Book Review

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The Harm in Hate Speech
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Dignity as the ultimate boundary to the freedom of speech

The international debate on the limits of speech

Freedom of speech as a prerequisite of free communication, expression and dissemination of opinions and ideas is the most fundamental pillar of any truly democratic society. Indeed, the protection of free speech guarantees the conciliation between rights and democracy. Freedom of speech provides the framework for the fruitful and harmonic co-existence between individualism and individual liberty and the collective-political autonomy of each and all members of any democratic polity. This extremely valuable function derives from the very nature of speech as a right that expresses both the individual and the political autonomy and thus serves as a means for the expression of individualism and as a vehicle for the political participation and expression. However, though of extreme importance, freedom of speech is not unlimited. Therefore, in the vast majority of national legal orders – with the exception of that of the USA – the legislator as well as the jurisprudence impose limits on the freedom of speech when it reflects racism, hate against the ethnic, sexual or religious identity of minority members of a given political community.

Thus, in Canada, based on Art. 319(1) of the Criminal Code, a punishable offence is committed by "…everyone who, by communicating statements in any public place, incites hatred against any identifiable group…". Art. 266b of the Criminal Code of Denmark determines that a crime is committed by any person who makes a statement or imparts other information, by which a group of persons is threatened (*trues*), insulted (*forhanes*) or degraded (*nedvaerdiges*) on the basis of race, colour, national or ethnic origin, belief or sexual orientation, publicly or with the intention of disseminating it to a wide circle of people. Art. 130(1) of the German Penal Code determines that a criminal offence is committed by "(1) whoever, in a manner that is capable of disturbing the public peace:

1 incites hatred against segments of the population (*Volksverhetzung*) or calls for violent or arbitrary measures against them

2 assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population…".

Similarly, the Human Rights Act of New Zealand (1993) in Section 61(I) prohibits expression that is threatening, abusive or insulting, and considered likely to excite hostility against or bring into contempt a person or a group on the basis of colour, race, national or ethnic origin.

At a constitutional level, however, the most characteristic limitation to the freedom of expression is the one included in the Constitution of South Africa (1996). It is a text strongly expressing the symbolic need for surpassing the *apartheid* authoritarian, discriminative regime. In particular, Art. 16 stipulates that "[…] the right in subsection 1 (freedom of expression) does not extended to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Additionally, at an international and supranational level there is protection against expressions of racism. Thus, the International Covenant on Civil and Political Rights (ICCPR, 1966) provides in Art. 20(2) that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is prohibited by law", and is complemented in an interpretative way by the General Comment, no. 34 (May 3, 2011, in particular paragraph 54) of the United Nations' Human Rights Committee. In the same framework, the International Convention on the Elimination of all forms of Racial Discrimination (ICERD, 1965), in Art. 4 prohibits any racial discrimination. Similarly, on the basis of Art. 10 of the European Convention on Human Rights a fairly high level of protection of the freedom of expression and speech is guaranteed. Nevertheless, the Council of Europe, though acknowledging the significance of protecting even provocative, annoying or shocking opinions in a democratic society, clearly restricts hate speech, the denial of the Holocaust and expressions appraising genocides or crimes against humanity. To this end, the Council of Ministers has adopted its respective Recommendation R(97)20, while the Council of Europe has founded the European Committee Against Racism and Intolerance (ECRI).

The USA way of understanding freedom of speech and hate speech

The USA presents an exception regarding the limitation of hate speech, since in the USA hate speech is protected in the framework of the First Amendment. This approach opposes the international consensus regarding the restriction of hate speech. Thus, though the vast majority of national legal orders consider hate speech as constitutionally unjustified, discriminating and damaging for the dignity and personality of the individuals, in the USA, hate speech is protected as a *prima facie* individual right. Subsequently, any federal or state legislation that imposes restrictions on hate speech is judicially reviewed as opposing the First Amendment's normative scope.

How is this totally differentiated approach on hate speech can be justified? In his analysis regarding the identity of the constitutional subject Michel Rosenfeld sustains, that freedom of speech enjoys such a fundamental protection in the USA legal system, because it has functioned and still serves as the core perquisite of the formation of the identity of the US constitutional subject. In this context, freedom of speech represents the

channel for the expression of all the diverse ethnic, racial, religious, social, political and ideological which are forming the fabric of US society (Rosenfeld, 2010). As the vehicle for the expression of different ideas and beliefs, freedom of speech has contributed to the ongoing dialogue and dialectic between majority and minority groups of every kind, thus construing the solidarity of the US polity. As Rosenfeld shrewdly observes the devotion of the USA to freedom of speech goes beyond the field of constitutional order and at the end invades a field of pride amongst the well-rooted elements of the US ethnic identity.

Comparing the European and US constitutional systems, James Whitman and Edward Eberle have adapted a quite different approach. More specifically, they sustain that in the US legal system, constitutional freedom is understood as an individual, personal freedom, as a right to develop ones autonomy and private sphere (*the right to privacy*), while in the European legal orders the epicenter of the rights talk lies in their subjective dimension, in their understanding both as individual rights and as principles of fundamental importance for the constitutional polity (Eberle, 1997; Whitman, 2004). In this perspective, the core of constitutional rights protection lies in human dignity, a value that reflects an individual both autonomous and free to act in the private, social and public sphere. This is the reason why in the European approach of rights, the very essence of protecting a constitutional right also implies its limitation by the rights of others (e.g., hate speech is restricted when it violates ones dignity). On the contrary, in the US constitutionalism the rights protect the individual autonomy of the subjects, an objective that in principle falls within the political and economic liberalism that characterises the US political system as opposed to the European *Sozialstaat*.

In a much similar context, in the US constitutionalism an emphasis on the political system and the democratic principle may be observed while in the European legal orders, democracy is always understood in the framework of the rule of law as reflected in the field of constitutional rights and freedoms protection. In the US constitutionalism, the emphasis given to the political and democratic organisation also provides with a solid explanation regarding the prominence of speech as a fundamental individual and political right in this legal system.

Jeremy Waldron: the harm in hate speech and its many aspects

Jeremy Waldron's book is developing an extremely European in its substance argument regarding hate speech. In his opinion hate speech has the potential to pose a serious threat to human dignity. Thus, Waldron sustains that any possible type of derogation arising from speech is not necessarily of the same nature. He claims that mocking a religious leader by presenting him as a terrorist via a series of sketches is not similar to the promotion of Nazi symbols and ideology, to the distribution of anti-homosexual pamphlets or to the burning of the cross. He upholds that the expression of hatred that these latter actions represent disposes certain characteristics that no legal system should ignore. Foremost, hate speech, intolerant speech derogates the most fundamental (*embedded*) function of rights. The rights function as the vehicle for the social and political integration of the subjects in a democratic polity, therefore reflecting their common decision to coexist in social peace and solidarity. This is precisely the reason for their particularly profound acknowledgement regarding the protection of diversity and minorities of all kinds. Rights are the arguments in favour of difference and diversity, against social conformity, state paternalism and the opinion or the ideology of any political or social majority.

In Waldron's opinion, this utterly significant function of rights is jeopardised by hate speech because its expression affects specific individuals or groups as well as the whole of society in the sense that it divides and disrupts the peaceful coexistence and solidarity between the members of a political community. The author claims that hate speech has a multi-level influence meaning that it can potentially inflict the rights of others in a specific level, e.g., a specific individual, in a more generalised one, e.g., by targeting a group of people and in an abstract level referring to the society as a whole. When referring to the society hate speech has an educating character, thus seeking for support in other society members. When referring to a specific group hate speech has an isolating and targeting effect, thus willingly dividing this group from the rest of society. In the end, when it refers to a specific individual hate speech inflicts his/her dignity. What is extremely interesting with Jeremy's Waldron argument, is that those three levels of potential injury actually coexist, meaning that even a *prima facie* abstract or generalised violation in most of the cases bears in its very core also the violation of a specific right of a specific individual.

This extremely interesting argument is illustrated by the author in the following paradigm: A Muslim walks with his son and daughter in a city street in New York when he comes across an anti-muslimracist sign: "Muslims and 9/11! Don't serve them, don't speak to them, and don't let them in" (Waldron, p.1). According to Waldron, this sign says at least two things. First its says to the members of the Muslim minority: "Don't be fooled into thinking you are welcome here. The society around you may seem hospitable and nondiscriminatory, but the truth is that you are not wanted, and you and your families will be shunned, excluded, beaten, and driven out, whenever we can get away with it" (Waldron, p.2). Second, it says to the other members of the community that may share the same feelings: "We know some of you agree that these people are not wanted here. We know that some of you feel that they are dirty (or dangerous or criminal or terrorist). Know now that you are not alone. Whatever the government says, there are enough of us around to make sure these people are not welcome. There are enough of us around to draw attention to what these people are really like. Talk to your neighbors, talk to your customers. And above all, don't let any more of them in" (Waldron, p.3).

Waldron's dignity argument and its critic by Edwin C. Baker and Ronald Dworkin

Waldron's argument regarding the necessity of restricting hate speech is highly European in its essence. Indeed, Waldron presents the supporters of the absolute protection of hate speech, with the need to protect *human dignity*. This is an argument influenced from the European legal tradition where rights are considered to be subjective principles and values of the entire legal order. This is an argument that goes beyond the US legal tradition where rights are considered to be aspects of the individual's autonomy.

There are four major arguments illustrated in the US rights theory against the imposition of any restrictions in the expression of hate speech. The first one is based on the understanding of the public sphere as a *free marketplace of ideas*. In the framework of this approach, the need to impose restrictions on hate speech is yielding towards the market's capacity to regulate itself and to resolve any conflicts arising from the enjoyment of rights with its own means. The second argument is supported by Edwin C. Baker, who sustains that imposing restrictions on hate speech infringes the very core of the individuals' autonomy (Baker, 1989). According to Baker, expression and speech are

the means to the way by which one opts to present oneself and his/her values to others and communicates to them his/her distinctiveness and uniqueness. In this context, imposing restrictions on hate speech limits autonomy thus violating the individuals' autonomy to self-disclosure (*self-disclosure thesis*).

Two other important arguments in favour of the freedom of speech can be drawn by Ronald Dworkin's work. As Dworkin supports the imposition of legislative restrictions on hate speech is lacking democratic and political legitimisation, in the sense that it violates the principle of equality thus causing unjustified discrimination between the members of a democratic polity (Dworkin, 2009; Hare and Weinstein, 2009). According to Dworkin, political and democratic *fair play* is violated when the rights of minorities are endorsed through legislative interventions, if the opposing groups and opinions, even if they represent the majority are not provided with the opportunity to criticise and publicly present their arguments respectively. Dworkin claims that this opportunity is impermissibly constrained by the imposition of legislative restrictions on hate speech.

Dworkin's argument underlining the value of freedom of speech for political justice apart from being extremely abstract, meaning that it can in the end be applied in cases not only of free speech but in any case regarding a conflict between rights, has the disadvantage of being mostly of a quantitative and not qualitative nature. In the centre of this argument lies inherently the idea of an imaginary legal order based on a quantitative mutuality of rights that should always be kept unimpaired and that does not take into account the substantial position of the rights barriers, whether they are weak or powerful, they belong in the majority or minority, etc. The second argument that can be drawn from Dworkin's work is the one regarding the understanding of rights as *trumps*, as the justifiable arguments that the rights barriers, the subjects, can use to shield themselves from any unlawful infringement or violation. Based on Dworkin's approach, Ivan Hare and James Weinstein sustain that not even the appeal of the need to protect social values is enough to legitimise the imposition of restrictions on the freedom of speech, even of hate speech.

Waldron's response to these criticisms leads to the articulation of a particularly interesting argument. As he underlines, the major weakness of the arguments in favour of the protection of hate speech lies in the fact that rights are understood as the individual claims of their subjects as subjective principles and values regulating social and political coexistence in its entirety. In this framework, he argues that there is an utterly substantial difference between the potential violations of the rights of the members of a society via the imposition of restrictions in the freedom of speech and the potential violations of the *dignity* of minority members of a certain society on the basis of their ethnicity, nationality, religion or sexual orientation. According to Waldron, the need for a society to protect its members as a principle that reflects its fair organisation, as well as its willingness to equally guarantee the fundamental rights of all of its members, are the main reasons that justify the imposition of legislative restrictions on hate speech.

Thus, in Waldron's *dignity argument*, the political decision of a legal order to guarantee dignity against hate speech does not derive from the need to protect honour or self-respect of the individuals, but from the need to protect the subject as full and equal member of a society, a democratic polity, taking into account that his/her particular and diverse identity should lead to his/her social and political integration and not to his/her stigmatisation or exclusion. Waldron's *dignity argument* is in fact an argument against social exclusion and in favour of integrating the diversity of minority members into the social and public sphere. Waldron claims that this approach refers to a well-organised

society based on those principles ensuring the social and political status of all of its members without any exemptions as the equal subjects of the rights acknowledged by a democratic polity.

Conclusions

Having read the book of Jeremy Waldron, an internationally acknowledged rights theorist, one inevitably grasps the novelty of his argument regarding the need to restrict hate speech. In his understanding, any theoretical approach of rights should detach them from the formal framework of law itself and should instead place them within the framework of current politics and the social reality of the contemporary representative democracies.

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