Fifty Shades of Tolerance: Human Rights Argumentations concerning Family Models and Hate Speech

Cincuenta Sombras de Tolerancia: Argumentos sobre Derechos Humanos respecto de los Modelos de Familia y el Discurso de Odio

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Abstract
The protection of human rights is one of the main obligations a state has in order to fulfill its duties. Therefore, the right of freedom of expression shall be protected, especially because it relates directly to the defense of the democratic of a society. Although there are different points of view regarding an issue, especially same-sex marriage, the state is obligated to stay neutral towards public opinions. Consequently, public opinions might end up transforming into hate speech which creates an even larger confrontation within people and the state. This is why, the state must establish fair limits for human rights. Finally, it is essential to understand that promoting tolerance is the most important aspect to safeguard the rights of people to freely speak their minds in order to exercise their right of freedom of speech.

Keywords
Freedom of expression/Same-sex marriage/Hate speech/Protect minorities

Resumen
La protección de los derechos humanos es una de las principales obligaciones de un estado para que pueda satisfacer sus deberes. Es por esto que el derecho a la libertad de expresion debe ser protegido, especialmente porque se relaciona directamente con el amparo de la sociedad democrática. Tomando en cuenta que hay diferentes puntos de vista sobre un asunto, especialmente sobre el matrimonio de personas del mismo sexo, el estadp está obligado a mantener una posición neutral. Por lo tanto, la opinión pública se puede transformar en discursos de odio que generan aún mayor confrontación entre las personas y el estado. Es por esto que el estado debe establecer los límites necesarios al ejercicio de los derechos humanos. Finalmente, es esential entender que el promover la tolerancia es básico para salvaguardar el derecho de las personas a expresarse libremente para que así puedan ejercer sus derechos.

Palabras clave
Libertad de expresión/Matrimonio igualitario/Discurso de odio/Protección de minoría.

1. Introduction

"I do not agree with you on what you say but I fight for your right to say it". Rumour has it that the quotation is from Voltaire, however there is no clear evidence to it. Whoever the author was, the sentence clearly highlights the difference between accepting a point of view and tolerating it. History is the mere battle of different ideologies and by now the original marketplace of ideas, as John Stuart Mill considered, has turned to the *battlefield of ideas*. In many aspects mainstream ideas intend to defeat concurring ones; i.e. they want them to be excluded from the marketplace.

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The acceptance of different family models is one of the most slippery issues both in Latin America and in Europe, and the battle of traditional and non-traditional (including same-sex, single parented, patchwork, etc.) models reminds one to a war till *last man standing*. Lately, in Latin American countries (like Ecuador) supporters of traditional family models were treated as offenders of hate speech[1], and in some European countries (especially Russia) authorities are likely to disturb the LGBT Pride March[2].

Present essay argues why it is better to leave the battlefield and get back to the marketplace. First it analyses the content of freedom of expression and argues that there is a greater social need to protect minority opinions. Secondly, it considers the role of the state concerning freedom of expression; it deals with what neutrality means. Thirdly, it considers hate speech as a limit of freedom of expression both theoretically and via some European regulations. Fourthly, it analyses family models and makes human rights argumentations concerning same-sex marriage. Lastly, it makes conclusions and intends to introduce tolerance in a different approach.

2. Content of freedom of expression

Freedom of expression is the most basic political right as it ensures individuals to participate in public debates. It forms public opinions therefore it can be deemed as an essential criterion of democracy (Smuk, 2015, p. 89). Forming the public opinion links to popular sovereignty; people have the right to form the state they live in. Considering all above one may come to three conclusions.

First, the subject of freedom of expression is typically of political nature. It is not necessarily limited to political views; one can quote to this right if he or she is not allowed to publish a cookbook or his or her otherwise non-political statement is censored. Still, both historically and theologically, the rationale beyond the protection of freedom of expression is to ensure that all fields of society can be subjects of public debate. In this sense 'political' means all views that affect the society. The constitutional protection must reflect to the fact that political views are much more criticised than others, therefore a greater level of protection seems to be necessary.

Secondly, beside the individual aspects, freedom of expression is a guarantee for the whole political community to avoid dictatorship. If a political regime cannot be criticised either in everyday communication or by free press, the system receives no feedback on its activity. Democracies need a close connection to the people governed and freedom of expression is the strongest link in this relationship. Not coincidentally, absolutistic countries are likely to limit freedom of expression at the very beginning.

Thirdly, the constitutional content of freedom of expression is more than just *forming* a statement. The core of the freedom is not forming the words but to communicate them; to *share* the information with others. The constitutional protection must include both

1 The most recent events in Ecuador occurred after the Government proposed a new law against the violence on women ("Ley Orgánica Integral para Prevenir y Erradicar la Violencia de Género contra las Mujeres" [Organic Law for Preventing and Eradicating the Gender Violence against Women]. As the influence of the gender theory has been gaining more influence on policy issues, like education and health, those who are in favour of the traditional family models, organized a protest in October 2017 upon the call of clericals and civil organizations against the new laws that tackle social problems as gender issues. As a reaction to the protest, a group of LGBTQ activists launched an action of protection against the organisers based on the argument that the protest itself and some of its messages manifested hate speech. On first instance their petition was rejected (No.17240-2017-0009) but because of the appeal the case is still pending. For arguments in favour of the hate speech, see: Juan Pablo Alban (2017).

2 *Alekseyev v Russia* (Council or Europe, 2010).

the free speech and to share the ideas with other people. Obviously, it would be a restriction of the right if your ideas are censored or you are fined because of what you have said. Yet it would be the same kind of restriction if you were allowed to say whatever you want but you were isolated from others. Freedom of expression is the freedom of communication and both the content (the expressed view) and the channel (the possibility of communication) must be ensured. Put together the three elements mentioned above freedom of expression can be defined as the free communication of mostly political view that is not only an individual right but the safeguard of democracy.

In constitutional terms the content of the speech hardly influences the constitutional protection; not the content but the fact of communication is the subject of the protection. Little does the constitutional law concern if my speech is popular or not, if it is a majority or a minority opinion. However, in reality minority opinions need a stronger protection than majority ones. If I support a football team in a stadium and my position is that our football team is the best in the world, I hardly have any negative consequence for exercising my freedom of expression. But if I state that the opponent team is better than ours, I can count on some encumbrance. In constitutional terms there is no difference between considering our team and the opponent team as better. In reality, there is a difference that law must also take into account.

Although the constitutional protection of mainstream and minority ideas is the same, the state has to pay a closer attention to the latter. However, it always changes which one is the mainstream and the minority position. Half a millennium ago, the mainstream position was that the earth is flat and does not move (Galilei must have had some experience on freedom of expression with his dissenting opinion). Hundred years ago, the mainstream position was that women did not have the right to vote. At present both statements are of non-sense. But you have no ground at all to consider that present mainstream ideas will not turn to minority ones in hundred or five-hundred years. Minority opinions must not be excluded from the public discourse; they need a stronger protection instead.

3. Freedom of expression and state neutrality

According to the famous provision of the First Amendment, "Congress shall make no law […] abridging the freedom of speech". The provision became so important in the US doctrine of political rights that it is often referred as the unamendable core of the Constitution of the United States (Albert, 2015, p. 14). Similarly, democratic states find it obvious not to involve into the freedom of expression and they abstain from any kind of censorship. It is the right of the people to formulate the public opinion which leads to state neutrality.

At first sight it seems obvious that only human beings may have human rights. However, certain rights are endowed to artificial persons, too. Enterprises, societies, NGOs, etc. may have the right to property, the right to enterprise or the free access to the judiciary. On the other hand, it is impossible to endow them with religious freedom, human dignity or privacy. By nature, such rights can only be exercised by human beings.

Although some artificial persons may have certain rights but the state as the sovereign does not have any constitutional right. Admittedly, states do have rights under civil law; they can conclude agreements, may launch judicial procedures or may employ people in the public administration. In this regard, there is no great difference between states and any other subjects of law. Yet in constitutional law terms, the state has only duties concerning human rights: duties to respect and protect such rights. In constitutional sense, the state does not have the freedom of expression and this is in parallel with the "Congress shall make no law" term of the First Amendment.

All this does not mean that the state has no stall in the marketplace of ideas. Even it does not have rights, the state does have legitimate aims (*Staatsziel* in the German doctrine) to formulate public opinion. Neutrality does not mean full passivity. Neither does it mean that states should be neglectful concerning public opinions. "Freedom of opinion can truly prevail if the state actively participates in organising pluralistic political discourse" (Smuk, 2015, p. 89). States have values and they are free to represent such values in public discourse. One can conclude that states freely have *priorities* but they cannot exclude all other views from the marketplace. They have to tolerate views other than their own. Consequently, content-based restrictions are presumptively unconstitutional (Stone, 2015, p. 125).

4. Where tolerance ends: hate speech

4.1. Restrictions for protecting individuals' rights

Despite the high rank of freedom of expression, it is impossible to find all sayings as equal. The US Supreme Court formulated the concept of low value speech that roots in the decision of *Chaplinsky v. New Hampshire*, which declared that "there are certain well-defined and narrowly limited classes of speech [that] are no essential part of any exposition of ideas". In the United States content-based limitation like hate speech is possible only if the speech constitutes a *clear and present danger* to other people.

Most European countries, having the sad memories of totalitarian regimes, are less confused to establish content-based restrictions. The rationale beyond that is that states are obliged to keep the democratic standards in public discourse and they are not about to tolerate views that are against democracy, rule of law, constitutionalism or human rights[3]. However, such a limitation must meet strict criteria. First, limitation must have a legitimate aim, then it must meet the necessity-proportionality test.

What is the legitimate aim, i.e. what can the possible grounds of the restriction be? There are two possible answers for the question. The most common ground for the restriction is the protection of human rights of others, especially human dignity. Hate speech is commonly persecuted because the expression offends other people. States have obligation to protect people's dignity and if they find that someone is offended because of a specific feature (like race, sex, religion, sexual orientation, etc.) they must take the appropriate measures.

However, the way of protecting others' rights from hate speech is not the same in all countries. Comparing some Central European regulations, the Czech, the Polish and the Hungarian, one may find interesting differences.

According to the Czech criminal code:

> Whoever publically defames:
> a) any nation, its language, any race of ethnic group, or
> b) a group of people for their true or presupposed race, belonging to an ethnic group, nationality, political or religious beliefs or because they are truly or supposedly without religion, shall be sentenced to imprisonment for up to two years (2009).

According to the Polish criminal code: "Who publicly insults a group of people or individual because of their national, ethnic, racial, or religious affiliation or irreligious nature or for such

3 Of course, this does not mean that I do not have the right to express my view for instance to turn the country to a monarchy or to a presidential state. Constitutionalism in this sense does not mean the entire constitutional document but only the basic constitutional values.

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reasons violates the physical inviolability of another person is punishable by imprisonment of up to 3 years" (1997).

The Hungarian criminal code states:

> Any person who before the public at large incites hatred against: a) the Hungarian nation; b) any national, ethnic, racial or religious group; or c) certain societal groups, in particular on the grounds of disability, gender identity or sexual orientation; is guilty of a felony punishable by imprisonment not exceeding three years (2012).

In constitutional terms it is important where the borderline between personal integrity and freedom of expression is. In the Czech Republic *degrading or defaming* someone because of features mentioned above constitutes a criminal offense, it is not necessary for it to be (at least verbally) violent. On the contrary, Poland and Hungary draw the borderline elsewhere; it is punishable only if hate speech *incites* people. The constitutional protection concerning hate speech is close to the American 'clear and present danger' test. The Hungarian Constitutional Court examined the previous version of the criminal code (that also found defamation punishable) and pointed out:

> But the unique historical circumstances give rise to another effect and it is precisely for this reason that a distinction must be made between incitement to hatred and the use of offensive or denigrating expressions. The term "public at large" – apart from meetings – practically means the press. With the freedom of the press having become a reality no-one speaking out publicly may invoke external compulsion, and with every line penned he gives himself and risks his entire moral credibility. Only through self-cleansing can a political culture and a soundly reacting public opinion emerge. Thus, one who uses abusive language stamps himself as such and in the eyes of the public he will become known as a "mudslinger". Such abusive language must be answered by criticism. The prospect of a large amount of compensation is also part of this process. However, criminal sanctions must be applied in order to protect other rights and only when unavoidably necessary, and they should not be used to shape public opinion or the manner of political discourse, the latter approach being a paternalistic one (1992)

Due to the decision of the court, free expression can be restricted only if it constitutes a direct threat against others.

4.2. Restrictions for protecting public order

Despite the significant difference among the regulations, they are commonly restricting free expression because of the (direct or indirect) protection of other people. It is a different issue when there is no clear link between the restriction and anyone's rights. In this latter case the reason for restriction is not the protection of rights but of public order. The most common restriction of free expression is Holocaust denial that is committed if someone denies that the massacre of mostly Jewish people during the World War ever happened or minimizes the importance of this historical fact. Nearly all European countries have such a regulation in their criminal codes.

In such a case not the individual but the 'collective memory' is protected (Belavusau, 2015, p. 535). The position of the legislators is perfectly understandable; they intend to exclude the possibility that such a genocide would ever happen and as there are fewer and

fewer people who personally witnessed the War, states do not let the memory fade away. Nonetheless, in such a situation the *historical fact* is protected by criminal law measures. After the criminalization of Holocaust denial, some countries extended the regulation to the criminalization of the denial of other genocides. While Holocaust is a unanimously condemned historical event among nations[4], there are some other events that are more debated. For instance, the denial of the Armenian genocide (the massacre of around one million Armenians by the Ottomans in 1915)[5] constitutes a criminal offence in several countries like in France, Switzerland, Slovakia and Greece (Belavusau, 2015, p. 541). On the contrary, Turkey persecutes people who state that the events of 1915 constituted genocide.

> In Turkey, the public affirmation of the Armenian genocide is treated as a crime, on the premise that it is an insult to Turkish identity. In March, the writer Orhan Pamuk was fined about $3,670 by a Turkish court for his statement in a Swiss newspaper that Turkey had killed 30,000 Kurds and one million Armenians (Sayare / Arsu, 2012).

What you can see is that in one country stating a fact and, in another country, denying the same fact is the ground for persecution. The restriction of free expression has an axiological character: it depends how the country relates to the statement. As the limit of free expression is a very political issue, it is a slippery field for constitutional law. "Memory laws have been central to the concept of *militant democracy*, which excludes incitement to hatred from constitutional protection of free speech for the sake of preservation of liberal democracy" (Belavusau, 2015, p. 541).

Criminal law, especially if it manifests in the restriction of a fundamental right, must never serve direct political reasons. Criminalization of people for having other views than the mainstream is everything but democratic. It is true that states have the obligation to preserve democracy and democratic standards and they also have the possibility to penalize activities that infringe such values. On the other hand, the more divisive the question, the greater need there is to formulate public debate. If the state is militant and refuses to allow free discussion on such topics, it results a tension between the opposing social groups. And, as the case of the Armenian genocide, it is possible that different approaches will be cemented to criminal procedures in different countries. States are wise to be self-restraint in criminalizing hate speech.

5. The acceptance of different family models

In the mid 20th century, at the time of the creation of the European Convention of Human Rights and many national constitutions, the acknowledgement of same-sex marriages did not emerge. Yet in the 21st century more and more countries allow same-sex couples to conclude marriage. Despite the trend, most of the countries do not open marriage for couples other than heterosexual[6]. It is an open question if the principles of democracy and equality need the acknowledgement of same sex marriage. There comes up two different argumentations: the human rights approach and the reference to social changes.

4 Admittedly, Holocaust denial can be observed in some governmental communication: in 2005 December Iranian president Ahmadinejad said that a "legend was fabricated" at Holocaust (Al Jazeera, 2005).

5 For historical details see Geoffrey Robertson (2015).

6 In Hungary the Constitutional Court pointed out in 1995 that the Constitution does not recognise same-sex marriage [15/1995. (III. 13.) CC]. The Basic Law of 2011 explicitly excludes the possibility of same-sex marriage, while registered partnership (ensuring nearly similar rights) is open for homosexual couples.

5.1. Human rights argumentations concerning same-sex partnership

The question arises if there are human rights that needs for the state to acknowledge same-sex marriage. It is noteworthy that heterosexual and homosexual couples have different positions, as heterosexuals do have the possibility to marry while homosexuals do not. This raises the question of discrimination. However, at the case of homosexual people, the practical problem is not the different criteria; on the contrary, the problem is that they are *subjects of the same criteria* as heterosexuals (they can only choose partner for marriage from the other sex).

In constitutional terms, it is a legitimate (but not the only legitimate) argumentation that finds the criterion of different sex discriminatory because it indirectly excludes certain people from the possibility of marriage. Practically, this was the argumentation of the US Supreme Court in Obergefell v. Hodges that legalised same-sex marriage in the whole territory of the United States[7]. On the other hand, the European Court of Human Rights did not accept such argumentation; it stated that concluding same-sex marriage is a "forming right" and national legislations have a margin of appreciation in the issue[8]. Both in Washington D.C. and in Strasbourg, the case was decided with one vote that shows how slippery the issue is.

The human rights argumentation on same-sex marriage concludes that people have the right to determine the elements of marriage and they fit them to their free will and conscious. If such an argumentation is accepted, then, due to equal dignity, this results not only same-sex marriage but other traditional elements of marriage can also be modified. For instance, polygamy could have been also introduced or it would have been also possible for people to conclude non-breakable marriage if their conscious excludes the possibility of divorce[9].

5.2. Social argumentations on same-sex marriage

Introducing same-sex marriage can also be justified with the fact that the content of marriage has changed in the last decades and legal systems must follow such changes. Undoubtedly that there is a greater need to introduce same-sex marriage throughout Europe, there is no such need for introducing polygamy, therefore the differentiation can be justified. In this case, the acknowledgement of same-sex marriage is a *political decision*, no judicial organs but national legislators are to decide if they open marriage for same-sex couples. In all countries of Europe in which same-sex marriage is acknowledged, it was the decision of the parliament that decided in the issue. The question was also a political issue in Ireland and in Croatia that held referendums; people voted in favour in Ireland and against in Croatia. The French Conseil Constitutionel (2010) explicitly declared that it is the competence of the parliament to decide.

5.3. Equality and different family models

One can hardly find a more debated issue than gender equality both on national and international level[10]. The academic problem is that equality has different aspects. *Political equality* means the equality in human rights, the equal possibilities in public and private

7 576 U.S. 2015

8 *Schalk and Kopf v. Austria* (Council of Europe, 2010)

9 This was the suggestion of Henri Mazeaud in 1945 in France but was not accepted by the legislation.

10 See the Gender Mainstreaming Policies from organizations across the UN system (by UN Women, the ILO or by the UNESCO); the Beijing Declaration and Platform for Action from 1995; the Action Plan for Gender Equality of the UNICEF for 2014-2017.

sector, etc. Since the second half of the 20th century, the political equality has been an undoubted feature of democracy[11]. Arguing against the political equality of men and women would be severely non-democratic. People have the same rights and same dignity irrespective of their sex or sexual orientation.

On the other hand, *biological difference* is a medical fact. Men and women are built up differently, some parts of their body are different, etc. Law cannot and will not conceal such difference. László Sólyom, Chief Justice of the Hungarian Constitutional Court, reckoned in 1995 while giving the opinion of the court: "Equality between man and woman has a meaning, if we acknowledge the natural difference between man and woman, and equality is realized with respect to this" (1995). Law can, therefore, only acknowledge biological and sexual differences and attach legal consequences to them, but the existence of such differences is not constituted by law. This may seem to be evident but talking about inclusion of gender orientation on the identity card or changing it on birth certificates, represent a practical importance of this question. Identity and the plurality of the society is something that exists independently from whether the law acknowledges it or not. Law, for better or worse, is not a superpower, it has its limits, therefore its capacity to be a catalyst of change is rather limited. The issues of family life and personal identity are clearly one of those areas of law that needs to be handled with sophistication.

The most interesting question is to what extent biological difference influences social life, including family life. Some say that the influence is little; sex has no relevance in social and in family life, while some others find that different sexes could add different things to family life[12]. Obviously, the question also has religious surroundings; the Catholic view clearly supports traditional family models[13]. Yet it is not only a religious but also a political-philosophic issue about which the academy should have its word. Such a debate is sociological and psychological, where the task of Constitutional Law is only to draw the conclusions of the debate made on the previous levels and acknowledge the results of this debate.

Law should not be the only battlefield for such polemic issues, as the family and personal identity. Law should rather coordinate social life, its individuals and communities so that they have the biggest chance and opportunity to live a good life. First, every society has to lead an honest and truthful debate about such core issues of human life, which must be protected and promoted by law, though, for instance, guaranteeing and exercising free speech.

6. Conclusions: different family models and hate speech

The present article is not about to determine sociological truth. It rather evaluates what the role of the state is in determining academic truth. In this sense, democratic states have to be neutral; pluralism excludes the possibility of accepting only one idea and criminalizing all other views. Indeed, states have an active role of protecting democratic values and human rights. For this purpose, they can only restrict free speech if it is necessary for the protection of anyone's rights but it is illegitimate if the state is intolerant and restricts public debate.

11 In many countries (e.g. Switzerland, Australia) women gained suffrage only in the 70s. In Hungary women received equlaity in citizenship only in 1957. During the years of socialism political equality did not prevail in Hungary; women had practically no access to political positions, even though the Marxist idea strongly emphasised equality. After the transition of 1989 the Constitution made efforts to achieve equality but it proved to be a long journey. Interestingly, the Hungarian Constitutional Court found regulations contrary to equality that were favourable for women, like more holidays and lower retirement age.

12 e.g. Kyle D. Pruett (1999), William Pollock (1998), John Attarian (2000).

13 Pope Francis's general audience on family can be read at Vatican (2015).

The social acceptance of traditional and non-traditional family models, including the acknowledgement of same-sex marriage and the relevance of sexes in family life is a very important public debate. Either way, states can have priorities even in this issue but they can exclude other possibilities only if their expression is offending or against democratic values, *but the mere fact of disagreement cannot be deemed as offending*.

Tolerance means the humble acknowledgement that there are several considerations; I may find one of them more convincing but I accept that others evaluate differently. Whoever promotes either traditional or non-traditional family models would gain with tolerant public debate instead of lethal combats in the battlefield of ideas.

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