

Using hate speech as an excuse

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Activists for freedom of speech in front of a police cordon in a demonstration in Barcelona.

Picture by Jordi Borràs

Since the beginning of the twenty-first century, it seems like the issue of hate speech has hijacked the entire free speech debate. Before then, our primary concern had been how to safeguard the right to freedom of expression from censorship attempts, which, ultimately, had become especially prone to taking the form of prohibiting pornography or immorality. Meanwhile, scholars of freedom of expression were striving to secure artistic liberties and increase the permitted manifestations of critiquing those in power. However, with the turn of the century came a restrictive wave and suddenly society is more concerned with protecting the community from totalitarian or discriminatory discourses, than about making more room for criticism.

This change constitutes a surprising paradigm shift. All of a sudden, society feels threatened by the excesses of free speech and the risk of media and information manipulation. The public is more disposed than ever before to prohibit the free dissemination of ideas they may find shocking and disturbing. There is an increasing awareness of the danger of everyone being allowed to say whatever they choose; at the expense, perhaps, of recognising the monumental threat implicit in allowing the authorities to control which ideas can circulate.

Historical evolution

The notion of hate speech is new, but historically all legal systems have established mechanisms to prosecute dissident speech. Those who deviate from the official truth have rarely been afforded protection when exposing and publicly disseminating their ideas. Not even in the regimes most recognised for protecting freedom of expression: in ancient Athens, the only exception to the right to freely express oneself in the assembly were expressions that called into question the essential principles of the city. In post-Revolution France, the order to shoot anyone who publicly supported the return of the monarchy was approved in 1797. In the United States, after the First Amendment was approved, the 1798 *Sedition Act* came into force, condemning the advocacy of foreign powers.

What's interesting about the recent advent of hate speech as a new enemy, is that this time, prohibiting the public contradiction of certain foundational ideas behind the political system appears to be justified by values linked to human rights and dignity.

Legally, the notion emerged from a Council of Europe Recommendation on the 30th of October 1997. It establishes that States must act against “*all forms of expression* which spread, incite, or promote racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance”. The very formulation of this recommendation highlights how controversial the matter is: our first attempt to deal with hate already accepts that it must be achieved by impeding the articulation of certain expressions. Our need to prevent the spread of racial hatred and intolerance has led, inexorably, to the curtailment of our freedom of expression.

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The term ‘hate speech’ has no place in the American theory of freedom of expression. As we all know, in the United States, the interpretation of its first constitutional amendment has given rise to a tremendously permissive system in which the idea of setting out a priori limits for any public speech is unimaginable.

In Europe, however, some constitutions approved after the Second World War have always exempted the propagation of totalitarian ideas from the right to freedom of expression, especially those linked to Nazism and Holocaust denial. This is the case in Germany, which can be explained by the fact that its 1949 Basic Law came into force at a time when its recent catastrophic experience of the Second World War and the heyday of the National Socialist State were still firmly etched on the public consciousness, and the country was immersed in a denazification process. The Constitution, which was expressly designed to distance the country from its totalitarian past, configured, in those particular circumstances, a militant

democracy in which there was no room for the free dissemination of ideas contrary to the new democratic model.

The intention to draw a line under dictatorial experiences can be clearly perceived in both Germany and Austria, but also in Italy and even in France. Both the Council of Europe and the European Convention on Human Rights itself emerged in response to Nazism. The defence of Nazism and its racist and anti-Semitic manifestations became the only exception to otherwise generous freedom of expression.

The paradox of tolerance

It is claimed the justification for this exception is rooted in what has become known as the paradox of tolerance, which refers to the amount of freedom of expression that open societies can tolerate without jeopardising their status quo. Writing in 1945 and reflecting on his recent experience of Nazism, Karl Popper believed that, in principle, intolerant philosophies should be countered by rational arguments and kept in check by public opinion, but when they aspire to impose themselves through force, he claims the right not to tolerate the intolerant. Thus, he advocates the idea that violent movements preaching intolerance should remain outside the law, and that inciting intolerance should be regarded as a criminal act.

And so, albeit from a democratic standpoint, Popper laid the foundations for the eternal tendency of public power to prohibit any discourse contrary to the established order. These theories are especially attractive in the current climate, where anti-democratic ideas disseminated through populism, lies and with no adequate contrasting argument, threaten to convince large swathes of the population.

The risk associated with this situation is obvious, and you don't need to go as far back as Nazism to prove it. During the last decade of the twentieth century, the massacres in Bosnia and Rwanda clearly demonstrated the power of ideological manipulation over one part of a population, to the extent that one part of society was willing to attempt the mass annihilation of another. In all these cases, the social groups who had power and control over the media deliberately used it to incite the physical extermination of their rivals. We should note, however, that experience has taught us that in these types of situations, any constitutional measures intended to restrict certain ideologies would have proved entirely useless. These types of rules are never effective against those in power because they also happen to be the ones responsible for applying them. If political authorities and judges are charged with deciding which ideas are undemocratic, they're unlikely to include the ideas they support themselves. They will use that power to curtail the spread of alternative ideas, but not the most dangerous ones. A Nazi judge will perceive more danger in allowing a Jew to criticise the Nazis than in the speech of those who share his own political persuasions.

The self-interested dissemination of discriminatory ideas is undoubtedly a threat to our societies, but attempting to prohibit it through the legal system doesn't solve anything.

Actually, the idea of hate speech poses a threat to pluralism that far outweighs its potential benefits. The 1997 Council of Europe definition cited above seeks to pursue those who deliberately promote racism and xenophobia, but also “all forms of intolerance”. As intolerance is a subjective concept (we only ever see it in opinions contrary to our own) this general clause allows the authorities to pursue any idea they consider to be radical. Something similar can be seen in the European Council’s Framework Decision 2008/913/JHA of 28 November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law, which provides the fundamental legislation in this regard. The European Union talks of sanctioning “public incitation 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 origin”. It adds religious hatred to racial hatred and xenophobia. This opens a dangerous door.

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It adds religious hatred to racial hatred and xenophobia. This opens a dangerous door. The link between race and religion, although it can be understood in the context of the growth of Islamophobia and anti-Semitism, implies a qualitative change: if initially, the object was to prosecute discourses that reject a person’s nature as defined by their race or origin, now we’re trying to combat the rejection of a person’s beliefs as well. However, while racial hatred denies the essence of a human being, animosity against the beliefs of others can be based on ideological dissent. You cannot refute that someone is a person because of the colour of their skin, but it is legitimate to disagree about the existence of a certain god. Hate speech’s centre of gravity ceases to be human dignity and begins to incorporate a diffuse idea of tolerance in which any form of extreme speech is unacceptable. It’s no longer a question of combating discrimination but of a supposed right not to have one’s own ideas radically confronted.

Spain’s context

In Spain, the constitutional foundations of freedom of expression are different from those in the rest of Western Europe. The Spanish transition to democracy, without legally divorcing the dictatorship, was built on the basis that all ideas, including totalitarian ones, have a place in our society. In our democratic system, constructed in the last quarter of the twentieth century, ideas cannot be described as harmful. This has been demonstrated when the issue has been raised before our Constitutional Court, both with regard to advocating specific ideas –especially those linked to terrorist acts –and to prohibiting denialism or the trivialisation of the Holocaust.

On terrorism, it concluded that public demonstration, in the form of praise or exaltation,

moral or ideological support and solidarity with certain criminal actions, cannot be confused with the activities themselves, nor be understood, under any circumstances, as inducing or provoking such crimes. With regard to permitting comments about the Jewish Holocaust, it limited itself to introducing some precautions. Simply denying the Holocaust is not a cause for prosecution, but affirmations with racist and anti-Semitic connotations that amount to anti-Jewish incitement are. As for insults, they constitute an attack on a person's honour if they are carried out to bring discredit and contempt to the victims. Thus, racist messages that advocate for the executioners, glorifying their image and justifying their actions, can be criminally punished insofar as they also intend to insult or humiliate the victims.

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Our Constitution, therefore, clearly distinguishes between what the law prohibits or allows and what is worthy of respect within the boundaries of the "civic morals of an open and democratic society". Some ideas may repel democratic morality yet not merit legal sanction. Although Article 17 of the European Convention on Human Rights admits exceptions to the freedom of expression when it is used against the values emanating from human rights, the Spanish 1978 regime upholds no similar exception, making it impossible to limit free expression. No idea can be prohibited so long as it does not cause immediate and effective damage. By contrast, any communicative contents broadcast to cause harm to another person –either directly through insult or threat or by inciting third parties –are not provided for by the right to freedom of expression, which is limited to ensuring the free circulation of suitably relevant ideas required to open social debate without direct incidence on reality.

In any case, the idea of hate speech has also found its way into Spain's system. And it has done so under the guise of 'indirect incitement', which refers to discourse that provokes the rejection of certain groups, creating a definite risk of generating a climate of violence and hostility that could materialise in specific acts of discrimination. With this idea in mind, Spain has built on the European framework decision to conceive article 510 bis of the penal code, which sanctions even the merest nurture of hatred. The hatred may be directed against someone because they belong to a particular group, or even because of their ideology or beliefs. In short, anyone who increases hatred towards any other person can be penalised.

This formula has turned our system into the perfect laboratory for analysing the risks associated with the idea of hate speech. The decision on whether an idea expressed in public is capable of creating hatred in a sufficiently significant way to deserve criminal reproach can only be reached on the basis of the ideological values of the judge who makes that evaluation. Once the strict enunciation of the motives disappears and the mere fact of provoking any type of hatred is pursued, the judge has no tool for evaluation other than the ideology itself, which can be hard to detach oneself from. This also applies to the

Constitutional Court of Spain.

In 2015, several Catalan independence supporters were sanctioned for burning an official photo of the King and Queen of Spain. It justified the ruling by saying that “publicly burning a portrait of the Monarchs is an act which is not only offensive but also incites hatred, insofar as the cremation of their physical image expresses, in a manner difficult to deny, that they are deserving of exclusion and hate”. In other words, it defined it as a hate crime, which was a category initially created to protect the particularly vulnerable collectives in our population, but now ends up being used to limit the freedom of expression of those who wish to express their rejection of the current political system.

A year later, Spanish Constitutional Court upheld the conviction of a Basque politician for placing, during a public tribute, some flowers on the portrait of a terrorist who died thirty years ago. It justified its decision by saying that the mere act of participating in the tribute was an expression of hatred based on intolerance. It argued that it constituted an act of aggressive nationalism with the unequivocal presence of hostility towards other individuals, as demonstrated by the fact that, with calculated ambiguity, he spoke of an alleged conflict with the State. At this point, we are identifying hatred through the ideological positions of a Court that neither recognises any conflict with the State nor shares in the nationalism it deems to be aggressive. In short, the courts are using hate speech as an excuse to punish the exercise of ideologies that differ from those defended by the public power, rather than to prevent discrimination against vulnerable groups.

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And this is a problem which is neither anecdotal nor peculiar to Spain. Ontologically, the idea of hate speech is based on prosecuting the dissident and imposing certain values as indisputable truth. The fact that those values are determined exclusively by the powers of the State is an inexcusable consequence. Thanks to this concept, the public powers can decide which values, in their opinion, are essential for peaceful coexistence, and may prohibit any manifestations that contradict them.

By now, however, the notion of hate speech has triumphed in public opinion and legislation to the extent that attempting to radically remove it would be challenging, to say the least.

Less restrictions on freedom of expression

Instead, aware of the dangers posed by the tendency of many European States to qualify any ideological expression contrary to the majority opinion and values as “hate speech”, the European Court of Human Rights is attempting to redirect the concept by developing an increasingly restrictive jurisprudence of the possible limitations on freedom of expression.

In 2009, the Court tried to redirect the concept by reinterpreting it as referring to forms of hatred based on intolerance and expressed through discrimination and hostility against minorities and immigrants or people of immigrant origin. In other words, only discourses that provoke social hostility towards particularly vulnerable groups should be prosecuted. In 2015, in the case of a Turkish political leader convicted in Switzerland of denying the Armenian Genocide and presenting it as an international lie, the Court pointed out that it was an attempt, by the Swiss authorities, to impose a single way of thinking and punish dissenting opinions. It went on to note that as no insulting expressions were used, the behaviour in question was simply intended to open a discussion on political issues.

In 2018, a punk band was convicted of religious hatred by the Russian legal system because of their choice of clothing, use of balaclavas, body language and violent verbal language during an unauthorised performance inside a cathedral. This time, the Court accepted that given that said behaviour took place in a cathedral, certain people may have found it offensive. However, it considered that the behaviour did not amount to inciting hatred; to be considered as such, it would be necessary to prove that the acts in question could be interpreted as a “call to violence or as justifying violence, hatred or intolerance” confirming, therefore, that “their actions could have had harmful consequences”. In that same year, it overruled the Spanish judgement on the burning of royal portraits, noting that it formed part of a debate on issues of public interest. It deemed the communicative acts to be an expression of the rejection of the monarchy as an institution, which falls into the category of political criticism or dissidence. Trying to restrict freedom of expression in cases such as this, by extensively applying the hate speech exception, would constitute an excessive limitation that cannot be accepted in a democratic society.

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Thus, we’re beginning to see restrictions being imposed on the capacity of States to use hate speech as an excuse to limit the freedom of expression of those who defend dissident ideas. This restriction is based on two pillars: on the one hand, limiting the interpretation of hate crimes to those perpetrated against a vulnerable sector of the population. On the other hand, ensuring that publicly relevant speech can only be sanctioned if it generates an imminent risk of discrimination against such groups. The mere emission of ideas that differ from those of the majority cannot be prosecuted, nor can mere expressions of hatred. Hate is a legitimate sentiment, which can be freely expressed as long as it is not done to immediately cause discrimination against a vulnerable group.

This seems like an appropriate approach to mitigating the most imminent threats to free speech. Yet the European system continues to pay the contradictory toll of its original sin. As long as Nazism and Holocaust denial remain as prohibited ideas, there will always be a

crack through which dissident repression may fall. As long as our courts and legal texts refuse to accept that an idea alone can never cause harm nor, therefore, be prohibited, there will always be room for the public powers to silence inconvenient opinions.



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