Indeed, according to the Court (paragraph 128) such an application would have been possible in view of the Lithuanian Criminal Code, and it was, however, the attitude of the national authorities which prevented it, citing reasons (the photographs were "provocative" or should have been shared only with friends) which indicated, according to the Court, a "discriminatory" mentality.

In the same line of *online* protection of fundamental rights, but from another perspective, the European Court of Human Rights has considered compatible with the Convention sanctions imposed on internet portals for comments, considered as hate speech, posted by their users.

This is the case, among others, of the ECHR (Grand Chamber) of 16 June 2015, *Delfi v. Estonia*, where the Court considered that the sanction imposed by the national authorities on the website where comments of this nature were published did not imply a violation of Article 10 of the Convention. This decision highlighted, among other ideas, that although the company had measures in place to detect and remove this type of comments, in the case, they did not work because the comments remained on the website for about six weeks.

For the Court⁵¹, these companies are obliged to take measures to limit the spread of hate speech and speech that incites violence, and it rules out that such measures can be qualified or considered as a form of private censorship. Entities are in a better position than the victims themselves to quickly identify and remove such speech. Indeed, they may be sanctioned without violating Article 10 of the Convention if they do not do so without delay, even if, as the Court emphasises, there has been no notification or complaint from the alleged victims or third parties.

⁵⁰ The applicants, relying on Articles 8 and 14 of the Convention, had alleged that they had been discriminated against on the grounds of sexual orientation and that this was the reason why the national authorities had refused to initiate a judicial investigation into the comments posted on the social network.

⁵¹ See paragraph 157 et seq.

2. The code of conduct for combating illegal hate speech on the internet

In August 2018, Facebook was accused by UN investigators of playing a key role in the possible genocide of the Rohingya community in Myanmar through the dissemination of "hate speech"⁵². One of these investigators had declared, according to the Reuter agency⁵³, that the platform "had become a beast".

Some of the *posts* published and referring to the aforementioned community were the following: "We must fight them the way Hitler fought the Jews", or "these dogs are killing us and destroying our land, our water and our ethnic people. We must destroy their race"⁵⁴

This company, however, includes among its "community standards" a specific one aimed at hate speech or hate speech that begins with the following statement:

"We believe that people use their voice and connect more freely when they don't feel attacked on the basis of who they are. That's why we don't allow hate speech on Facebook. It creates an environment of intimidation and exclusion, and in some cases may promote offline violence.

We define hate speech as a direct attack against people on the basis of what we call protected characteristics: race, ethnicity, national origin, disability, religious affiliation, caste, sexual orientation, sex, gender identity and serious disease. We define attacks as violent or dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal, cursing, and calls for exclusion or segregation. We consider age a protected characteristic when referenced along with another protected characteristic. We also protect refugees, migrants, immigrants and asylum seekers from the most severe attacks, though we do allow commentary and criticism of immigration policies. Similarly, we provide some protections for characteristics like occupation, when they're referenced along with a protected characteristic.

We recognize that people sometimes share content that includes someone else's hate speech to condemn it or raise awareness. In other cases, speech that might otherwise

⁵² Mathew B. , Dutt R. Goyal P. and Mukherjee A., "Spread...", cit. p. 1.

⁵³ <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>

⁵⁴ <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>

violate our standards can be used self-referentially or in an empowering way. Our policies are designed to allow room for these types of speech, but we require people to clearly indicate their intent. If intention is unclear, we may remove content.”

Twitter also includes the following rule in its rules and policies:

"Hateful conduct: You may not promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.⁵⁵

Another rule is: *"You may not threaten violence against an individual or a group of people. We also prohibit the glorification of violence.”*

In contrast to these social networks, Gab presents itself as *"the home of free speech online"* and allows its users to post content that could constitute forms of hate speech without fear of reprisal, which has led to users of other networks, whose accounts had been suspended or banned for violating the rules of use, to migrate to it⁵⁶.

Gab is not one of the companies that, along with Facebook, Twitter, Microsoft and YouTube, signed a code of conduct with the European Commission in June 2016 to combat illegal hate speech online⁵⁷. Among the initial statements of this code is one according to which all these companies share a collective responsibility and a sense of pride in promoting and facilitating freedom of expression throughout the online world, as well as the commitment of the European Commission and EU member states to tackle illegal hate speech online.

In this code of conduct⁵⁸, in addition to promoting the training of their staff and users, collaboration among themselves and with civil society organisations, and the flagging by experts of content that promotes incitement to violence and hateful conduct, companies commit themselves to this code of conduct:

(a) to have in place clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content.

⁵⁵ Mathew B. , Dutt R. Goyal P. and Mukherjee A., "Spread...", cit. p. 1.

⁵⁶ Mathew B. , Dutt R. Goyal P. and Mukherjee A., "Spread...", cit. p. 1.

⁵⁷ In 2018, Google+, Instagram, Snapchat and Dailymotion joined.

⁵⁸ Available at [The EU Code of conduct on countering illegal hate speech online | European Commission \(europa.eu\)](https://ec.europa.eu/anti-hate-speech/code-of-conduct)

(The IT companies to have in place Rules or Community Guidelines clarifying that they prohibit the promotion of incitement to violence and hateful conduct);

(b) Upon receipt of a valid removal notification, to review such requests against their rules and community guidelines and where necessary national laws transposing the Framework Decision 2008/913/JHA, with dedicated teams reviewing requests.;

(c) to review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary.

In June 2020, the European Commission published the fifth assessment of the implementation of the Code of Conduct⁵⁹, which was described as positive.

90% of the notifications were reviewed within 24 hours and 71% of the content covered by the notifications was withdrawn. The rate of removal depended on the seriousness of the content concerned. On average, this rate was 83.5% for speech inciting murder or violence against particular groups, while it dropped to 57.8% for content using simply defamatory words or images.

The percentages also varied by company. Facebook had removed 87.6% of the challenged content, YouTube 79.7%, Twitter 35.9% and Instagram 42%.

The assessment also showed that sexual orientation was the most frequent motive for hate speech (33%)⁶⁰, followed by xenophobia, including hatred of immigrants (15%), and anti-Roma statements (9.9%).

If the difficulties of curbing hate speech *offline* are enormous, the difficulties of trying to do so *online* are, at times, almost titanic.

⁵⁹ The document is available at https://ec.europa.eu/info/sites/info/files/codeofconduct_2020_factsheet_12.pdf

⁶⁰ See European Parliament Resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including the concept of "LGBTI-free zones", which warns about the intensification of public discrimination and hate speech against LGBTI people across the European Union, and highlights that hate crimes motivated by anti-LGBTI phobia are on the rise in the Union.

VI. A FINAL REFLECTION

The debate on hate speech and how it is dealt with is, in short, a debate on what kind of society we want, and also on what kind of effectiveness of fundamental rights we want to have in it.

Without the need to appeal to what has been called "militant democracy", it does seem necessary that we reach a minimum consensus on the scope and contours of these rights so that we can *all* enjoy them on equal terms. And *all* is anyone, because the dignity from which they are born is only one.