

Sexual Hate Speech in the Light of Liberal Free Speech Theories: Freedom of Expression or the Violation of Women's Rights?

Şule Özsoy*

Introduction:

In liberal theory free speech is one of the essential qualities of democratic society justified either by its possible "benefits" for individuals and society or "values" that it serves to¹. All these possible benefits or values not only underpin legal protection of free speech, but also shed light on ideal standards for the relation of governments to citizens. These principles, furthermore, have implications for what practices of suppression are legitimate and what practices of speech, even though unpleasant to some, are to be tolerated. In this regard the most controversial challenge to the liberal theory comes from the arguments supporting restrictions to sexual hate speech or pornography (thought to be type of sexual hate speech). Such restrictive approach to sexual hate speech seeks to uphold the women's rights to equality, dignity and to live free from discrimination and maltreatment.

This article addresses the question of sexual hate speech in the light of several established free speech arguments. Seeing a nexus between power relations and certain speech acts in the social field it endeavours to explain the complex and often-confusing legal effects of this relationship.

* Research Assistant, Faculty of Law, University of Istanbul.

¹ See Greenawalt, "Free Speech Justifications", 89/1 Columbia Law Review (1989), at 119-155.

In this regard it is sought to decipher the basis for sexual hate speech moving social or political disputes to the legal sphere and bearing in mind the importance of discursive activities' potential to regenerate and convey social values; good or bad. Moreover the inquiry is not limited to one specific legal system as the writer aims to explore the problem in broader terms and searches for theoretical basis rather than concrete solutions to a legal problem instigated by social injustices.

Specifically it will begin by defining power relations and the nexus between hate speech and suppressive power relations targeting historically disadvantaged groups; women in particular. In the later parts theoretical positions underpinning free speech will be explored with respect to their standpoint towards sexual hate speech and answers will be sought to the question whether an intervention in sexual hate speech could have legitimate basis under the recognised free speech arguments.

1. Power Relations and Women

Power as a social phenomenon could be identified from several perspectives yet remains difficult to define precisely. In this article's context the word of power is used to describe supremacy exercised over people by other people or the institutions founded by people. And suppressive power relations as a term define human relationships in which one person or a group tries to control the conduct of the other(s). While power relations require free subjects, and exist in every social field remaining mobile and modifiable, suppressive power relations fix and sustain asymmetrical supremacy. In other words it is "domination"².

When a group or an individual blocks the mobilisation of this relation and prevents the reversibility of movement, they are in the state of domination. In the state of domination, the dominated partner has very little margin of freedom. In social field this occurs in economical, social, institutional or sexual forms³.

Power is something very complex generating strategies, networks and mechanisms according to Foucault. Producing knowledge is one of

² Foucault, "Foucault Live; Collected Interviews, 1961-1984" Lotringer (ed.) (Newyork: Semiotext, 1989) at 441.

³ Ibid., at 434, 442.

the strategies of power⁴. All power relations use knowledge conveying social values, and justifications for behavioural codes.

As for women such power discourse has been operating for many centuries "pinning women to their sex" for centuries as Foucault puts it⁵. The knowledge has been produced throughout the centuries in the form of science or culture declaring that women are the weaker sex and should be identified with their sexuality.

Freedom of expression in this picture is expected to be a valuable tool for women to produce defying knowledge and participate in collective decision making as partners of non-domineering power relations. However having been suppressed so long, women, facing all the mechanisms and networks of power, do not easily reach communication channels and produce a counter discourse.

In that context, the biggest challenge towards women's attempt to gain equal and respectful status in society comes from sexual hate speech.

2. Identification of Sexual Hate Speech

Sexual hate speech is the voice of domination and a form of offensive speech directed at less powerful; in this article's context, women⁶. Such speech attacks, degrades and aims to diminish its victims' free will and personality. Sexual expressions in the form of hate propaganda constitute and disseminate dangerous and offensive lies about women's sexuality.

Namely, women's presentation as sexual objects who enjoy pain or humiliation; or as sexual objects who experience sexual pleasure in being raped; or as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or as whores by nature; or women's presentation in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual,

⁴ Foucault, "Politics Philosophy Culture", Kritzman (ed.), (Newyork : Routledge, 1988) at 102, 104- 107.

⁵ Ibid, at 115.

⁶ Wolfson, "Hate Speech, Sex Speech, Free Speech", (Westport, Conn. : Praeger, 1997) at 1.

can be seen as a strong sexual hate propaganda⁷. These images or words sell sexual objectification, sexual violence, and eroticise subordination of female sexuality⁸. Such images or words do not only portray women (or one of the participants of sexual relationship) degraded and abused, but also recommend this abusive sexual behaviour⁹.

Although some feminist scholars argue that all sexist, sexually explicit and stimulating materials are sexual hate speech, even sex education materials¹⁰ such broad definitions lack the necessary elements for judicial review. A legal argument has to present the aim of a speaker and the capacity of a given speech to have undesirable effects, in other words, the capacity to produce or to maintain sexual domination by terrifying, humiliating or degrading the victim(s).

J.L Austin scrutinises speech forms and argues that some words do not "describe", "report", or express anything at all, therefore they are not true or false, but they "do" something. Speech can act¹¹. It is possible to do something by saying something or in saying something. Speech can be "performative" in the right context¹². Where circumstances are suitable, a speaker who is in a powerful position can have the desired "physical" or "mental" impact on listener¹³.

Similarly, in the right context and performed in the right manner, sexual hate propaganda could function as medium of power relations to

⁷ Similar but extensive definition has been proposed by MacKinnon in Mineopolis Ordinance Draft in 1983, in "harm's way: the pornography civil rights hearings" MacKinnon and Dworkin (eds.) (Cambridge, Mass. : Harvard University Press, 1997) at 1-2.

⁸ Itzin, "Legislation against Pornography without Censorship", in Itzin (ed.) *Pornography, Women, Violence & Civil Liberties* (Oxford : Clarendon Press, 1992) 401 at 411.

⁹ Langino, "Pornography, Oppression, and Freedom: A Closer Look", in Lederer (ed.) *Take Back the Night; Women on Pornography*, (New York: W. Morrow, 1980) 40 at 51-52.

¹⁰ Russell, "Pornography and Violence: What Does the New Research Say?", in Lederer (ed.) *Taking Back the Night; Women on Pornography* (New York: W. Morrow, 1980) 218 at 218-219.

¹¹ Austin, "How To Do Things with Words?", (Oxford: Clarendon Press, 1962) at 5.

¹² Langton, "Speech Acts and Unspeakable Acts", 4 *Philosophy & Public Affairs* (1993) 293 at 312-322.

¹³ Austin, *supra* note 11, at 8,12.

dominate. The target can be a woman or a group of women or may well be women as a whole.

The question here is about devaluation of the less advantaged groups' standing in society. It is about disseminating views degrading to the less powerful individuals while they do not have equal opportunities to respond through communication channels. Abel describes sexual hate speech question as social competition for status or respect and emphasises its connection to the "centrality and pervasiveness of conflict over respect"¹⁴. Delgado and Stefancic also note that the "indisputable element of harm" in hate speech is the "affront to dignity"¹⁵. They indicate that the concerted purpose in such expression is to use hate speech collectively as an offensive weapon to keep the subordinated down. Speech becomes a weapon to keep certain groups in their places; "formal mechanisms that maintained status and caste gone or repealed ... all that is left is speech and the social construction of reality"¹⁶.

In this regard the conflicting interest of the subordinated groups is their desire of respect, honour, and dignity from society at large. According to this view "what turns an otherwise unpleasant comment into hate speech is the notion that its expression threatens the social standing or respect of another"¹⁷.

3. Sexual Hate Speech in The Light of Established Free Speech Arguments

Would possible functions of sexual hate speech in founding domineering power relations be a sufficient base to hold its users legally responsible? The possible answer here is predominantly related to legitimate limits to the right to free speech and the rights of possible victims of sexual hate speech (the right to equality, the right not to be discriminated on the ground of gender, etc).

¹⁴ Abel, "Speaking Respect", (Chicago: Univ. of Chicago Press, 1998), at 5.

¹⁵ Delgado & Stefancic, *Must We Defend Nazis? Hate Speech, Pornography and the New First Amendment*. (New York: New York Univ. Press, 1997) at 20.

¹⁶ *Ibid*, at 160.

¹⁷ Gould, "Difference through a New Lens: First Amendment Legal Realism and the Regulation of Hate Speech", 33 *Law & Soc'y Rev.* 1999, 761 at 762.

The right to freedom of expression is commonly recognised in many democratic countries as a right with which governments may interfere implementing certain legitimate reasons proportionately and consistently with the underpinning *raison d'être* of this right. The underlying values and justifications of freedom of expression in this regard draw the scope of the right and define its inalienable core. The scope and the core of the right correspond to duties that every one has to respect.

In Hohfeldian analysis of rights, legal rights are correlative to certain legal duties that other people have towards the right holder¹⁸. Incidentally a right is enjoyed in practice where its correlative duties are fulfilled¹⁹. Yet the duties generated by different rights are prone to compete for application in situations where people have legal duties towards different right holders²⁰. That is to say, in specific situations, A might owe B and C different legal duties but can only fulfil one at ones. Then one right is to prevail over the other. In such situations a right's fulfilment does not override the other right completely but only certain duties that generated by the other right.

It means that the speaker's enjoyment of the right to free speech depends on the subjective situations in which the rights of the possible audience are also at stake. The rest is a balancing process.

How does a legal system balance the subordinated group's need for a legal shield from threatening social perceptions against the speakers' attempts to sustain domination by using free speech "extirpating internalized feelings of subordinated"²¹? Both sides could claim protection under different rights. One can formulate the questions as the conflict between the right to equality (or not to be discriminated against or the generic right to human dignity) and the freedom of expression.

To balance the conflict Rawls suggests adjusting scopes of given rights by determining their "most central applications" where they clash

¹⁸ S. D. Hudson and D. N. Husak, "Legal Rights: How Useful is Hohfeldian Analysis?", 37 *Philosophical Studies* 1980 (45) at 45.

¹⁹ A Gewirth, "Are There Any Absolute Rights?" 31 *Philosophical Quarterly* 1981 (91) at 92.

²⁰ Waldron, "Liberal Rights: Collected Papers 1981-1991", (Cambridge : Cambridge University Press 1993), at 215.

²¹ Abel, *supra* note 14, at 70.

with one another, and have a final scheme in which well-defined rights consist of a system²². The bottom line is to define the central applications and fundamental interests to be protected by rights. Where a legal system declares the most central application of a right and the most fundamental interest represented by a right, it draws the "central range of application" of that right²³. It is the inalienable core of rights with which governments are not authorised to interfere. The duties generated by this core are to be fulfilled whereas the duties corresponding to the outer scope of the given right could be traded off to balance the conflicting rights. The central ranges have absolute and simultaneous protection. They all may not have the same extension but have equal protection for everyone.

The specification of scopes is done at the constitutional level by parliamentary bodies exercising their constitution making role and constitutional courts implementing their discretion. The lines among rights are drawn from "the standpoint of the representative equal citizens"²⁴.

In the light of this technical and theoretical explanation, the starting point of this inquiry over the sexual hate propaganda should be the central application of the right to freedom of expression. The most central application of a right is the core corresponding to duties of other people essential to the satisfaction of the right holder. Without this core the given right could not generate values or benefits justifying its existence and becomes meaningless. In other words the core stands for the reasons why a legal system holds people responsible to respect this right in the first place. That is to say if sexual hate speech falls out of the inalienable core of the right to free speech one could argue that the duty to respect freedom of expression of the speakers uttering sexual hate speech can be traded off to protect weighing interests.

There are two groups of theories underpinning the practice of free speech: "consequentialist" and "non-consequentialist". These arguments help to determine the most central application of the right to freedom of

²² Rawls, "A Theory of Justice", rev. ed. (Oxford: Oxford University Press, 1999), at 178.

²³ Rawls, "Liberty, Equality, and Law: Selected Tanner Lectures On Moral Philosophy", McMurrin (ed.) (Salt Lake City : University of Utah Press, 1987), at 11.

²⁴ Rawls, *supra* note 22 , at 179.

expression by explaining justifications and the substance of the right to freedom of expression.

Consequentialist theories explain the protection of free speech through the benefit that freedom of expression generates. Kent Greenawalt describes these useful consequences as “ a practice having value because of its contribution to some desirable state of affairs”²⁵. Non-consequentialist theories perceive freedom of expression valuable independent from its possible consequences. These theories are based on value premises, rights and wrongs. For example, people have personal autonomy, therefore they can decide for themselves what to speak out or listen to.

The first group of theories deems freedom of expression valuable since it generates truth, personal self-fulfilment, promotes tolerance, or democracy.

In the Mill's truth argument²⁶, suppression of free discussion lessens the emergence of truth in society. There is always possibility of truth emerging from free discussion, at least partially. The argument consists of two basic parts as the justificatory reasons for free speech: the notion of truth and fallibility of people. Mill believes in human rationality and in an open debate, through which people can see the truth, because they are rational. There is an objective truth to be discovered.

Is sexual hate propaganda part of free discussion? Sexual hate speech, lying about women's sexuality, functions in social power context, do not argue or debate. It cannot be defended on the ground of free discussion leading to truth. On the contrary such speech makes it very difficult for women to explain their sexuality. In a sense, they prevent reaching the truth. Reaching the truth can only be possible if every part of the society is able to make a contribution.

Certain pornographic images portraying women subjected to sexual violence could not be seen as harmless fantasies, but the presentation of sexual subordination and aggression in a sexy package. It is at least very offensive to the women who are raped or abused in real life. Making the

²⁵ Greenawalt, *supra* note 1, at 128.

²⁶ This theory has been applied widely in the American jurisprudence under the name of “marketplace of ideas”.

trauma and the horror of rape victims sexy is a simple hate speech since it ignores victim's horror and experience but propagates the perpetrators' sexual and psychological satisfaction over this pain. Sexual hate speech justifies sexual subordination and violence. For instance; alleging that deep down all women want to be raped is simply making the victim as perpetrator, since she wants it and asks for it. This is an attempt to silence "women" over their sexuality. By silencing one side of this power relationship, sexual hate propaganda actually does not aim at exercising free speech but hardens for society to reach the truth over women's true sexuality.

It has also been argued that there is no neutral and objective truth. Reason is also a socially constructed concept²⁷. Some feminist scholars believe that society creates truth by using discursive means. Free speech should be a positive right, which is implemented to demand state intervention in favour of equality, so that the less powerful would be able to participate in discursive acts. Throughout the centuries, all the inequality and subordination that has been produced is declared as the truth. Behind that process, there is a conflict between the powerful and the others. Keeping the state out of personal lives does not necessarily liberate all individuals, but leaves some part of the population subject to private domination of the other.

Freedom of speech is especially important for the less powerful to explain their opinion and interests as well. However it is not possible to do that by defending negative right to free speech, which is based on freedom from government interference. For feminists, equal participation of discourse is very important in order to have a fair society. This does not only require equal participation, but also necessitates prevention of inequality and discrimination in discursive activities as they generate and convey social values²⁸.

Another consequentialist theory, the theory of toleration argues for free speech as a way of promoting toleration. L.C. Bollinger argues in his book that the benefits to be derived from toleration of extreme

²⁷ Qistgaard, "Pornography, Harm, and Censorship: A Feminist (Re)vision of the Right to Freedom of Expression", 52 *University of Toronto Faculty of Law Review* (1993), 132 at 142

²⁸ MacKinnon, "Only words", (Cambridge, Mass. : Harvard University Press, 1993), at 72.

speeches are far greater than their harm, since free speech has functions helping to create a tolerance ethic in the society²⁹. His argument is utilitarian and communitarian. He emphasises the importance of community values. However, there is no social value is to be derived from false statements. Also he sees the rejection of racist speech and hard core pornography as symbolic assertions of community values³⁰. This argument fails to recognise women's lack of opportunity to access speech channels or pay special attention to speech as a medium of power relationships by which women are subordinated. Instead it recognises the importance of collective bonds holding society together. The unity and tolerance are the values keeping society together in a peaceful coexistence. Speeches functioning against that unity, namely obscenity, fighting words or libel will not be protected. Where obscenity does not get protection, sexual hate speech could claim a legal shield.

Another established theory of free speech is the democracy argument which is adopted by the European Court of Human Rights along with self fulfilment theory³¹. Freedom of expression is one of the essential mediums of democracy. It requires the free communication of ideas for citizens to exchange different opinions and information particularly concerning political questions. Thus political speech represents the central values protected by this right with which governments enjoy very little margin to interfere.

Protection of minorities holds an important place in this theory as democracy is based on each individual's equal participation in the political process. Otherwise it loses its main premise. This means that minorities and subordinated groups should have the chance to make their voice heard. Sexual hate speech does not really serve full functioning

²⁹ Bollinger, "The Tolerant Society", (Oxford: Oxford University Press, 1986)

³⁰ Ibid., at 184-185.

³¹ European Court of Human Rights, *Handyside v. The United Kingdom*, Judgement of 7.12.1976, Series A, No. 24, P. 49. "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

democracy in that sense. Quite the contrary, by being a medium of power relations, hate speech aims at subordinating and degrading minority groups which historically have less power in society. Democracy obliges governments to protect minority groups and enable them to use their rights equally and participate in the political process regardless of their less advantaged status. Therefore hate speech does not correspond to the most central application of the right to free speech under this argument.

Finally the writer examines consequentialist self-fulfilment theory according to which freedom of expression is required for individuals' intellectual and spiritual development. Self-fulfilment is explained by the reference to human dignity. Freedom of expression is considered as closely related to the intellectual development of human beings as autonomous individuals. There are three main justificatory values in this regard that free speech serves; the general satisfaction of human beings, equality and respect for human dignity³². The difficulty to justify any kind of hate speech in the light of this theory is obvious as the values upheld by the theory essentially contradict with the purpose of hate speech.

As for the non-consequentialist theories, they perceive human beings as autonomous individuals who are capable of choosing what they want to listen to or to express. These predominantly liberal theories explain basic rights through the notion of personal autonomy which is understood traditionally as an area in which "a person or group of persons is or should be left to do or be what he is able to do or be, without interference by other persons"³³.

Namely everyone enjoys the general right to liberty protecting their autonomy. These arguments for free speech strongly oppose state interference in individual spheres, and consider human dignity and equality as essential values.

There are several perspectives defended to explain the notion of autonomy. The most rigid defenders of autonomy are libertarians who understand freedom as "the absence of an intentional interference in the

³² Kaufman, "A Sketch of a Liberal Theory of Fundamental Human Rights", 52 *The Monist* (1968), 595 at 611.

³³ Berlin, "Four Essays on Liberty", (London: Oxford University Press, 1969), at 121-122.

private sphere of another person, sufficient to produce the intent effect with which that person does not freely agree"³⁴. The notion of autonomy is grounded on the idea of self-control and independence from coercion³⁵. Individuals have "practical reason" and can determine how to live their lives³⁶.

These theories on the whole draw the scope of the right to freedom of expression broader than others. As a result, hate speech is more likely to get protection under this understanding of right to freedom of expression than other theories. The only acceptable limit to freedom of expression is the harm concept. Harm here is understood as physical immediate harm, which is visible.

On the other hand harming others is a very vague concept as a limit to freedoms. It is possible to offer different conceptions of harm as a possible limit. The determination of which of the competing conceptions of harm should be preferred, is a politically and culturally conditioned position³⁷.

Furthermore it is not possible to imagine a person being able to have personal autonomy without considering the importance of social relationships for her. No one can live ignoring social power relationships. There are sources of power (other than state) that influence women's equal and independent personhood. People are equal and independent but at the same time connected to each other.

The biggest challenge to the classic liberal view of personal autonomy in this regard comes from the radical feminist argument. According to them "equal" liberty of autonomous individuals is the aim. Liberty without equality is not liberty for some groups, such as women since they actually lose their liberty along with their equality. This approach to freedom of expression can be seen as a part of the old argument assuming a conflict between liberty and equality.

³⁴ Bouillon, "Defining Libertarian Liberty", in Bouillon (ed.) *Libertarians and Liberalism; essays in honour of Gerard Radnitzky*, (Aldershot : Avebury, 1996) 95 at 98-100

³⁵ Narveson, "The Libertarian Idea", (Philadelphia : Temple University Press, 1988) at 16.

³⁶ *Ibid.*, at 17-18.

³⁷ Koskenniemi, "The Effect of Rights on political Culture", in Alston (ed.) *the EU and Human Rights* (Oxford : Oxford University Press, 1999) 99 at 107-108.

Additionally this feminist understanding argues that the classical concept of autonomy excludes women's experience in society, as women are "essentially connected" rather than being separate. Although individuals are indeed separate from each other, they also desire to connect with each other³⁸. This indicates the true effects of social relationships on individual preferences. To overvalue personal autonomy underestimates the value of the social construction of identities and preferences³⁹. In this theory, "rights not only secure personal autonomy; they also express relationships between the individual and the community"⁴⁰. Feminist critical theory emphasises the importance of social power relationships for the individual preferences without denying individuals' autonomous selves. People can act freely so long as their actions do not affect other people's autonomy. Expressive actions in this regard cannot be explained only by personal autonomy. Expression, by definition does not stay in the personal area. When people express some opinions or feelings, these indicate personal preferences but at the same time communicate to its audience.

Feminist critical theory consequently does not classify prohibition of sexual hate speech as a conflict between personal choices and general social preferences⁴¹. Radical feminists do not refute free speech protection for sexual hate propaganda simply saying that it is not speech under speech protection. They see it as inciting speech against women's equality and women's right to free speech (silencing their answer). They do not consider it from the moral perspective, but as a social reconstruction medium of the subordination of women in society. This indicates a conflict between rights of the speakers of sexual hate speech (producers and their customers) and women's rights.

In short sexual hate speech is not an essential part of free speech protection to promote positive interests in the light of any free speech theory. Even if one explains human rights as the individual capability of

³⁸ West, "Jurisprudence and Gender", 55 *University of Chicago Law Review* (1988)1 at 9-10.

³⁹ Rhode, "Feminist Critical Theories", Barnett (ed.) *Sourcebook on Feminist Jurisprudence*, (London : Cavendish Pub., 1997) 347 at 354-355.

⁴⁰ *Ibid.*, 359.

⁴¹ MacKinnon, "Pornography, Civil Rights, and Speech", 20 *Harvard Civil Rights-Civil Liberties Law Review* (1985) 1 at 64

pursuing their own preferences, the producers and buyers of sexual hate speech cannot be considered as exercising their personal preferences, but subtly helping to sweep away some others' choice over their lives. Thus sexual hate speech does not fall under the inalienable core of the right to freedom of expression in the light of the generally recognised liberal theories of free speech. In other words sexual hate speech does not enjoy an absolute protection under any free speech argument. Yet this does not lead to the conclusion that governments could freely identify and prohibit sexual hate speech. Freedom is the rule and the interference is the exception in liberal systems. Therefore the interference is to be done by balancing legitimate rights and interests.

4. Legitimate Interests Weighing Against Sexual Hate Speech

In a liberal legal system legitimate interests that could weigh against free speech are the right to equality, the right not to be discriminated against, and most importantly the generic right to have dignity in the social and legal context of sexual hate speech provided that given speech generates harmful impacts on certain holders of these rights.

“Speech acts differ from simple non-linguistic activities not only by virtue of this reflexive characteristic of self-interpretation but also by virtue of the kind of goals that can be intended through speaking, as well as the kind of success that can be achieved”⁴².

Although speech acts are self-expressive, the speaker may intend to achieve a purposive activity aiming to get the hearer to do something by not making it clear to her⁴³. This could be done by *persuading, convincing or scaring* etc⁴⁴. In this type of speech acts operating against a complex background of power relations, speech is the means to have the desired end.

⁴² Habermas, “Actions, Speech Acts, Linguistically Mediated Interactions, and the Lifeworld”, in Cooke (ed.) *On the Pragmatics of Communication* (1998) 215 at 215.

⁴³ Solum, “Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech”, 83 *Northwestern University Law Review* (1989), 54 at.89.

⁴⁴ Searle, “Speech Acts An Essay In The Philosophy Of Language”, (London, Cambridge U.P., 1970) at 25.

Sexual hate speech shows the main characteristics of such purposive acts and presents itself in different forms from one culture to the other. In Western societies, that could be a pornographic expression making rape sexy: in an Islamic society, that could be a written or verbal expression portraying women as non-trustworthy, filthy whores: in any way attempting to justify sexual violence or subordination by turning the victim into the perpetrator.

Furthermore expressions showing women having pleasure from subordination, degradation, physical pain and rape promote women's weak position in society and harms their right to have basic human dignity to act equal and autonomous persons⁴⁵.

Women, historically perceived as the weaker gender, are open to abuse more than men in society. Sexual hate speech functions against this historical background and promotes sexual violence as sexual activity that women like. Promotion of sexual abuse, even if it does not instigate actual violence, is affront to human dignity. Radical feminists in this regard believe that the voice of hard core pornography is the voice of male domination and powerful enough to "put women in a position of inferiority or loss of power, or to demean or denigrate them"⁴⁶.

Rape is not a fantasy. It is a reality in every society and it is an exercise of power, more than sex. Female subordination and lack of power is also a reality. So it does not really matter, for instance, that some hard-core pornography causes sexual violence as long as it justifies its performance.

Thus the writer of this article believes that there are legitimate interests to interfere with sexual hate speech to create an equal and fair society. Yet it is still needed to decide what the best way to deal with it is.

5. Dealing With Sexual Hate Speech

One view is not to apply prior censorship but to disseminate women's reaction to sexual hate speech as a way promoting the state's interest in equality whereas some radical feminists demand legal

⁴⁵ MacKinnon, *supra* note 28, at 30-31

⁴⁶ *Ibid.*, 303.

acknowledgement that sexual hate speech is discrimination and subordination of women.

Radical feminists, although agree that hard core pornography is sexual discrimination and harmful to women, have different propositions to solve this problem. Some support censorship, some are reluctant to do so⁴⁷. Radical feminists are not in favour of obscenity law, like other feminists. Their aim is not the prohibition of showing sex images, but the protection of women's rights. Yet restrictions on hard core pornography meeting their definition of sexual hate speech are seen as justifiable censorship and promotion of women's basic human rights⁴⁸.

The most well known action against pornography is the MacKinnon and Dworkin legislations in the USA. They drafted feminist anti-pornography legislation in 1993 in Minneapolis as a civil rights ordinance. The state of Indianapolis later enacted a modified version of the Minneapolis ordinance in 1994. Although the Indianapolis ordinance censored pornography, the original proposition of MacKinnon and Dworkin was not the prior censorship. These famous feminist scholars do not suggest criminal law control over hard core pornography, but civil law remedies for the women who are harmed by certain pornographic speeches and restrictions on those certain pornographic speeches as "relief for proven injuries"⁴⁹.

In the United Kingdom radical feminists have proposed making the incitement of sexual hatred and violence illegal, accompanied by legal provisions for civil actions⁵⁰. British feminists in this regard point out the difficulties of regulating pornography in criminal law which is necessarily based on a narrow harm concept. Criminal law requires proof of guilt beyond a reasonable doubt. And the burden of proof is not on the defendant. But for civil law, it is possible to set out a lower standard, just enough to show "something is more likely than not to have happened" and also possible to place the burden of proof on pornographers (as the

⁴⁷ Ibid., 299-230.

⁴⁸ Itzin, "Pornography and Civil Liberties: Freedom, Harm and Human Rights", in Itzin (ed.) *Pornography: women, Violence & Civil Liberties* (Oxford : Clarendon Press, 1992) 553 at 557

⁴⁹ MacKinnon, 'Feminism Unmodified: Discourses on Life and Law', (Cambridge, Mass. : Harvard University Press, 1987) at 210.

⁵⁰ Itzin, *supra* note 48, at 580.

producers of sexual hate speech) due to the social power structures in which women are disadvantaged. It is also proposed to make legal claims against pornography on the ground of "injuries to women as a group" in civil law cases⁵¹.

The British Race Relations Act presents a legal model disclosing similarities between racial and sexual hatred and prohibits the incitement of both⁵².

Conclusion:

Sexual hate speech creates conflicts of rights (and interests) and it is very difficult to offer one concrete recipe for solution as weighing up conflict of interests involves cultural and political assumptions about human good and a good form of common life⁵³.

In this regard the writer believes that it is possible to adopt different approaches to acknowledge women's civil rights in different legal systems with one common need: carefully engineered public policies promoting gender equality. Such policies are essential part of implementing basic rights as Martti Koskenniemi explains "a right is often a policy and must be weighed as such against other policies"⁵⁴.

"Rights not only determine and limit the policies, but policies are needed to give meaning, applicability, and limit to rights"⁵⁵. This concretisation is made at law-making level and further adjusted at judicial level⁵⁶. Respectively there is no need to redefine the right to freedom of expression at the constitutional level to interfere in sexual hate speech (in a system recognised basic rights as a consistent scheme) but to concretise it at legislative and judicial levels.

⁵¹ Itzin, *supra* note 8, at 424.

⁵² Forna, "Pornography and Racism: Sexualising Oppression and Inciting Hatred", in Itzin (ed.) *Pornography, Women, Violence & Civil Liberties* (Oxford : Clarendon Press, 1992) 102 at 424.

⁵³ Koskenniemi, *supra* note 37, at 108- 109.

⁵⁴ *Ibid.*, at 110.

⁵⁵ *Ibid.*, at 112.

⁵⁶ Martin, "Rawls and Rights" (Lawrence, Kan.: University Press of Kansas, 1985) at 135, 142.

Having claimed that sexual hate speech does not fall under the inalienable core of the right to freedom of expression, the writer considers hate speech within the scope which could be compromised. That is to say legislation targeting sexual hate speech could be enacted to endorse the right to equality and human dignity.

Yet such policy choices have to be implemented only where its necessity and legitimacy is proven. In other words specific restrictions to free speech are expected to meet certain criteria which prove the legitimate necessity to have such policies. The writer in this regard proposes to apply the Martin's principles as a way to measure the necessity of policies promoting women's equality and dignity;

- a. When a given policy is discontinued or allowed, other policies promoting equality and dignity are weakened,
- b. or if there was thought to be a gap in the area protected equally by rights, when the given policy was absent,
- c. or if the given anti-hate speech policy serves everyone more frequently than policies promoting free speech⁵⁷.

As an example of such policy choice the writer suggests allowing women who claim to be the victim of sexual hate speech to take up their cases to the court in a liberal constitutional system provided that given legislation is applied in consideration with the context in which hate speech has been performed and the elements of the particular cases such as the identity of the speaker and the hearer and other elements proving the purposive character of given activity. In other words such legal policies (criminal law or civil law) justified at theoretical level are to be applied proportionately to the harm done to the women's rights in particular cases. Balance is to be maintained by the judicial discretion.

And finally the purpose behind such policies is to make it "wrong" disseminating hate regarding a less advantaged group, as all human beings deserve to be treated equally and respectfully.

⁵⁷ Ibid, at 145-146.

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