FREEDOM OF SPEECH AND HATE CRIME

What comes beyond the criticism?

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Imatge Pedro Chaparro (amb megàfon) el 12 d'octubre de 2014, a l'acte ultradretà de Montjuïc. Chaparro era en aquells moments cap de les joventuts de Democracia Nacional i un dels condemnats per l'assalt del Centre Blanquerna de Madrid l'11 de setembre de 2013. Fotografia: Jordi Borràs

In recent years, and particularly following the judicialisation of the Catalan push for independence, we have witnessed an erratic and even arbitrary use of hate crimes. Some of the statements made by the Spanish National Police and the Civil Guard, such as the alleged refusal, by a mechanic in the Maresme region, to repair police vehicles used in the October 1st police violence, are verging on the ridiculous. The discourse of incitement to hatred, or hate speech, a relatively unknown concept to the bulk of society and even the judiciary before that day, suddenly dominated the front pages and took up a central role in the political debate. The State's dangerous use of these rights in recent years has generated a pendulum effect, causing the left to close ranks against using them as a legal tool.

First round: shared criticisms

Critics of the criminalisation of hate speech, have been extracting and exhibiting the ideological, historical, philosophical, and legal considerations that justify their theories. And for the most part, they're right. The overall conclusion being that the potential negative consequences do not outweigh the collective benefits. Several ideas underpin these criticisms. Among them, on the one hand, is the risk of allowing the State to define and, above all, interpret what can and cannot be said, in full knowledge of the tendency of all States to restrict any discourse that contradicts the factual powers and majority sentiments. On the other, is the fact that only behaviours can be legitimately punished, not ideas, and hatred is a legitimate sentiment, indivisible from the right to ideology and the freedom to engage in a political participation consistent with it. The long list of convicted or indicted politicians, activists, teachers and musicians supports the foundation of these two central suspicions.

From a practical point of view, it has been alleged that attempts to incite hatred have exploited the prohibition of hate speech to persecute dissidence; that the crime of inciting hatred has been confused with that of inciting terrorism; that the vague wording of Article 510 of the Penal Code could result in the penalisation of legitimate discourse, and that the prison sentences of up to four years for toxic discourse spread through social media, are disproportionate. These criticisms have crystallised into two positions: the more radical call for the abolition of the crime contained in Article 510 of the Penal Code (and, in fact, in other articles, such as that of offending religious sentiments contained in Article 525 of the Penal Code, which was to be used against the activists who organised the "insubordinate pussy" procession in Seville). And then there's the more attenuated standpoint, which defends the modification of Article 510, proposing a plethora of changes that range from reducing the penalties to clarifying the wording, adding an express mention as to the intentionality of the perpetrator or eliminating the possibility of committing the crime by encouraging, promoting or inciting "indirect" hatred, hostility, discrimination or violence [1].

The latest significant development on crime 510 of the Penal Code (incitement to hatred) is the State Attorney General's dissemination of Circular 7/2019 [2], which imposes a specific interpretation of said crime on prosecutors throughout Spain. The Circular initially generated a certain amount of uproar when it was published, but it has since been consolidated without any resistance. Incomprehensibly, a vast amount of critical energy was devoted to the wording of Article 510, but not to the Circular that cements its interpretation. Apart from the pedagogical considerations arising from its 41 pages, even more relevant for social and political purposes is the fact that, for the first time, the Attorney General has set out, in black and white, its criteria for deciding which discourses should be punished and which should not.

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> application of these crimes, any person, regardless of their social status, can be protected by the legal concept of hate crimes. Herein lies the explanation for why police, heads of state, other public figures have been unduly protected by this tool

In a laudable performative exercise of "State neutrality", the State Attorney General mentions that what is forbidden is "any attack on the different as an expression of an intolerance incompatible with coexistence". This mention clarifies the root of one of the significant problems with the arbitrary application of Article 510 of the Penal Code. The basis for punishment is not the dignity of people or their right to difference, nor even the need to specifically punish conduct that impinges on the possibility of people belonging to vulnerable groups being able to exercise their fundamental rights in conditions of equity. The State Attorney General decontextualises the historical raison d'être of the hate crime concept as a tool for combating discrimination, and usurps their condition of political violence to turn them into an instrument for guaranteeing social harmony. If the criterion for sanction is the outlawing of intolerance, any action motivated by antagonism and criticism of the different is liable to be punished.

Should the protection of persons belonging to vulnerable groups cease to be the foundation and interpretive guideline for the application of these crimes, a first practical consequence is that any person, regardless of their social status, can be protected by the legal concept of hate crimes. Herein lies the explanation for why police, heads of state, other public figures or even Nazis and ultras have been unduly protected by this tool. A second consequence is that speeches motivated by "intolerance" may be banned, regardless of whether their underlying motivation and intention is to promote rights and values or vice versa.

Second round: self-critical reflections

A first self-criticism questions our awareness of who has been leading the criticism of the ban on hate speech. Most of the opinions and analyses circulated have come from professionals; experts in law, philosophy, journalism, sociology, etc., who analysed the problem without first admitting the privileged position from which they address it. We have conducted our analyses from the sterile comfort of a critical distance that allows for theoretical analysis. In doing so, we have self-legitimised the representativeness and solidity of our critical points of view, while reproducing the usual hierarchy of knowledge sources on theoretical material vis-a-vis situational awareness. We need to ask ourselves whether the people we listen to are representative of society's diversity, whether our positions have addressed the full range of hate crimes, and whether our criticisms have sought to defend our rights and normative values, or focused on the well-being and rights of these "others", i.e., the vulnerable groups.

Having to deal with hate speech on a daily basis ourselves would surely give us a more comprehensive view of the scale of the phenomenon. Arguments have often been put forward to say that no one can demand the right to be free from criticism, that coexistence

requires the toleration of expressions and ideas that bother us, and that we must assume that individual rights find their limit in the rights of the collective. These criticisms can obscure an ignorance of the violence of discrimination and be damaging in the way they trivialise the fallout of hate speech. Far from being limited to affecting well-being or individual honour, it has an impact on personal security, the shaping of identities, vital decisions, job opportunities, family life or the deprivation of the right to political participation for thousands of people. Perhaps it would be beneficial to reflect on whether the defence of our social identity is purely about vindicating the rights and values we claim? Or is it also about the human value we attribute to others, our conception of citizenship, and giving equal importance to the commitment to create social conditions in which we can all play an active role in social construction?

A second reflection centres on the use of a "cost-benefit" equation to critique the use of hate crimes as a tool. A common argument is that the interpretation of hate crimes ends up being misused and, therefore, it would be better to remove them from the Penal Code altogether. In the first instance, it would be useful to identify these costs and the social sectors bearing the brunt of them when making the calculation. That said, if we follow a merely utilitarian approach to legal tools, we might ask ourselves what purpose does legislation on gender violence serve, if it is to be applied in a patriarchal judicial system that will interpret it erroneously and sometimes even go as far as to be counterproductive? We should recall that when the crime of femicide was introduced in several Latin American countries, some of the first convictions were applied to homicides committed within lesbian relationships.

Indeed, the consequences of the misuse of any crime are severe and cannot be ignored. Still, it's utterly incongruous that at a strategic level, we have allowed the pernicious interpretation of the State Attorney General to be established. It has taken advantage of the fact that since the 2015 Penal Code reform that shaped the current wording of Article 510, organised civil society has failed to articulate a social consensus that forces another conception and, above all, another interpretation of hate crimes. The office of the State Attorney General has used the inside lane to overtake us, and it will take a lot of collective work based on court cases, debates, articles and conferences to get to a stage where we can claim that the Attorney General – the State -, under the pretext of ensuring (formal) equality, is denaturing those crimes to the point of utilising them against the people it should be protecting. For now, it seems that the only ongoing strategy is the one taken by Podemos, which since 2018 has been seeking a reform of the Penal Code on "crimes of expression" that addresses the reform of Article 510 [3].

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One final reflection focuses on the admission that, beyond criticising Article 510 of the Penal Code, the left has put forward very few solutions to the problem. Yet, despite this, we've had

cruel situations in which offended groups have been fiercely criticised for seeking to curb hate speech with administrative sanctions based on new anti-discrimination laws, such as LGBTI legislation. You may steadfastly believe that the establishment of such sanctions will not be an effective measure, or even that their establishment could end up strengthening the censorship power of the State. But before levying such harsh criticisms, it's essential to reflect on whether it's fair to place the responsibility of squandering the country's freedom of expression on the shoulders of certain vulnerable groups.

Unresolved issues

Once again, the response of the State, through sanctions, whether criminal or administrative, has been imposed because civil society and social actors have not accepted responsibility for articulating mechanisms to neutralise toxic discourse. If every time someone tweeted toxic content against trans persons, the citizenship, or LGBTI groups, human rights organisations or institutions were to mitigate the repercussions by publicly rejecting it and supporting the offended party, in all likelihood, that trans collective wouldn't be doomed to the dichotomy of either not acting and continuing to bear the cumulative effect of discrimination or using the courts to respond to the tweet and deter any similar ones in the future.

This example brings us to one of the first unresolved central issues in addressing hate speech: if we are to criticise the legal sanctioning tools for their pernicious effects and expect vulnerable groups to renounce them, our counterpart action must include the will, as a society, to pour all our energy and commitment into accepting co-responsibility for mitigating the effects of toxic discourse. The second is that we must transform the current system of communicative social interaction, both in classical media and on social networks, to ensure the emergence of narratives that counter the toxic discourse so that offended groups can confront it with at least some chance of success. However, although this counter-effect could provide a solution in the medium to long-term, it does nothing to solve the daily wounds inflicted on thousands of people from various social sectors. And at the moment we don't seem to be making any progress in that direction. Moreover, a lot of resources are being invested in feeding certain discourses to obtain electoral returns or achieve more pragmatic goals, such as monetising outrage, taking advantage of the increased distribution of toxic content, even if it is to denounce it.

The other unresolved issue has to do with an ethical, political, and legal debate that the left is reluctant to confront: is prohibiting hate speech equivalent to punishing ideas? Is the right to freedom of expression a right in itself, as the liberal position would suggest? Or, does it only deserve to be protected if it fulfils its social function of contributing to the social debate and promoting collective rights? The latter being closer to the position upheld by the Strasbourg Court and so-called "militant democracy". The social consensus we reach on these questions will largely determine the limits we self-impose on ourselves as a society when it comes to our freedom of expression. Until we can clarify the issue and plot a way forward, we will continue to be subject to the increasingly restrictive boundaries imposed by the State.

REFERENCES

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