

# **FRAMING LGBT-PHOBIC INCIDENTS IN SPAIN: BEYOND HATE CRIMES**

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**Abstract:** According to official statistics, in 2017 there were 271 hate crimes in Spain on the grounds of sexual/gender orientation/identity, which means an increase of 17,8% from 2016. Nevertheless, there is an important, invisible rate of incidents on the same grounds that don't match the criminal offences requirements, so they aren't shown in the official data. Recent research developed by the FELGTB (State Federation of Lesbians, Gays, Trans, and Bisexuals) reveals 629 incidents suffered by people within the collective reported by different associations. This unrecorded rate is intended to be rescued by using the concept “LGBTI-phobic incident”, which would also include any kind of behavior that involves an assault in a wide meaning.

**Keywords:** hate crimes; LGBT; LGBT-phobic incidents; vulnerable group- violence

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## **1. Introduction**

Section 10 of Spanish Constitution clearly recognizes that respect to people’s dignity and free development of personality are “the foundation of political order and social peace”. Within this framework, it is not hard to recognize that respecting affective-sexual diversity is to recognize that both affective-sexual orientation and sexual-gender identity are key elements of people’s dignity and according to that they are to be protected.

Although orientation, sexual identity and gender are status not specifically included in section 14 of the Spanish Constitution (which establishes equality among people), it should not be an issue at all as it could be included in the general provision that refers to “any other considerations or circumstances of a personal or public nature”. In fact, the

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Supreme Court had the occasion of expressing its point of view about that, specifically on a transgender issue

It shares with the other provisions included in section 14 of the Spanish Constitution the fact that it is a historically entrenched discrimination and it has located transgender people, by both the public institutions and the social practices, in disadvantaged and against people's dignity - recognized in section 10.1 of the Spanish Constitution- positions, because of the deep prejudices entrenched in the law and in the culture against these people; and, on the other side (Judgement of the Supreme Court number 176/2008)

Similarly, Article 14 of the European Convention on Human Rights (ECHR) doesn't make an specific reference to sexual orientation, identity or gender as status of discrimination, but it does mention "other status", where this circumstances could be included. Even the ECHR in 1976 accepted this interpretation in their Judgement in the Case of Engel and others v. The Netherlands, by saying: "the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as". Besides, the word "status" is wide enough to include rank". In the same meanings, this Court offered a Judgement in 1999 and this time focused on a LGBT issue, in the Case of Salgueiro Da Silva Mouta v. Portugal: "[...] sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as".

In contrast, *The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*, do include in Principle w related to "the rights of equality and non-discrimination" an specific reference to discrimination based on "orientation or gender identity", that it defines as:

Includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms (Yogyakarta Principles, 2017, pp. 10-11)

The document that reflects these principles, warns of the worrying situation of discrimination and violation of human rights that people suffer on the basis of these status. Thus, it points out to a “global and entrenched pattern” as the main reason that takes advantage of the “policing of sexuality” to continue “gender-based violence and gender inequality” (Yogyakarta Principles 2017, p.6).

The European Union Agency for Fundamental Rights (FRA) has recently concluded the collection of responses for their second edition of the EU LGBT survey. This second round has meant a real step forward compared with the previous edition in 2012, as it includes new categories: intersexual, non-binary gender and gender fluid.

This kind of victimization survey is based on two clear assumptions from their results. On one hand that LGBT individuals constitute a specially vulnerable group (nearly the half LGBT population have suffered from harassment or sexual orientation or identity based discrimination and a quarter of them have suffered violence based on the same status in the past five years (FRA 2013, p. 7) and on the other the importance of the dark figure (report rates to police institutions are critically low in cases of violence, which are around 22%, but overall in cases of non-violent behaviors defined as harassment, where the percentage drops to 6%)( FRA 2013, p. 24). However, there is a segment of individuals that stands out among the LGBT group with higher rates regarding to attacks, we are referring to transgender people, whose victimization rate when talking about violent attacks comes to 35% (FRA 2013 p. 7). In fact, there is a whole section in the FRA report assigned to “transgender specific questions”<sup>2</sup>.

In the case of Spain, the number of physical/sexual attacks or violent threats are situated within the European average. Nevertheless, what really attracts attention is the fact that the only two cases where Spain exceeds the European average (just in a 1%) are the most different ones: the one time attack and the more than ten times attack. Regarding police reports, Spain is just 1% over the European average with an alarming 82% of people not reporting because they didn't consider the fact as being important (a 48% adduced this reason, which means a higher rate than in Europe that has a 43%). Therefore we are facing not just an issue related to invisibility but also to underestimation of the attacks, even by themselves, this community receives. However, the survey shows that a 17% of people did decide to report, but to other institutions such as NGOs, LGBT associations, victims

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<sup>2</sup> Available online: <https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-fundamental-rights-lesbian-gay-bisexual-and> (accessed on 22 August 2019)

of crime offices, state institutions, hospitals or health services or even other kind of organizations<sup>3</sup>.

The figures are not better when people is asked about the worst physical/sexual attack or violent threat; 77% of the Spanish survey respondents did not report this situations (a 2% more than the European average) and the reason is again (for a 41% of respondents against the 35% European average) the lack of considering the fact as important enough, even when the wording of the question was clear: “the worst attack”. For this cases there is still a 17% which reported to other institutions different from police<sup>4</sup>.

Aguilar García (2014 pp.360-367) said about the important consequences of the dark figure that it could lead to a lack of awareness of the seriousness and importance of this issue not just related to public authorities who design the criminal policy, but also to staff involved in crime investigations (public prosecutor offices, courts, police departments). In this sense, he pointed to a some tendency of the judiciary to

Minimize the seriousness of the reported threats or minor injuries, which in occasions end up as mild infringements, without being deeply analyzed and with no assessment of the possibility to find another crimes related to another legal assets such as dignity or moral integrity. (Aguilar García 2014, p. 368)

In view of this situation, the FRA from a general perspective encourages all the member states to facilitate an promote actions involving mass media, political parties and religious institutions but also to increase the efforts from the research area (FRA, 2013, p.10). Regarding to hate crimes, FRA recommends the member states to adopt their own laws on homophobia, transphobia, hate crimes and hate speech crimes (FRA, 2013, p.10). According to this, the Spanish Criminal Code punishes on one hand the hate speech crime (sections 510 and 510 *bis*) and on the other hand the hate crimes<sup>5</sup> by a general aggravating circumstance (section 22.4<sup>a</sup>) that increase the penalty of any crime with a racist, anti-semitic basis or any kind of discrimination related to the victim’s ideology, religion, believes, ethnicity, race, nation, sex, sexual orientation or identity, gender status, illness or disability.

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<sup>3</sup> Available online: <https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-fundamental-rights-lesbian-gay-bisexual-and> (accessed on 22 August 2019)

<sup>4</sup> Available online <https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-fundamental-rights-lesbian-gay-bisexual-and> (accessed on 8 August 2019).

<sup>5</sup> Following the concepts used Landa Gorostiza (2018, *pássim*)

Nevertheless, Spain does not have a state law against LGBT discrimination, so the different autonomous communities have had to address this issue<sup>6</sup>. This fact does nothing but exacerbate the situation, as depending on the place, the response to the LGBT attack would be different, which would lead to legal uncertainty and blatant inequality among people being affected by the same incidents.

Just one parliamentary party, “Unidos Podemos-En comú Podem-En Marea”, has submitted two legislative proposals in this sense; the one in 2017 was about a law against sexual orientation, gender identity or expression, sexual features based discrimination and social equality of lesbian, gay, bisexual, trans and intersex individuals, and the one in 2018 about legal protection to trans individuals and the right to free election of sexual identity and gender expression. None of them has been approved yet. Even more, the latest addition of the political party VOX makes the possibility of an agreement on these issues even more difficult<sup>7</sup>.

## **2. Violence against LGBT community: from hate crimes to hate incidents**

LGBT individuals could be considered as an especially vulnerable group being the victims not just of physical and verbal attacks but also of a hard social exclusion (Peramato Martín, 2013) as the data from FRA have reflected. The origin of these attacks could be located according to Hereck (1990) in heterosexism, specifically in a “logic, although extreme extension”(p.316) of it. So he defines heterosexism as

An ideological system that denies, denigrate and stigmatize every non heterosexual behavior, identity, relation or community. As racism, sexism and other ideologies based on oppression, heterosexism appears in the customs and social institutions, such as religion and legal system (which is understood here as cultural heterosexism) and also in attitudes and individual behaviors (which is understood here as psychological heterosexism) (Hereck 1992, p. 89)

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<sup>6</sup> There are just five autonomous communities (from a total of 17) with no law on this topic (Asturias, Cantabria, La Rioja, Castilla y León, Castilla –La Mancha) plus the two autonomous cities (Ceuta and Melilla).

<sup>7</sup> This political party asked for the erasing of 15 sections from the Law 3/2016, of global protection to LGBTphobia and orientity and sexual based discrimination in Madrid and the Law 2/2016 of Identity and Gender Expression in Madrid

Iganski and Levin (2015) maintain that hate crimes share an emotional process with any other violent act. The common element would be the damage or disrespect feeling that the offender experiences. Feeling that the offender would counterattack with the aim of “imposing a formal justice system over the victim and repairing the damage made to their respect”. The victim’s weaknesses are used to make the attack (verbal or physical). And the origin of these weaknesses are just located in the social construct of difference, which is understood as negative and so it is (re)interpreted into a weak point (pp.54-55).

In this emotional process, there is a key element according to Thomas (1995) which is shame, understood as a “primitive” response against situations that people feel as disrespecting. This response could be projected on the individual causing this feeling, on other people or even on the person themselves (p. 587). Thus, those people handling a good self-esteem level are able to manage shame better than others that have experienced through their life a poor self-pray, so when they feel in some way that they are being humiliated (in a real or imaginary way) instead of recognizing it, they conceal it with anger (Iganski and Levin, 2015). As a recent sample, we can bring into consideration the incident that took place las *Pride Barcelona 2019*, when a young man was verbally attacked by a man in a public place. The offender expressed in the video that recorded the aggression that “*you are disrespecting me with such a clothing in a public place*” and then threatened the victim saying “*I am gonna make you a straight by beating*” (La Vanguardia 2019).

Considering anger as a key and trigger element makes us come back again to the cultural issue. According to the Madrid Observatory on homophobia, transphobia and biphobia (2017) the 89% of offenders are men. Here we need to recall that men are used to express themselves through anger since they are kids, in fact it could be said that this response is not just allowed but recognized as an “manhood” indicator. Thus, the heteropatriarchal culture promotes since childhood that boys are not allowed to express their feelings or emotions, because this would be considered a “girl thing” which is linked to weakness. Nevertheless, there is a feel that boys are allowed even encouraged to show, anger. Boys that get angry show “manhood”, girls that show anger are going too far. The lack of emotions management means a key element in shaping the cause of the crimes we are analyzing.

### *2.1. The terminological issue*

The Organization for Security and Co-operation in Europe (OSCE) (2009) defines hate crimes in the following terms

Hate crimes are criminal acts motivated by bias or prejudice towards particular groups of people. A hate crime therefore comprises two distinct elements: it is an act that constitutes an offence under criminal law; and in committing the crime, the perpetrator acts on the basis of prejudice or bias [...]. The term describes a phenomenon, not a legal concept.

In Spain, the term hate crimes has spread out and now it is widely used, even though the Criminal Code does not use this term, it just regulates on one hand a bunch of offences within the title dedicated to “crimes committed while exercising the fundamental rights and public freedoms guaranteed by the Constitution “ (section 510) and on the other the general aggravating circumstance in section 22.4<sup>a</sup> related to committing a crime with a discriminatory based (in this paper we will focus on the sexual and identity orientation status).

According to Landa Gorostiza (2018) the term hate crimes would include both those crimes consisting of a mere expression and those referred to acts themselves. Therefore, this author understands that behaviors in section 510 is to punish the “hate speech”, whereas section 22.4<sup>a</sup> is to penalize “hate acts” crimes (pp.25-48). In this sense, section 510 makes reference to “ideological manifestation [...], whereas the aggravating in the aggravating circumstance the “vehicle” of the threatening message is different: is the criminal behavior itself”(p.124). In this same extent, Santana Vega (2014), understands that section 22.4<sup>a</sup> is related to offer a core and general protection in the area of sexual identity and orientation based discrimination. Furthermore, the author highlights that the reference to sexual identity was included before in section 22.4<sup>a</sup> -2010- than in section 510 -2013- (pp.385-387). Aguilar García (2014) underlines the significance of using the terminology “hate crime” as it allows to really stand out what characterize them, what is the motivation of the offender based on their “open antagonism or hostility against individuals or groups”. In addition, the author exposes the serious consequences and the impact that these crimes mean not just to the direct victim, but also to the group they identify with, “affecting very directly both the cohesion of the community and social stability”(p.354).

Even the first official Spanish statistic from the Ministry of Interior on this topic includes this terminology and clarifies in this sense that even the Criminal Code does not include this name

It has been decided to count the punishable actions which are no doubt to expertise. For that purpose, it would be taken under consideration that any act that could be consider of criminal and administrative nature that is made against an individual because of their ethnicity, race, religion or religious practice, disability, sexual orientation or identity, as well as they poverty and social exclusion situation, would be classified as hate crime. This definition is “extensive” regarding its consideration, so it would be considered not just the most serious offenses, but also the ones that are less serious and the offenses based on an administrative law (Report on the evolution of hate crimes in Spain 2017 p.7)

So the first data on this issue, although being located on a report about “crimes”, are focused not just in behaviors on located in the Criminal Code, but also in administrative offenses, as an extensive purpose is alleged in order to include any kind of act that takes place against an individual because of any of the status mentioned before. It seems like, it is no correct to include in the category of crime those acts that are just administrative offenses, as it could lead to a distorted image in the criminal reality.

In view of this situation, the concept “discriminatory or hate incidents” arises as a unifying category. In 2010, the Council of Europe through its Recommendation CM/Rec (2010) 5 on measures to combat discrimination on grounds of sexual orientation or gender identity, distinguished between “hate crimes and other hate-motivated incidents”. Díaz López (2018) sheds some light on this and defines hate incidents as

Facts that although could be initially considered as hate crimes or an administrative offense related to hate crime, they are not; because they do not mean any kind of offense, because they just mean an administrative offense or even because there is still no judgement on the issue. A hate speech cannot be classified as hate speech crime but it could be as hate incident [...]. It seems better to keep using “hate crime” as a synonymous with “hate offense”, leaving the term “hate incident” for non-criminal acts. (p.55)

This concept of incident is wider and it allows to include acts that are not included in the Criminal Law but still attack rights and freedoms of LGBT community. Incident as all-inclusive term, allows to know more about the reality of the society's position against discrimination too. In the same sense, FELGTB (2018) points out the importance of the distinction between hate incidents and hate crimes

If we do not make that distinction any discriminatory act would be considered as a crime, even though without a guilty verdict and without recognizing that there is a rank that not always leads to a penal response [...]. It guarantees the legal certainty and the effective legal protection principles are respected in order to give a legal and social response that is proportioned to the damaged that has been done to the victim. (p.15)

Precisely in these kind of incidents have the FELGTB (2018) focused its report, because of the high dark figures and invisibility due to two main reasons: on one hand we need to take into consideration that the law does not combat these incidents in a direct way (because in some extent they are compatible with freedom of speech) and on the other hand we cannot forget that sometimes it is very difficult to identify these incidents as discriminatory as they could be concealed discrimination

## *2.2. The regulation of the aggravating circumstance in section 22.4<sup>a</sup> of the Criminal Code*

According to Landa Gorostiza (2018) we are analyzing here the aggravating circumstance in section 22.4<sup>a</sup> being it considered as the precept that really punish "hate acts" despite sections 510 and 510 *bis* which punish "hate speech".

The idea of increasing the penalty because there are discriminatory causes was included for the first time in Spain in 1995 but just related to "racist, anti-semitic or other references to ethnic or national origin, ideology, religion or believes" and just for crimes against persons or property. Later, when our present Criminal law was approved, this precept was modified in order to include any kind of crime and other status of discrimination as sex, sexual orientation, illness and disability. It was in 2010 when sexual identity was included by Law 5/2010 without any reference of this inclusion. However the last reform made on

the Criminal Code in 2015, gender was also included in the aggravating circumstance and this time the Law did give a basis for it in its preamble

The reason for that is that gender, understood according to the Council of Europe 210 Convention on preventing and combating violence against woman and domestic violence, approved in Istanbul by the Committee of Ministers of the Council of Europe the 7 April 2011 as “socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men”, could mean a different category of discriminatory actions that are out of sex considerations (Law 1/2015, Preamble)

Although this precept has a long historical tradition, the first conviction based on sexual orientation discrimination was given in 2000 (Judgement of the Provincial Court of Barcelona, 13 March) that was later confirmed by the Supreme Court in its judgement of 17 June 2002 (Peñaranda Ramos 2013). The judgement of the Supreme Court is highly important because it does not take under consideration the real sexual orientation of the victim, just the motivation of the offenders based on it and according to this the conviction was made without proving the homosexuality of the victim. However, this understanding is not homogenous nor in the case law or in the doctrine. So, is not unusual to find judgements and authors that maintain that in order to apply this aggravating circumstance it is a requirement that the victim is homo/bi sexual. Thus, we could find a judgement from the Supreme Court of 23 November 2006 that understood the “to apply this circumstance it is needed to prove not just the criminal fact and the participation of the defendant but also the condition of the victim as well as the intentionality”. And that is because the Supreme Court understands that the cause of this circumstance is an increase of the guilt, “it is a circumstance based on more guilt of the author because of the increase of the blameworthiness of the motivation that leads to commit the crime, so it is a requirement that this motivation is decisive to commit the crime”. This is the main idea that the doctrine follows, like Muñoz Conde and García Arán. But in the other side, we can find authors like Landa Gorostiza (2018) who understands that

The “motivation” is not the most important issue but the impartial danger of the act. In order to apply this aggravating circumstance is not necessary that a motivational investigation but the checking of the author knowing the circumstances and the

context within they were developing their action and the consciousness that this behavior was going to be understood not just by the target group but also by the entire society, as an “expressive behavior”; which is, that is projected beyond the specific victim and means a threat to all -or at least an important art- of the individuals which share the element that led the author to their victim. (p.124)

In this sense the Peramato Martín (2013) notes that the French Criminal Code is clearer when regulating this issue, as it makes an specific reference to “real or supposed” sexual orientation. This author understands section 22.4<sup>a</sup> in the same ways as Landa Gorostiza, pointing out that

The requirement of the condition [...] to be real, does not help to reach the aim projected by the Criminal Law: which is to increase the penalty to the offender that acts leaded by one of the status in the precept; the protection of these groups from discriminatory attacks would just be reachable if we also punish those violence acts against men and women that are not gays and lesbians, but they are supposed to be. (p. 218)

Even the ECHR has made its position clear on this topic in its judgement of 26 March 2017, in the case *Skorjanec vs. Croatia*. So, the Court understood that it is not necessary that the victim “personally possess the protected characteristic or status” that sustains the aggravation (in the case it was a racist ground).

Another of the problems regarding this aggravation is the difficulty in the evidence phase. And this is precisely one of the causes that according to Peramato Martín (2013) would be on the grounds of its “limited or non-existent” application (p. 217). In this sense, The OSCE in its *Preventing and responding to hate crimes* guide (2009) offers a range of indicators to help identifying hate crimes: the perception of the victim, the conduct of the offender (words or symbols used), characteristics of the victim and perpetrator (different race, religion, ethnicity/national origin, disability status, gender or sexual orientation; the victim is a member of a minority group; the victim is a member of a community concentrated in specific areas; the victim is attacked by a group composed of groups from a different population group; there is historically animosity between the groups involved in the attack; the victim could be identified as “different” not just by the offender but also by the majority community because of their appearance, dress, language or religion; the

victim is a reference among their community; the victim is accompanied of or married to someone from the minority group; statements, expressions or behaviors made by the offender before, during or after the attack; clothing, tattoos or insignia representing extremist movements; the offender behavior is able to suggest a possible membership in a hate organization; the offender has committed crimes or hate incidents before).

The Spanish Ministry of Interior in its *Law-Enforcement Agencies Intervention Protocol for hate crimes and behaviors violating laws on discrimination* use these indicators from the Organization for Security and Co-operation in Europe. However, the aim of this tool is primarily focused on racist and xenophobic incidents. In fact, the protocol itself recognizes that during its production it was taken as a reference the “Support Manuel for training the Law-Enforcement Agencies on identifying and registering racist and xenophobic incidents”.

### *2.3. The FELGTB report*

Undoubtedly, social movements, activism and organizations have played a fundamental role in the achievement of rights for the LGBT community. These institutions “had and still have to deal in not few occasions, in pretty harsh and homophobic climates” (Peramato Martín 2013, p. 35).

In Spain there is an important number of entities devoted in one way or another to the defense of LGBT community. However, the FELGTB is (according to its own declarations on its web [www.felgtb.org](http://www.felgtb.org)) “the most important reference for the lesbian, gay, trans and bisexual association movement in Spain [...] because of its history, career, structure, number of associations that form part of it, its contributions through all these years”. This federation has recently carried “the most complete until now” (FELGTB 2018, p.7) research on this topic showing its concern

Not just because of the amount of victims that it causes, but also because it means a decrease of freedom for the entire community, which feeling threatened with the risk of violence they seem forced to live with, would withdraw -or at least is susceptible to- again to the fake and very harmful security of the invisibility” (FELGTB 2018, p.6)

One of the first realities that this report has revealed is the lack of correlation between the official statistics given by the Ministry of Interior and the ones collected by the FELGTB. Thus, according to the *Report on the evolution of hate crimes in Spain* (Ministry of Interior 2017) the total amount of known “hate crimes incidents” based on sexual identity or orientation, is 271, whereas in the FELGTB report this number amounts to 629<sup>8</sup> (FELGTB, 2018).

This difference shows on one hand, what has been said before by the FRA which is that the victims prefer sometimes to report this incidents in non-police or judicial institutions and on the other one idea evidenced by the FELGTB (2018) report “the difficulty to open out and coordinate the support for the victims and the information collection process” (p.7).

Therefore, the data in this report expect to show a general view of the situation that allows us to know, even in a rough way, the victim and offender’s profile as so the more usual incidents typology.

Regarding to the victim, from the total amount of analyzed cases (332), the majority of them were cis male homosexuals between 18 and 35 year old. It is important to highlight at this point, taking back what has been discussed before about the possibility of non-application of section 22.4<sup>a</sup> when the victim is not homosexual, that FELGTB gathers reports from 13 heterosexual individuals that have been victims of these crimes or incidents.

Catalonia is where the highest rate (130) of incidents is located, which is closely related to the correlation between size of population and number of incidents, which points out that the bigger a city is the highest rates of incidents. Public places are the most usual locations for the incidents, specifically the streets. However, it is important to highlight the idea that FELGTB evidences, which is that the result of the addition of the numbers in categories where the person is supposed to feel more protected (scholar institutions, job and home) equals the number of incidents in public places.

In respect of the type of incidents, just recall that this report collects both crimes and administrative offences. So, the 56% of the reported incidents are related to harassment and intimidation where the attacks with insults thrives (62%). These attacks are realized in the same proportion both by unknown individuals and by the inner circle<sup>9</sup> of the victim, which is closely related to what has been said before about the location of the incidents

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<sup>8</sup> From that number, 332 has been studied.

<sup>9</sup> Understood here as the sum of neighbors, family and close community.

(unknown individuals would act in the streets and inner circle at scholar institutions job or home). In this sense, the FELGTB reveals the serious consequences of assaults within the inner circle, as it could “urge LGBT community to protect their safety by hiding their reality even in circles which are supposed to be friendly or safe” (FELGTB, 2018, p. 34).

### **3. Conclusions**

The attention on LGBT phobic incidents has been rare not just from the academic point of view, but also from public institutions. So, despite the aggravating circumstance based on sexual orientation has been in the Criminal Code since its origin and on sexual identity since 2010, the first report from the Ministry of Interior was released in 2013 and the National Office Against Hate Crimes was created in 2018. This office was based on the acknowledgement that these type of crimes are a priority “to Spain” (Ministry of Interior, 2018 p.1.) and it is constituted as a “key and basic tool for study and analysis of hate crimes and so as to motivate the collaboration with other Ministries and public or private organizations, associations and NGOs” (Ministry of Interior 2019, p.1). The *Plan for Action Against Hate Crimes* by the Ministry of Interior was released at the beginning of this very year 2019. As it can be checked, everything is newly-made, maybe too much. It seems like public institutions have not taken this problem under consideration until social groups have pointed at the issue.

This sets the great challenge of finding a clear and solid response from the public institutions that needs to include as Monereo Atienza (2015) says “a structural transformation of the patriarchal sex-gender system (p.74).

Using the term hate crimes to make assaults (in a wide sense) on LGBT community visible, leaves out other behaviors that are also able to victimize people and mean a serious attack to dignity and equality of people. In this sense, it is important to include the claims made by different organizations that represent and struggle for this group’s rights. So, the *Observatorio Madrileño on homophobia, transphobia and biphobia* (2017) points out that

There are acts that undermine our dignity as LGBT individuals that could be crimes (homicides, threats, injuries) and others which are more difficult to classify as the alleged “recovery” from homosexuality, insults or certain discriminations, that although could be considered as a crime, are more usually considered as an administrative offence. That is the reason why we always talk about hate or

discriminatory incidents, where we include both crimes and administrative offences.  
(p.10)

There is no doubt that these organizations with its daily routine encourage and promote the implementation of diversity policies and recognition of LGBT community's rights. A good example of this could be the one developed during the Feria in Málaga, where since 2 years a "rainbow point" has been settled to report any kind of LGBT phobic incident (Diario Sur 2019). This kind of interventions help not just to make these incidents visible but also to highlight which are the patterns in massive-leisure context assaults.

Knowing the reality and the phenomenology of the problem we expect to solve, is basic for every public policy hoping to be effective. In this case, to be able to reach this phenomenon from a true point of view in order to develop real effective tools for LGBT community it is necessary that they, the individuals who are in the community, feel supported by the institutions, not invisible and overall they need to feel that any kind of attack mean an attack to their dignity and equality rights.

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# **FRAMING LGBT-PHOBIC INCIDENTS IN SPAIN: BEYOND HATE CRIMES**

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**Abstract:** According to official statistics, in 2017 there were 271 hate crimes in Spain on the grounds of sexual/gender orientation/identity, which means an increase of 17,8% from 2016. Nevertheless, there is an important, invisible rate of incidents on the same grounds that don't match the criminal offences requirements, so they aren't shown in the official data. Recent research developed by the FELGTB (State Federation of Lesbians, Gays, Trans, and Bisexuals) reveals 629 incidents suffered by people within the collective reported by different associations. This unrecorded rate is intended to be rescued by using the concept “LGBTI-phobic incident”, which would also include any kind of behavior that involves an assault in a wide meaning.

**Keywords:** hate crimes; LGBT; LGBT-phobic incidents; vulnerable group- violence

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## **1. Introduction**

Section 10 of Spanish Constitution clearly recognizes that respect to people’s dignity and free development of personality are “the foundation of political order and social peace”. Within this framework, it is not hard to recognize that respecting affective-sexual diversity is to recognize that both affective-sexual orientation and sexual-gender identity are key elements of people’s dignity and according to that they are to be protected.

Although orientation, sexual identity and gender are status not specifically included in section 14 of the Spanish Constitution (which establishes equality among people), it should not be an issue at all as it could be included in the general provision that refers to “any other considerations or circumstances of a personal or public nature”. In fact, the

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Supreme Court had the occasion of expressing its point of view about that, specifically on a transgender issue

It shares with the other provisions included in section 14 of the Spanish Constitution the fact that it is a historically entrenched discrimination and it has located transgender people, by both the public institutions and the social practices, in disadvantaged and against people's dignity - recognized in section 10.1 of the Spanish Constitution- positions, because of the deep prejudices entrenched in the law and in the culture against these people; and, on the other side (Judgement of the Supreme Court number 176/2008)

Similarly, Article 14 of the European Convention on Human Rights (ECHR) doesn't make an specific reference to sexual orientation, identity or gender as status of discrimination, but it does mention "other status", where this circumstances could be included. Even the ECHR in 1976 accepted this interpretation in their Judgement in the Case of Engel and others v. The Netherlands, by saying: "the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as". Besides, the word "status" is wide enough to include rank". In the same meanings, this Court offered a Judgement in 1999 and this time focused on a LGBT issue, in the Case of Salgueiro Da Silva Mouta v. Portugal: "[...] sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as".

In contrast, *The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*, do include in Principle w related to "the rights of equality and non-discrimination" an specific reference to discrimination based on "orientation or gender identity", that it defines as:

Includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms (Yogyakarta Principles, 2017, pp. 10-11)

The document that reflects these principles, warns of the worrying situation of discrimination and violation of human rights that people suffer on the basis of these status. Thus, it points out to a “global and entrenched pattern” as the main reason that takes advantage of the “policing of sexuality” to continue “gender-based violence and gender inequality” (Yogyakarta Principles 2017, p.6).

The European Union Agency for Fundamental Rights (FRA) has recently concluded the collection of responses for their second edition of the EU LGBT survey. This second round has meant a real step forward compared with the previous edition in 2012, as it includes new categories: intersexual, non-binary gender and gender fluid.

This kind of victimization survey is based on two clear assumptions from their results. On one hand that LGBT individuals constitute a specially vulnerable group (nearly the half LGBT population have suffered from harassment or sexual orientation or identity based discrimination and a quarter of them have suffered violence based on the same status in the past five years (FRA 2013, p. 7) and on the other the importance of the dark figure (report rates to police institutions are critically low in cases of violence, which are around 22%, but overall in cases of non-violent behaviors defined as harassment, where the percentage drops to 6%)( FRA 2013, p. 24). However, there is a segment of individuals that stands out among the LGBT group with higher rates regarding to attacks, we are referring to transgender people, whose victimization rate when talking about violent attacks comes to 35% (FRA 2013 p. 7). In fact, there is a whole section in the FRA report assigned to “transgender specific questions”<sup>11</sup>.

In the case of Spain, the number of physical/sexual attacks or violent threats are situated within the European average. Nevertheless, what really attracts attention is the fact that the only two cases where Spain exceeds the European average (just in a 1%) are the most different ones: the one time attack and the more than ten times attack. Regarding police reports, Spain is just 1% over the European average with an alarming 82% of people not reporting because they didn't consider the fact as being important (a 48% adduced this reason, which means a higher rate than in Europe that has a 43%). Therefore we are facing not just an issue related to invisibility but also to underestimation of the attacks, even by themselves, this community receives. However, the survey shows that a 17% of people did decide to report, but to other institutions such as NGOs, LGBT associations, victims

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<sup>11</sup> Available online: <https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-fundamental-rights-lesbian-gay-bisexual-and> (accessed on 22 August 2019)

of crime offices, state institutions, hospitals or health services or even other kind of organizations<sup>12</sup>.

The figures are not better when people is asked about the worst physical/sexual attack or violent threat; 77% of the Spanish survey respondents did not report this situations (a 2% more than the European average) and the reason is again (for a 41% of respondents against the 35% European average) the lack of considering the fact as important enough, even when the wording of the question was clear: “the worst attack”. For this cases there is still a 17% which reported to other institutions different from police<sup>13</sup>.

Aguilar García (2014 pp.360-367) said about the important consequences of the dark figure that it could lead to a lack of awareness of the seriousness and importance of this issue not just related to public authorities who design the criminal policy, but also to staff involved in crime investigations (public prosecutor offices, courts, police departments). In this sense, he pointed to a some tendency of the judiciary to

Minimize the seriousness of the reported threats or minor injuries, which in occasions end up as mild infringements, without being deeply analyzed and with no assessment of the possibility to find another crimes related to another legal assets such as dignity or moral integrity. (Aguilar García 2014, p. 368)

In view of this situation, the FRA from a general perspective encourages all the member states to facilitate an promote actions involving mass media, political parties and religious institutions but also to increase the efforts from the research area (FRA, 2013, p.10). Regarding to hate crimes, FRA recommends the member states to adopt their own laws on homophobia, transphobia, hate crimes and hate speech crimes (FRA, 2013, p.10). According to this, the Spanish Criminal Code punishes on one hand the hate speech crime (sections 510 and 510 *bis*) and on the other hand the hate crimes<sup>14</sup> by a general aggravating circumstance (section 22.4<sup>a</sup>) that increase the penalty of any crime with a racist, anti-semitic basis or any kind of discrimination related to the victim’s ideology, religion, believes, ethnicity, race, nation, sex, sexual orientation or identity, gender status, illness or disability.

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<sup>12</sup> Available online: <https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-fundamental-rights-lesbian-gay-bisexual-and> (accessed on 22 August 2019)

<sup>13</sup> Available online <https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-fundamental-rights-lesbian-gay-bisexual-and> (accessed on 8 August 2019).

<sup>14</sup> Following the concepts used Landa Gorostiza (2018, *pássim*)

Nevertheless, Spain does not have a state law against LGBT discrimination, so the different autonomous communities have had to address this issue<sup>15</sup>. This fact does nothing but exacerbate the situation, as depending on the place, the response to the LGBT attack would be different, which would lead to legal uncertainty and blatant inequality among people being affected by the same incidents.

Just one parliamentary party, “Unidos Podemos-En comú Podem-En Marea”, has submitted two legislative proposals in this sense; the one in 2017 was about a law against sexual orientation, gender identity or expression, sexual features based discrimination and social equality of lesbian, gay, bisexual, trans and intersex individuals, and the one in 2018 about legal protection to trans individuals and the right to free election of sexual identity and gender expression. None of them has been approved yet. Even more, the latest addition of the political party VOX makes the possibility of an agreement on these issues even more difficult<sup>16</sup>.

## **2. Violence against LGBT community: from hate crimes to hate incidents**

LGBT individuals could be considered as an especially vulnerable group being the victims not just of physical and verbal attacks but also of a hard social exclusion (Peramato Martín, 2013) as the data from FRA have reflected. The origin of these attacks could be located according to Hereck (1990) in heterosexism, specifically in a “logic, although extreme extension”(p.316) of it. So he defines heterosexism as

An ideological system that denies, denigrate and stigmatize every non heterosexual behavior, identity, relation or community. As racism, sexism and other ideologies based on oppression, heterosexism appears in the customs and social institutions, such as religion and legal system (which is understood here as cultural heterosexism) and also in attitudes and individual behaviors (which is understood here as psychological heterosexism) (Hereck 1992, p. 89)

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<sup>15</sup> There are just five autonomous communities (from a total of 17) with no law on this topic (Asturias, Cantabria, La Rioja, Castilla y León, Castilla –La Mancha) plus the two autonomous cities (Ceuta and Melilla).

<sup>16</sup> This political party asked for the erasing of 15 sections from the Law 3/2016, of global protection to LGBTphobia and orientity and sexual based discrimination in Madrid and the Law 2/2016 of Identity and Gender Expression in Madrid

Iganski and Levin (2015) maintain that hate crimes share an emotional process with any other violent act. The common element would be the damage or disrespect feeling that the offender experiences. Feeling that the offender would counterattack with the aim of “imposing a formal justice system over the victim and repairing the damage made to their respect”. The victim’s weaknesses are used to make the attack (verbal or physical). And the origin of these weaknesses are just located in the social construct of difference, which is understood as negative and so it is (re)interpreted into a weak point (pp.54-55).

In this emotional process, there is a key element according to Thomas (1995) which is shame, understood as a “primitive” response against situations that people feel as disrespecting. This response could be projected on the individual causing this feeling, on other people or even on the person themselves (p. 587). Thus, those people handling a good self-esteem level are able to manage shame better than others that have experienced through their life a poor self-pray, so when they feel in some way that they are being humiliated (in a real or imaginary way) instead of recognizing it, they conceal it with anger (Iganski and Levin, 2015). As a recent sample, we can bring into consideration the incident that took place las *Pride Barcelona 2019*, when a young man was verbally attacked by a man in a public place. The offender expressed in the video that recorded the aggression that “*you are disrespecting me with such a clothing in a public place*” and then threatened the victim saying “*I am gonna make you a straight by beating*” (La Vanguardia 2019).

Considering anger as a key and trigger element makes us come back again to the cultural issue. According to the Madrid Observatory on homophobia, transphobia and biphobia (2017) the 89% of offenders are men. Here we need to recall that men are used to express themselves through anger since they are kids, in fact it could be said that this response is not just allowed but recognized as an “manhood” indicator. Thus, the heteropatriarchal culture promotes since childhood that boys are not allowed to express their feelings or emotions, because this would be considered a “girl thing” which is linked to weakness. Nevertheless, there is a feel that boys are allowed even encouraged to show, anger. Boys that get angry show “manhood”, girls that show anger are going too far. The lack of emotions management means a key element in shaping the cause of the crimes we are analyzing.

### *2.1. The terminological issue*

The Organization for Security and Co-operation in Europe (OSCE) (2009) defines hate crimes in the following terms

Hate crimes are criminal acts motivated by bias or prejudice towards particular groups of people. A hate crime therefore comprises two distinct elements: it is an act that constitutes an offence under criminal law; and in committing the crime, the perpetrator acts on the basis of prejudice or bias [...]. The term describes a phenomenon, not a legal concept.

In Spain, the term hate crimes has spread out and now it is widely used, even though the Criminal Code does not use this term, it just regulates on one hand a bunch of offences within the title dedicated to “crimes committed while exercising the fundamental rights and public freedoms guaranteed by the Constitution “ (section 510) and on the other the general aggravating circumstance in section 22.4<sup>a</sup> related to committing a crime with a discriminatory based (in this paper we will focus on the sexual and identity orientation status).

According to Landa Gorostiza (2018) the term hate crimes would include both those crimes consisting of a mere expression and those referred to acts themselves. Therefore, this author understands that behaviors in section 510 is to punish the “hate speech”, whereas section 22.4<sup>a</sup> is to penalize “hate acts” crimes (pp.25-48). In this sense, section 510 makes reference to “ideological manifestation [...], whereas the aggravating in the aggravating circumstance the “vehicle” of the threatening message is different: is the criminal behavior itself”(p.124). In this same extent, Santana Vega (2014), understands that section 22.4<sup>a</sup> is related to offer a core and general protection in the area of sexual identity and orientation based discrimination. Furthermore, the author highlights that the reference to sexual identity was included before in section 22.4<sup>a</sup> -2010- than in section 510 -2013- (pp.385-387). Aguilar García (2014) underlines the significance of using the terminology “hate crime” as it allows to really stand out what characterize them, what is the motivation of the offender based on their “open antagonism or hostility against individuals or groups”. In addition, the author exposes the serious consequences and the impact that these crimes mean not just to the direct victim, but also to the group they identify with, “affecting very directly both the cohesion of the community and social stability”(p.354).

Even the first official Spanish statistic from the Ministry of Interior on this topic includes this terminology and clarifies in this sense that even the Criminal Code does not include this name

It has been decided to count the punishable actions which are no doubt to expertise. For that purpose, it would be taken under consideration that any act that could be consider of criminal and administrative nature that is made against an individual because of their ethnicity, race, religion or religious practice, disability, sexual orientation or identity, as well as they poverty and social exclusion situation, would be classified as hate crime. This definition is “extensive” regarding its consideration, so it would be considered not just the most serious offenses, but also the ones that are less serious and the offenses based on an administrative law (Report on the evolution of hate crimes in Spain 2017 p.7)

So the first data on this issue, although being located on a report about “crimes”, are focused not just in behaviors on located in the Criminal Code, but also in administrative offenses, as an extensive purpose is alleged in order to include any kind of act that takes place against an individual because of any of the status mentioned before. It seems like, it is no correct to include in the category of crime those acts that are just administrative offenses, as it could lead to a distorted image in the criminal reality.

In view of this situation, the concept “discriminatory or hate incidents” arises as a unifying category. In 2010, the Council of Europe through its Recommendation CM/Rec (2010) 5 on measures to combat discrimination on grounds of sexual orientation or gender identity, distinguished between “hate crimes and other hate-motivated incidents”. Díaz López (2018) sheds some light on this and defines hate incidents as

Facts that although could be initially considered as hate crimes or an administrative offense related to hate crime, they are not; because they do not mean any kind of offense, because they just mean an administrative offense or even because there is still no judgement on the issue. A hate speech cannot be classified as hate speech crime but it could be as hate incident [...]. It seems better to keep using “hate crime” as a synonymous with “hate offense”, leaving the term “hate incident” for non-criminal acts. (p.55)

This concept of incident is wider and it allows to include acts that are not included in the Criminal Law but still attack rights and freedoms of LGBT community. Incident as all-inclusive term, allows to know more about the reality of the society's position against discrimination too. In the same sense, FELGTB (2018) points out the importance of the distinction between hate incidents and hate crimes

If we do not make that distinction any discriminatory act would be considered as a crime, even though without a guilty verdict and without recognizing that there is a rank that not always leads to a penal response [...]. It guarantees the legal certainty and the effective legal protection principles are respected in order to give a legal and social response that is proportioned to the damaged that has been done to the victim. (p.15)

Precisely in these kind of incidents have the FELGTB (2018) focused its report, because of the high dark figures and invisibility due to two main reasons: on one hand we need to take into consideration that the law does not combat these incidents in a direct way (because in some extent they are compatible with freedom of speech) and on the other hand we cannot forget that sometimes it is very difficult to identify these incidents as discriminatory as they could be concealed discrimination

## *2.2. The regulation of the aggravating circumstance in section 22.4<sup>a</sup> of the Criminal Code*

According to Landa Gorostiza (2018) we are analyzing here the aggravating circumstance in section 22.4<sup>a</sup> being it considered as the precept that really punish "hate acts" despite sections 510 and 510 *bis* which punish "hate speech".

The idea of increasing the penalty because there are discriminatory causes was included for the first time in Spain in 1995 but just related to "racist, anti-semitic or other references to ethnic or national origin, ideology, religion or believes" and just for crimes against persons or property. Later, when our present Criminal law was approved, this precept was modified in order to include any kind of crime and other status of discrimination as sex, sexual orientation, illness and disability. It was in 2010 when sexual identity was included by Law 5/2010 without any reference of this inclusion. However the last reform made on

the Criminal Code in 2015, gender was also included in the aggravating circumstance and this time the Law did give a basis for it in its preamble

The reason for that is that gender, understood according to the Council of Europe 210 Convention on preventing and combating violence against woman and domestic violence, approved in Istanbul by the Committee of Ministers of the Council of Europe the 7 April 2011 as “socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men”, could mean a different category of discriminatory actions that are out of sex considerations (Law 1/2015, Preamble)

Although this precept has a long historical tradition, the first conviction based on sexual orientation discrimination was given in 2000 (Judgement of the Provincial Court of Barcelona, 13 March) that was later confirmed by the Supreme Court in its judgement of 17 June 2002 (Peñaranda Ramos 2013). The judgement of the Supreme Court is highly important because it does not take under consideration the real sexual orientation of the victim, just the motivation of the offenders based on it and according to this the conviction was made without proving the homosexuality of the victim. However, this understanding is not homogenous nor in the case law or in the doctrine. So, is not unusual to find judgements and authors that maintain that in order to apply this aggravating circumstance it is a requirement that the victim is homo/bi sexual. Thus, we could find a judgement from the Supreme Court of 23 November 2006 that understood the “to apply this circumstance it is needed to prove not just the criminal fact and the participation of the defendant but also the condition of the victim as well as the intentionality”. And that is because the Supreme Court understands that the cause of this circumstance is an increase of the guilt, “it is a circumstance based on more guilt of the author because of the increase of the blameworthiness of the motivation that leads to commit the crime, so it is a requirement that this motivation is decisive to commit the crime”. This is the main idea that the doctrine follows, like Muñoz Conde and García Arán. But in the other side, we can find authors like Landa Gorostiza (2018) who understands that

The “motivation” is not the most important issue but the impartial danger of the act. In order to apply this aggravating circumstance is not necessary that a motivational investigation but the checking of the author knowing the circumstances and the

context within they were developing their action and the consciousness that this behavior was going to be understood not just by the target group but also by the entire society, as an “expressive behavior”; which is, that is projected beyond the specific victim and means a threat to all -or at least an important art- of the individuals which share the element that led the author to their victim. (p.124)

In this sense the Peramato Martín (2013) notes that the French Criminal Code is clearer when regulating this issue, as it makes an specific reference to “real or supposed” sexual orientation. This author understands section 22.4<sup>a</sup> in the same ways as Landa Gorostiza, pointing out that

The requirement of the condition [...] to be real, does not help to reach the aim projected by the Criminal Law: which is to increase the penalty to the offender that acts leaded by one of the status in the precept; the protection of these groups from discriminatory attacks would just be reachable if we also punish those violence acts against men and women that are not gays and lesbians, but they are supposed to be. (p. 218)

Even the ECHR has made its position clear on this topic in its judgement of 26 March 2017, in the case *Skorjanec vs. Croatia*. So, the Court understood that it is not necessary that the victim “personally possess the protected characteristic or status” that sustains the aggravation (in the case it was a racist ground).

Another of the problems regarding this aggravation is the difficulty in the evidence phase. And this is precisely one of the causes that according to Peramato Martín (2013) would be on the grounds of its “limited or non-existent” application (p. 217). In this sense, The OSCE in its *Preventing and responding to hate crimes* guide (2009) offers a range of indicators to help identifying hate crimes: the perception of the victim, the conduct of the offender (words or symbols used), characteristics of the victim and perpetrator (different race, religion, ethnicity/national origin, disability status, gender or sexual orientation; the victim is a member of a minority group; the victim is a member of a community concentrated in specific areas; the victim is attacked by a group composed of groups from a different population group; there is historically animosity between the groups involved in the attack; the victim could be identified as “different” not just by the offender but also by the majority community because of their appearance, dress, language or religion; the

victim is a reference among their community; the victim is accompanied of or married to someone from the minority group; statements, expressions or behaviors made by the offender before, during or after the attack; clothing, tattoos or insignia representing extremist movements; the offender behavior is able to suggest a possible membership in a hate organization; the offender has committed crimes or hate incidents before).

The Spanish Ministry of Interior in its *Law-Enforcement Agencies Intervention Protocol for hate crimes and behaviors violating laws on discrimination* use these indicators from the Organization for Security and Co-operation in Europe. However, the aim of this tool is primarily focused on racist and xenophobic incidents. In fact, the protocol itself recognizes that during its production it was taken as a reference the “Support Manuel for training the Law-Enforcement Agencies on identifying and registering racist and xenophobic incidents”.

### *2.3. The FELGTB report*

Undoubtedly, social movements, activism and organizations have played a fundamental role in the achievement of rights for the LGBT community. These institutions “had and still have to deal in not few occasions, in pretty harsh and homophobic climates” (Peramato Martín 2013, p. 35).

In Spain there is an important number of entities devoted in one way or another to the defense of LGBT community. However, the FELGTB is (according to its own declarations on its web [www.felgtb.org](http://www.felgtb.org)) “the most important reference for the lesbian, gay, trans and bisexual association movement in Spain [...] because of its history, career, structure, number of associations that form part of it, its contributions through all these years”. This federation has recently carried “the most complete until now” (FELGTB 2018, p.7) research on this topic showing its concern

Not just because of the amount of victims that it causes, but also because it means a decrease of freedom for the entire community, which feeling threatened with the risk of violence they seem forced to live with, would withdraw -or at least is susceptible to- again to the fake and very harmful security of the invisibility” (FELGTB 2018, p.6)

One of the first realities that this report has revealed is the lack of correlation between the official statistics given by the Ministry of Interior and the ones collected by the FELGTB. Thus, according to the *Report on the evolution of hate crimes in Spain* (Ministry of Interior 2017) the total amount of known “hate crimes incidents” based on sexual identity or orientation, is 271, whereas in the FELGTB report this number amounts to 629<sup>17</sup> (FELGTB, 2018).

This difference shows on one hand, what has been said before by the FRA which is that the victims prefer sometimes to report this incidents in non-police or judicial institutions and on the other one idea evidenced by the FELGTB (2018) report “the difficulty to open out and coordinate the support for the victims and the information collection process” (p.7).

Therefore, the data in this report expect to show a general view of the situation that allows us to know, even in a rough way, the victim and offender’s profile as so the more usual incidents typology.

Regarding to the victim, from the total amount of analyzed cases (332), the majority of them were cis male homosexuals between 18 and 35 year old. It is important to highlight at this point, taking back what has been discussed before about the possibility of non-application of section 22.4<sup>a</sup> when the victim is not homosexual, that FELGTB gathers reports from 13 heterosexual individuals that have been victims of these crimes or incidents.

Catalonia is where the highest rate (130) of incidents is located, which is closely related to the correlation between size of population and number of incidents, which points out that the bigger a city is the highest rates of incidents. Public places are the most usual locations for the incidents, specifically the streets. However, it is important to highlight the idea that FELGTB evidences, which is that the result of the addition of the numbers in categories where the person is supposed to feel more protected (scholar institutions, job and home) equals the number of incidents in public places.

In respect of the type of incidents, just recall that this report collects both crimes and administrative offences. So, the 56% of the reported incidents are related to harassment and intimidation where the attacks with insults thrives (62%). These attacks are realized in the same proportion both by unknown individuals and by the inner circle<sup>18</sup> of the victim, which is closely related to what has been said before about the location of the

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<sup>17</sup> From that number, 332 has been studied.

<sup>18</sup> Understood here as the sum of neighbors, family and close community.

incidents (unknown individuals would act in the streets and inner circle at scholar institutions job or home). In this sense, the FELGTB reveals the serious consequences of assaults within the inner circle, as it could “urge LGBT community to protect their safety by hiding their reality even in circles which are supposed to be friendly or safe” (FELGTB, 2018, p. 34).

### 3. Conclusions

The attention on LGBT phobic incidents has been rare not just from the academic point of view, but also from public institutions. So, despite the aggravating circumstance based on sexual orientation has been in the Criminal Code since its origin and on sexual identity since 2010, the first report from the Ministry of Interior was released in 2013 and the National Office Against Hate Crimes was created in 2018. This office was based on the acknowledgement that these type of crimes are a priority “to Spain” (Ministry of Interior, 2018 p.1.) and it is constituted as a “key and basic tool for study and analysis of hate crimes and so as to motivate the collaboration with other Ministries and public or private organizations, associations and NGOs” (Ministry of Interior 2019, p.1). The *Plan for Action Against Hate Crimes* by the Ministry of Interior was released at the beginning of this very year 2019. As it can be checked, everything is newly-made, maybe too much. It seems like public institutions have not taken this problem under consideration until social groups have pointed at the issue.

This sets the great challenge of finding a clear and solid response from the public institutions that needs to include as Monereo Atienza (2015) says “a structural transformation of the patriarchal sex-gender system (p.74).

Using the term hate crimes to make assaults (in a wide sense) on LGBT community visible, leaves out other behaviors that are also able to victimize people and mean a serious attack to dignity and equality of people. In this sense, it is important to include the claims made by different organizations that represent and struggle for this group’s rights. So, the *Observatorio Madrileño on homophobia, transphobia and biphobia* (2017) points out that

There are acts that undermine our dignity as LGBT individuals that could be crimes (homicides, threats, injuries) and others which are more difficult to classify as the alleged “recovery” from homosexuality, insults or certain discriminations, that although could be considered as a crime, are more usually considered as an

administrative offence. That is the reason why we always talk about hate or discriminatory incidents, where we include both crimes and administrative offences.  
(p.10)

There is no doubt that these organizations with its daily routine encourage and promote the implementation of diversity policies and recognition of LGBT community's rights. A good example of this could be the one developed during the Feria in Málaga, where since 2 years a "rainbow point" has been settled to report any kind of LGBT phobic incident (Diario Sur 2019). This kind of interventions help not just to make these incidents visible but also to highlight which are the patterns in massive-leisure context assaults.

Knowing the reality and the phenomenology of the problem we expect to solve, is basic for every public policy hoping to be effective. In this case, to be able to reach this phenomenon from a true point of view in order to develop real effective tools for LGBT community it is necessary that they, the individuals who are in the community, feel supported by the institutions, not invisible and overall they need to feel that any kind of attack mean an attack to their dignity and equality rights.

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