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On the Constitutionality of the Criminalization of Hate Speech

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1. *Types of hate speech and their criminal significance.*

The climate that has characterized this past decade has returned to the fore certain questions that the approval of the Constitution and of constitutional principles – in clear contrast to the principles that characterized Italy in the pre-republic era – seemed to have resolved once and for all: the concept of equal dignity among all people, equality which is confirmed by the indifference (in the sense of non-difference or non-relevance) to race, language, religion, sex, political opinions, or personal or social conditions of the members of society (see Article 3 of the Italian Constitution); and the recognition and legal protection of the pluralistic nature of society.

Today we are witnessing, in various contexts and places, a surge in what we call, to refer to American legal literature, *hate speech*: speech inciting hate towards individuals or groups who are believed to be "hateful" based on particular characteristics.

This is a complex and multifaceted phenomenon, be it from a legal perspective or from cultural, social, or historic points of view. We are all – even the constitutionalists – forced to reflect again on matters that were once presumed to be well-established and settled.

For a long time, lawmakers, legal doctrine, and jurisprudence all paid particular – if not exclusive – attention more to what is defined as the *principle of substantive equality* than to the *principle of formal equality*. Taken for granted was the impossibility of the law discriminating on the basis of sex, race, language, religion, political opinions, personal or social conditions[1], at the risk of its contrary to Constitution, the task of the Republic was, through all of its constitutional organs, to guarantee adequate, normative solutions that would overcome the obstacles which exist in actual fact, and which, if not removed, prevent the realization of full equality.[2] Today, however, the situation seems to have been turned on its head: it is as though the generation of normative solutions intended to overcome differences which do in fact exist had failed, and there is a need to resort to normative instruments which not only obstruct, but in fact *sanction*, those types of discrimination. Overcoming discrimination seems to

[1] Principle of formal equality. «All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions» (Italian Constitution, Article 3, clause 1).
[2] Principle of equality in the substantive sense. «It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country» (Italian Constitution, Article 3, clause 2).

require – in order to face the phenomena of ethnic, racial, and religious intolerance and sexism – something that is no longer avoidable: pervasive criminal legislation.[3]

2. *The Constitutional paradox inherent in hate speech.*

Arriving at the use of criminal law as the only tool (or in any case the principal one, given the failure of others) to oppose conduct attributable to hate speech, however, demands that we reflect on the foundations upon which the constitutional State is built.

One of the basic principles of *any* democratic constitutional State is, in fact, that of the free expression of thought. It is a basic principle because it permits the expression of agreement, but also that of dissent, thereby enabling dialogue between the opposing viewpoints. It implies that a society has chosen tolerance over intolerance. Today's repeated recourse to hateful statements and, through them, the occurrence of incidents of discrimination lead us, however, to rethink this principle, be it from the standpoint of its very nature (that means how it can be defined), or from the standpoint of its eventual limitation. Nevertheless, it must be said that forbidding or criminally sanctioning expressions that are clearly "hateful" (be they those which incite violence, or those which may be hateful to their intended recipients) implies a limitation on the freedom of the responsible members to express their thoughts, leading to what could be defined as a constitutional paradox: the prohibition of the free expression of thought – even if that thought is hateful by its nature – in the name of that same constitutional democracy which has as one of its core principles the free expression of thought.

3. *Legal doctrine confronting hate speech.*

In order to understand if and at what point free expression of thought can confront a legitimate (in the constitutional sense) limit to expressions of hate, it is necessary to turn our attention to those legal doctrines which have already been dealing with this issue for some time. The attempt to settle the question of legitimacy or illegitimacy as regards the criminalization of hate speech which is proposed here is deliberately situated within the borders of Italian law, and with full knowledge of the variability of constitutional laws across the world. However, it is not possible to speak of the freedom of thought, of hate speech, and of hate crimes, without referring to the United States legal doctrine which, although it expresses the historical and cultural context of a country different from ours, remains, with its First Amendment, the mother of *freedom of speech*.

It is common practice (even in Italian legal literature, when it evokes that of the United States) to use *First Amendment doctrine* to refer to the interpretation that the Supreme Court of the United States has given to free speech. A legal literature has developed surrounding this which reinforces a singular way

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[3] The Council Framework Decision 2008/913/JHA of the Council of the European Union (28 November 2008) on the struggle against certain forms and expressions of racism and xenophobia invites recourse to criminal law. And the Italian Parliament, referring to our only set of rules, followed this guidance: Law nr. 115 of 2016 introduced, in fact, the aggravating factor of Holocaust denial, the minimization of crimes of genocide, war crimes, and crimes against humanity; and Legislative Decree nr. 21 of 2018 inserted in Title XII of the Penal Code (Crimes Against Equality), Article 604 *bis* (formerly Article 3 of the Law n. 654 del 1975) and Article 604 *ter* (aggravating racial discrimination, formerly Article 3 Decree Law n. 122 del 1993).

of interpreting the First Amendment: a way which, as we will discuss, and even with the variety of arguments proposed, refuses to admit any criticism that might prevent the free circulation of ideas, culture, or knowledge, and would prevent the attainment of truth. Alongside this interpretation, however, another one has appeared more recently. Even in the wake of President Trump's famous speech of 6 January 2021, this new interpretation has begun to gather support by calling into question whether free speech could keep on thinking as an absolute principle. Answering in a negative way, it maintains that the introduction of limits to free speech is necessary, if not required.

The American bibliography on this subject is considerable. I do not intend to (and it may be impossible to) review it in its entirety. Therefore, I will give an account of the principal arguments supporting each side, dichotomously. This approach will simplify the complexity of the arguments, but also enable us, by highlighting the unique features of the two contrasting visions, to understand the doctrinal framework within which to situate the political and jurisdictional decisions that may be undertaken regarding hate speech.

First Amendment and doctrines of free speech.

The First Amendment doctrine. The most deeply-rooted doctrine (and, perhaps, that which the American people feel somewhat possessive of) is one that rejects any possible limitation of freedom of expression of individual thought, in deference to the philosophy of John Stuart Mill, for whom «the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race, posterity as well as the existing generation, those who dissent from the opinion, still more than those who hold it» [Mill (2002), 46].

In the words of Ronald Dworkin [Dworkin (1996), 199ss], two distinct ways subsist of justifying the need that the expression of individual opinions not be limited in any fashion.

The first justification underlines the *instrumental* dimension of freedom of expression: the right to speak must be guaranteed «not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us»; because «politics is more likely to discover truth and eliminate error, or to produce good rather than bad policies, if political discussion is free and uninhibited».

The second justification underlines the *constitutive* dimension of the right to speak. This must be guaranteed without limits, because «we are a liberal society committed to individual moral responsibility, and any censorship on grounds of content is inconsistent with that commitment»; «Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one - no official and no majority - has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it».

Both of these dimensions – which, as Dworkin himself emphasizes, are not mutually exclusive, but in fact often coexist [Dworkin (1996), 201][4] - plunge their roots into what has been referred to as the *marketplace of ideas,*[5] which is understood as the territory where, owing to the juxtaposition of diverse opinions, democracy grows. Free speech is not an individual right in itself; or rather, it does not end in the individual dimension. It is a *functional* right (or a constitutive one, depending on the justification one wishes to adopt) of a democratic society. It functions as a tool to bring about a democratic and pluralistic system. Expression of a thought, on which there may be agreement or disagreement, contributes always and in any case to the flow of ideas, to the awareness of diverse ways of thinking, to the growth of knowledge and, therefore, to the attainment of the truth. The disorder of ideas is not a *threat* to society; it is an *asset to* society. This encounter (or collision) of ideas cannot (must not) be subject to any type of limitation. «[H]ate speech bans undermine democratic legitimacy to the extent that they deprive the citizens of a voice in the political process» [Gould (2019), 172-173]; a voice that could be consisted even in protesting the laws they are expected to obey.

But is this really the case? Does the freedom to express one's opinion always and in any case really increase knowledge? Does it really contribute to the attainment of the truth? Which truth?

«Is our electorate really in a better position to choose its leaders or its politics because it permits speech of [any] kind? Would we be in a worse position to sift truth from falsity - would the marketplace of ideas be less efficient - if Klansmen or Nazis or sexist bigots were silent?». Ronald Dworkin responded to these questions by invoking the idea of a society comprised of «morally responsible people», those capable of distinguishing true from false and who participate in the democratic political process. One part of American legal doctrine instead responds by turning the presuppositions of the First Amendment doctrine on their heads.

The Harm in free speech. Relegated to the second tier of doctrine are those positions which, while not negating the centrality of free speech in a democratic system, highlight the dystopia that First Amendment doctrine has produced: «[F]ree speech doctrine has been traditionally understood not as a good in itself but as a means of securing other important values. The most commonly cited of those values are democracy, autonomy, and truth. The freedom to speak is essential for the ability of the people to govern themselves, the development of the human personality, and the pursuit of knowledge. But the creation, interpretation, and application of the First Amendment subverts rather than protects these values» [Franks (2019), 4][6]. Contrary to what the First Amendment doctrine

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[4] Ronald Dworkin, while backing the constitutive justification, nevertheless points out the fragility of the instrumental justification: «It is more fragile because [...] there are circumstances in which the strategic goals it appeals to might well be thought to argue for restricting rather than protecting speech. It is more limited because, while the constitutive justification extends, in principle, to all aspects of speech or reflection in which moral responsibility demands independence, the instrumental one, at least in its most popular versions, concentrates mainly on the protection of political speech».

[5] A well-known expression used by Justice Oliver Wendell Holmes in his dissent in Abrams v. United States.

[6] «First Amendment doctrine has created a free speech dystopia in which only the powerful are truly at liberty to speak and the pursuit of truth has been rendered virtually impossible».

affirms, the total absence of limitations to free speech – and thus the legitimate adoption of statements that may be hateful – paradoxically harms the very idea of democracy.[7]

The possibility of easy access to speeches that incite perpetual hate, intimidating and humiliating individuals or groups in ways they have been before, favors the maintenance of a *status quo* in the social consciousness of inequality. Furthermore, it causes those discriminated groups to distance themselves from public debate, which is the opposite result to what the *marketplace of ideas* sought to guarantee. Free speech, understood in absolute terms, can therefore transform itself into its opposite: that is, it can impose the majority's way of thinking onto a minority defined by its membership in a specific social or ideological group. A majority that is itself variable and unpredictable can be harmful to the rights of the minority. One might say that these positions turn to the First Amendment "with a European gaze". Insofar as they bind freedom of expression to the dignity of the individual, to equality among associates, to inclusivity,[8] they imply the need to search for balance (and, therefore, no longer the absolute of freedom of speech). It may be said that they too recognize a *functional* nature of free speech, but in an inverse way: «[F]reedom of expression is of primary importance in a representative democracy devoted to individual rights and social stability. Yet, it is not an absolute right. When speech is used to disparage others and spread falsehood about them, it can be restricted because the law of defamation is rooted in our experience that the truth rarely catches up with a lie» [Tsesis (2002), 129].

Two opposing visions, with opposite arguments, which lead to opposing opinions on the introduction of regulation to prevent hate speech. As has been said, making explicit the contrast and the difficulty of taking a position on one side or the other, «imagine that you care deeply about freedom of speech. You might care for any number of (non-mutually exclusive) reasons. Perhaps you believe freedom of speech is vital to democratic citizenship or to the formation of a democratic culture. Perhaps you think personal expression is an element of personhood and therefore a precondition for human freedom. Perhaps you think freedom of speech is instrumental as much (or more) for listeners as for speakers, to aid in the search for truth or to promote a culture of tolerance. Imagine, though, that in addition to caring deeply about freedom of speech you also find other values compelling. Perhaps they are the very same values to which you view free speech as relevant or instrumental, but you think unregulated speech may threaten as much as facilitate them. Or maybe in addition to freedom of expression, you also believe strongly in substantive equality, or civility, or economic justice» [Greene (2019)].

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[7] It is important not to forget the historical context within which the First Amendment was written. As M.A. Franks (2019) has pointed out, «[T]he First Amendment was written by those who already had the speech». «Free speech was written not only *by* but *for* white men». «If freedom of speech is intended to serve the interests of democracy […] then the First Amendment presents a problem from its inception. The First Amendment was rooted in inequality from the start and has continued to primarily serve the interests of privileged minority at the expense of other groups» (4-5).

[8] There are two ways to describe what is at stake while talking about hate speech: «First, there is a sort of public good of inclusiveness that our society sponsors and that is committed to. [...] Hate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be. It does this not only by intimating discrimination and violence, but by reawakening living nightmares of what this society was like - or what other societies have been like - in the past»; secondary, the person's dignity, that is «[...] their social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society» [Waldron (2012), 4ss.]

4. *Understanding constitutional values. The concept of public order.*

Answering the question of whether it is possible (or, rather, constitutionally correct, given that it is in fact possible) to have recourse to the protection of criminal law requires that the implicated constitutional values be preliminarily identified, obviously on the assumption that the right to freely express one's thoughts is not the only principle at play.

When we speak of hate speech, the values that are invoked (and for which safeguards are sought) alongside the free expression of thought are: human dignity (the certainty of not being discriminated against for reasons of race, religion, sex … is what, owing to indifference to these conditions, makes possible the safeguarding of human dignity); the principle of equality (formal and substantive); and public order. And if we accept the approach that conceives of each right not as an absolute, but a relative one (in the sense that no right is considered first in the hierarchy, and that each right must coexist with all the other rights), it is necessary to find the balancing point that enables many values to be taken in consideration (at least in the abstract) and none of them to be sacrificed at the expense of the others. To be more precise, it is necessary that the law which is intended to eventually introduce limits to the manifestation of thought (and designate as a criminal offense anything surpassing these limits) must contain rules such that this balance be respected.

It has not always been the case, however, that we have spoken in terms of balancing these principles.

Historically, criminal charges for incitement to hatred were seen as a legal asset to protect public order (to be understood as national security). The *ratio* underlying the criminal charges were protecting the "public peace," the *status quo* of the privileged majority – the dominant group - with respect to minorities (the dominated groups). The latter were seen as a "danger" to that peace. Consider, for example, the crime of blasphemy. It is covered in Article 724 of the Codice Rocco (Italian penal code), first clause, which defines as a violation the conduct of anyone who «publicly blasphemes, with invective or offensive words against the Divine or the Symbols or Persons venerated within the State religion». This has the clear intent of protecting, in a manner that is privileged compared to other religions, the Catholic Church, which was at the time understood to be the «source of moral unity of the nation»[9]. Or consider the Fascist racial laws. Implicit in the attribution of criminal offenses to specific types of conduct was the safeguard of a *status* of privilege determined *a priori*. This demanded, by necessity, the identification of an "enemy," a distinction between "us" and "the others," with "us" needing protection and "the others" being marginalized as dangerous. In this context, the principle of expression of thoughts, that of human dignity, as well as equality, all succumbed. Or perhaps it could be said that they did not succumb so much as they, in a hypothetical weighing of the values involved, were placed on the same side of the scale as public order: because dignity, equality and free expression of thought were the values desired by of that same majority group.

The reference to public order can, however, take on another meaning: not so much that which is historically linked to the State's interest in public safety, and to defense from danger, as the interest of the State in safeguarding its own constitutional values. Thus, the prohibition of speech that incites

[9] As we may read in sentence nr. 440 of 1995, from the Constitutional Court which, in declaring unconstitutional the reference to symbols and persons, makes clear the *ratio* implicit in that regulation. It is noteworthy that in the same pronouncement the Court maintains the punishment of blasphemy directed towards the Divine, extending it towards all religions.

hate no longer serves to safeguard the *status quo*, so much as it makes a constitutionally relevant and consubstantial objective into a constitutional structure: the fight against discrimination, on the presupposition that incitement to hatred might be a cause (one of the causes) of the persistent inferiority into which certain categories of people in fact do fall.[10]

When we discuss incitement to hatred today, the two variations of public order continue to confront each other, leading to two different responses on the topic of the (eventual) criminalization of hate speech. Those who emphasize the protection of public order as a defense of the State view with fear the criminalization of the manifestation of thoughts, even hateful ones, because it might unwittingly lead to the reemergence of that which was thought to be submerged. It is a return to the origins of incrimination for incitement of hatred, to the protection of the *status quo* of privilege, with respect to the minorities understood to be a "danger" and, therefore, "enemies" (particularly when the impulses of intolerance originate not only from an individual or from the social body from which that individual comes, but also from the State) [Manetti (2004)]. «[T]he State may use 'equality and diversity' as an excuse to arrogate to itself the power to dictate, not just its own point of view, but also the point of view of the speaker of racist speech» [Gould (2019), 180].

Those who, on the opposite side, emphasize the protection of public order as a tool to overcome the fact of discrimination and, thus, as a means to actualize the principle of equality, consider certain types of discourse as inevitably leading to criminalization.

5. *Further issues to investigate.*

On the basis of the premises described here, further issues to explore arise. The questions posed by hate speech and its eventual criminalization are numerous. We can examine only some of them, keeping in mind as our final objective to develop tools to respond to (and to debate) the question posed in the title of this work.

5.1 *The weight of words.*

I do not intend to take on the role of a linguist or of a philosopher concerned with language. But certainly, to reflect on hate speech means to recognize, even from the point of view of constitutional principles, the importance of language. Language narrates the social categories we make use of. It is not only a mirror of its society, in the sense that it reflects phenomena, classifications, hierarchies and social conflicts as they are; it is also a crucial tool for building, reinforcing, or revoking those same classifications, hierarchies, and conflicts [Bianchi (2021), 9]. «Language transmits our interactions with others» [Pugiotto (2012), 4]. But it can have (and does have) a dark side: «[It] plays a crucial role in creating and reinforcing asymmetries and social injustices, in disseminating and legitimizing prejudices and discrimination, in fomenting hate and violence» [Bianchi (2021), 4]. Hate speech weighs on society. As we have seen, it can perpetuate the already-existing inferiority of individuals or groups of individuals. It can pose a threat to social cohesion and to democratic values, weakening the sense of belonging to society of certain individuals by excluding them from public debate. Reiterating hateful

[10] In this sense, Waldron (2012), 16 («[...] it may be helpful to view hate speech laws as representing a collective commitment to uphold the fundamentals of people's reputation as ordinary citizens or members of society in good standing - vindicating [...] the rudiments of their *dignity* and social status»).

statements consolidates stereotypes. Stereotypes which strike both individuals and social groups, resulting in two contemporaneous consequences: on the one hand, they contribute to the care and feeding of prejudices, and in so doing they influence in a significant way the social perception of a specific group; on the other hand, they water down into an undifferentiated whole the individuals to whom the stereotypes refer, denying them in this way their individuality [Pugiotto (2012), 3; Bianchi (2021), 12[11]].

5.2 Freedom of opinion: individual rights, functional rights, relational rights.

We may affirm that in the face of certain matters, the State must remain neutral; or, if not indifferent, impartial, in the sense that its function is to guarantee debate and discussion among its citizens, without demonstrating bias *a priori* towards one or another viewpoint. As we have seen, the State «does not have beliefs or absolute values to defend, with the exception of those upon which it is based» [Zagrebelsky (2005), 15].

In referring to the freedom to express thoughts, this exception might take on two different meanings, according to the nature we intend to concede to this right, and consequently persuade to respond in a different manner to the question of constitutionality of the criminalization of hate speech.

The freedom to express one's own thoughts is traditionally connected to the rights of *individuals*,[12] to that category of rights recognized to a single person, through the exercise of which they establish their own personality. These constitute a limit to public power. We are speaking, in fact, of freedom *from* the State, precisely in order to refer to those freedoms that have been placed in the Constitution to prevent all forms of interference on the part of the State. The First Amendment is certainly an expression of this approach, particularly the part in which it affirms – for those taking notice – that «Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press [...]». A right against Government, then. If the emphasis falls on the personalistic nature of freedom of speech, hateful expressions cannot (and should not) attain the level of criminal offense, at the risk of betraying the very foundations of the constitutional system: the appreciation of its own presumptions leads to free social interaction on all matters, and the role of the State is only the protection of the conditions that allow the discussion.

Freedom to express thoughts, while certainly remaining an individual right, can however also be recognized as a *functional* right. As we have said, the guarantee of this right is the tool for satisfying not only the interest of the individual, but also general interest. Therefore, if the emphasis falls on the functional nature of the freedom of speech, it can (and must) be limited. Criminalization of certain expressions can not only be legitimately acknowledged, but must be seen as appropriate. Free expression of thought *serves* democracy, because thought can be freely expressed within the framework

[11] 1[…] in calling someone 'faggot,' we deem worthy of contempt both that individual, and all homosexual persons. […] with 'faggot' we catalog and describe an individual as homosexual, but at the same time we judge them worthy of contempt as a homosexual, and in so doing we legitimize discriminatory attitudes and behaviors in regard to that person and in regard to the entire group» [C. Bianchi (2012), 12].

[12] Rights can be classified in a different way, and the different classifications often intersect and overlap. One of these distinguishes the rights of individuals as such (*individual rights*) and the rights of organizations of individuals (*collective rights*), to those which the Italian Constitution defines as social formations, in which the individual carries on in the development of his or her personality.

of the values presupposed by the constitutional system. This is even more true if we pause to consider the fact that free expression of thought can be defined as a *relational* right. At its core, as Waldron has correctly observed, «[h]ow we think about free speech is partly a matter of how we think about rights in general. […] Every right I have thought of being held and exercised not just by me but by thousands, indeed millions of high-spirited individuals, who despites the universalism of their human rights differ from one another in innumerable ways. […]. The right to free speech is a right to speak to or with (or at) other» [Waldron (2019),1,3].

5.3 Limited freedom: an oxymoron?

The free expression of thought is fundamental to a democratic and pluralistic system, as an expression of tolerance and inclusion (but can tolerance and inclusion coexist conceptually?) and openness, even in the face of those who have ideas that clash with, upset, or disturb the State or a certain part of the population.[13] "Tolerance in the face of intolerant people" is the strength of democratic values, as is dissent. But until what point can the right to express an individual opinion be guaranteed (and protected) in the face of those who do not recognize democratic values? Until what point can those who do not adhere to the fundamental principles of the constitutional system avail themselves of those same principles in order to express positions that aim to undermine their solidity? Is the protection of dissent acceptable at any cost?

Only if we speak in terms of functional and relational right, beyond the mere dimension of individual right, can we deem the limitation of freedom of thought as legitimate.

Freedom *from* the State means no interference from the State, but not the *absence* of the State. Freedom does not imply a lack of rules; rules do not restrict freedom, but rather enable all to live freely. As we read in Cicero, «We are slaves of the law so that we may be able to be free». In order that we be able to say we live in a true democracy, the State is called not only to allow its citizens to exercise their own individual rights, but also that these be exercised by all and with respect for the rights of all.[14] The concept of freedom (even freedom of expression of thoughts) is a concept that must be balanced with that of equality and dignity. Freedom without social justice is merely an easy conquest.

For this reason it may be said that when the expression of a thought becomes hateful, in the sense that it harms the freedom and dignity of others, it may be limited: because with that expression one places oneself beyond the framework of the Constitution.

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[13] Returning to an affirmation contained in the verdict to *Handyside*, European Court of Human Rights, 7 December 1976: «Freedom of expression makes up one of the fundamental essentials of a democratic society, one of the basic conditions for its progress and for the full development of each individual. Save what is provided for in Article 10 n. 2, freedom of expression is applicable not only in relation to information or ideas received favorably or considered inoffensive or indifferent, but also to those that clash with, upset, or disturb the State or a certain part of the population: that conclusion is imposed by pluralism, by tolerance, and by the spirit of openness, without which this is not a democratic society».

[14] «Laws preventing dangerous forms of hate speech [...] are necessary to protect individual rights and to guarantee social welfare» [Tsesis (2002), 73 - 74].

5.4 The difficult distinction between hate speech and hate crimes.

We cannot ignore, however, another difficulty: that of distinguishing freedom of expression (including in dissent) from the instigation to hatred – that subtle passage from hate *speech* to hate *crimes*. The concept of "hate" in hate crimes is unclear [Besussi (2019), Gould (2019)]. The notion of hate crimes is not defined unequivocally, just as it is not clear what determines the transformation of a hate speech into a hate crime: is it the content in itself, or the strength of the content? Does calling certain expressions "hateful" in a criminal context (in the dual sense discussed above) not imply a sort of anticipation of the criminal significance at the moment the thought is expressed (*dicere*), regardless of the moment of harm (*facere*)?

For the purposes of the definition of hate crimes, merely causing offense is not sufficient, as hateful as it may be. Following what we have tried to say thus far, what should be noticed is the means of expression that harms the dignity of an individual or group of which he/she is a member, which generates an asymmetrical discourse that increases power and epistemic imbalances between the active and passive individuals. It is, therefore, not a problem of content, but of modality. «Not dignity in the sense of any particular level of honor or esteem (or self-esteem), but dignity in the sense of a person's basic entitlement to be regarded as a member of a society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction» [Waldron (2012), 105]. This does not have to do with punishing the expression in and of itself, but the expression when it, by its modality of expression, presents components that may instigate. We may look at the formulation contained in the Council Framework Decision (2008/913/GAI) of the Council of the European Union (28 November 2008), Article 1, clause 1, on combating certain forms and expressions of racism and xenophobia by means of criminal law. It asks member States to adopt necessary measures to make punishable, among others, public incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin, and specifying that «only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting» is punishable. Or, in the case of apologia, denial or minimization of crimes of genocide, crimes against humanity, or war crimes, when they are «directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a

member of such a group». It is a distinction that is difficult to make, but the priority must be to avoid sanctioning as such opinions, assessments, and feelings.

5.5 Why criminalization must be a political choice.

In the preceding pages, I have sought to explain why criminalization of hate speech can be considered constitutionally legitimate, although I am aware that the subject can be argued in the opposite manner.

There is one more point that deserves to be highlighted, however. The transformation of a hate speech into a hate crime, while prosecutable, is (and must be) for this writer a political act, and as such a historically determined one. To say that criminalization of hate speech is legitimate from a constitutional point of view does not automatically imply that it is compulsory for a legislator. We are not facing a situation where, to use a typical definition from Italian constitutional doctrine, approval is needed for a law that is constitutionally necessary; that is, a law that must exist in order for the Constitution and its principles to be concretized. To say that the criminalization of hate speech is legitimate from a constitutional point of view implies not that the laws on hate crimes *must* be introduced, but that they *can* be introduced.

As to the impact that hate speech can have on dignity, equality, democracy, and the effective participation in the social life of a country, recognizing hate speech under criminal law is a political choice, which the State cannot relinquish [Tsesis (2002), 73-74]. The choice made by a legislator, once made, must be a reasonable one, respecting the balance of all the rights in play, and one in which it is historically determined – that is, susceptible to modification or even abandoned, in case the historic situations were to change. The law, furthermore, is a practical science which contributes to the building of the culture of a nation. The legislator is not limited to describing reality, to acknowledge the common sentiment in society at a particular moment in history. The legislator can, with its own political choices, create a new fragment of reality [Bianchi (2021), 69].

Some maintain that the criminalization of hate speech would open the way for pedagogical criminal law, or the recourse to criminal law in a symbolic way, «a 'norma manifesto' called thus to carry out a function that is entirely abstract and extremely ideological» [Pugiotto (2013), 12; Vigevani (2014, 193ss.], and to the possibility that is surreptitiously attributed to the State of using democratic categories and the protection thereof to counter antagonistic positions and repress dissent.

It is still true that criminal law «must not impose its values with brute force, but must protect the values that are already settled, with consensus and dialogue» [Pugiotto (2013), 12]. It is important to remember, however, that recourse to criminal law is always the expression of a criminal politics which, as such, is the responsibility of the State. It is the task of a State to choose, from time to time, according to the historical and cultural context, what is a criminal matter and what is no longer a criminal matter. Furthermore, as we will see in a moment, the values that criminal law must protect are those on which consensus has already been reached, through the adoption of the text of the Constitution.

Others still object that this means of viewing the law would lead to a moralistic and paternalistic concept of the law, because it is based «on the idea that there is speech that is morally wrong and must be silenced *for this reason*. This would entail a politics of selective discourse, which is incompatible with the priority of the right of free expression on diverse content which the speakers bring» [Besussi (2019), 13][15]. By operating in this way, the State trades places with its citizens in the choice of what is morally just or unjust. Certainly, rules against hate speech are not neutral. But one error that it is easy to make is to confuse terms: eventual regulations do not have as a goal to generate evaluative unanimity in the public culture of a nation, but to tend towards the satisfaction of democratic principles on which a constitutional State is founded. Obviously on the assumption that the concept of democracy is not completed with universal suffrage and free elections (through which popular sovereignty is expressed), but it also implies concepts of dignity, justice and solidarity, with which freedom of expression must coexist. We cannot (and must not) speak of speech that is *morally right* or *morally wrong*, but of speech that is *constitutionally correct* (adequate) or *constitutionally incorrect*.

[15] «The use of a bad-tendency test is functional to the promotion of a model of "good" discourse, which is by definition not shareable in societies that are morally conflicted, where the "bad" tendency of something should not be defined indirectly in terms of differing concepts of what is bad, and on the basis of a normative criterion open to criticism and disagreement. HSC (Hate Speech Censorship) tends towards a virtuous reorganization of public discourse, even through the institutionalization of an official discourse. It shows some affinities with political propaganda of totalitarian regimes: it is clear that the more the category HS is ideologically oriented, the more individuals and governments can take advantage of it to discredit or silence whoever is occupying the post of the objective enemy» (p. 13).

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