

6 FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION: DRAWING THE LINES BETWEEN HATE SPEECH, BLASPHEMY AND FREE SPEECH

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In Western society, ethnic, racial and religious conflicts are on the rise, owing among other things to the rapid and considerable increase in migration flows. In the last decade, the religious factor has become important, above all, with regard to culturally motivated crimes. This may also be explained by the fact that many immigrants arrive in the Western world not by free choice, but because of severe socio-economic conditions in their regions of origin or as economic refugees or refugees of conflict and war. In many cases, for these immigrants, integration into their destination society is not their first goal,² and this becomes a realistic prospect only when they have achieved a certain degree of economic stability. Before reaching this threshold, preservation without compromise of their own cultural and religious identity is a widespread attitude that can lead to deep conflict even within family groups, where in comparison to older generations, younger individuals live a situation of ambiguity in relation to the land of immigration. Some of them feel more strongly the appeal of the society in which they live, others claim stronger their routes. In these contexts, phenomena such as the honour crimes³ or membership in subversive associations can easily arise. The first are a clear manifestation of the wish to remain well integrated in the orthodoxy of the culture and religion of origin; the second suggest that common religious affiliation acts as an element of powerful encouragement to fight against a society which is necessary for material reasons, but which at the same time is perceived as extraneous and dangerous. This is all the more true when it comes to exercise of freedom of expression and of freedom of religion.

Western legal systems are therefore faced with a series of new problems raised by societies that are becoming increasingly multicultural. It is thus necessary to find new points of balance between the legitimate requirements of the group, which

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2 Facchi A. 2001. *I diritti nell'Europa multiculturale* [Rights in multicultural Europe]. Roma-Bari: Laterza. 11. See also Taylor C. 1992. *Multiculturalism and the Politics of Recognition: an Essay*. Princeton: Princeton University Press; Kymlicka W. 1995. *Multicultural Citizenship: a Liberal Theory of Minority Rights*. Oxford: Oxford University Press.

3 "Honour" crime involves violence, including murder, committed by people who want to defend the reputation of their family or community. Honour killing is the murder of a person accused of bringing shame upon his or her family. This phenomenon is spread all over the world, but Western societies have been trying to reduce its presence. Instead statistics demonstrate that the problem is arising again. See, for example, the U.K. situation in Summers H. 2017. "Only 5% of 'honour' crimes reported to police are referred to CPS", *The Guardian*, 6 November.

claims secure criteria on which to base the concept of affiliation, and the fundamental rights of its individual members, who may no longer recognise themselves in the original group and in its principles and who call on the state to provide protection from the group itself. This is even more true when it comes to the issue of fundamental rights, such as freedom of religion and freedom of expression, which very often are understood not in the Western sense, but in the light of their culture of origin. This is why phenomena such as blasphemy have become sensitive in the public opinion once again.⁴

The legal regulation of the relationship between freedom of religion and freedom of expression, and of the conflicts surrounding them, depends on how each legal system interprets these two fundamental human rights. In some parts of the world, such as the Middle East, both the right to religious freedom and that of freedom of expression are subjected to strict limitations.⁵ This solution is not only antithetical to the rules of living together in a democracy, but it is also incapable of generating cohesion and social peace, especially in those parts of the world where religiously motivated conflicts are strong. In Europe, where restrictions on the exercise of freedom of religion and of freedom of expression are fewer, the result is anything but satisfactory. In recent decades, the conflict between freedom of expression and freedom of religion has led to incidents as the ones surrounding the assassination of Yitzak Rabin in 1992; the murder of Dutch film director Theo Van Gogh in 2004 pursuant to his making the film "Submission"; the controversy and violence that followed the publication cartoons published by the Danish newspaper *Jyllands-Posten* in 2005; the online dissemination of the film "Innocence of Muslims" in 2012; and the assassination of the Parisian editorial staff of the satirical journal *Charlie Hebdo* in 2015.

This last case is the one that most shook the Western world. To the cry of "*Je suis Charlie!*", Westerners reacted immediately in support of the centrality of the freedom of expression in their democratic systems as the first fundamental freedom. This was in contrast to the killers, who claimed to be defending their religion from the attack by infidel Western cartoonists, albeit in a violent way and outside the rules of democracy. Implicitly, the killers proposed a contrast between the freedom to exercise, and therefore "defend", their belief and the freedom to express ideas on religion also in contrast and in open criticism of a particular faith.

The satirical weekly *Charlie Hebdo* was not new to the subject of religion in the public space, as it had already tackled the question over the years in a very "democratic" way.⁶ It had levelled often-forthright criticism of all the monotheistic religions, with

4 See as an example the recent decision of the European Court of Human Rights in *Sekmadienis Ltd. v Lithuania*, Application n. 69317/2014.

5 For types and statics on the religious restrictions all over the world, see Pew Research Center. 2015. *Latest Trends in Religious Restrictions and Hostilities*. Washington, DC: Pew Research Center, 4, 6, 22.

6 See, for example. the cartoons on the Catholic Church that appear when one googles: charlie hebdo caricatures catholicque

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its cartoonists targeting Judaism, Christianity and Islam to an equal degree. The difference was the reaction of the believers of each religion. For the Christians and Jews, the feeling of offence was probably equal to that of Muslims, but the path of violence was surely not a practicable option for the former two communities, as in the past they had fought strenuously to establish freedom of expression and of freedom of religion in Europe. Instead, although also many Muslims agree on the need to avoid violence, for the most radical part of the Muslim community, the offence to the Prophet and to Islam was an unforgivable affront that required a strong reaction. Islam is, indeed, highly sensitive to defamation of the Prophet: a good Muslim cannot in any way offend the person of Muhammad. If he did so it would be the equivalent of renouncing his or her own religion – in other words, it would be like committing apostasy.⁷ In the case of *Charlie Hebdo*, however, it was, furthermore, an offence to the Muslim religion that was made by people who did not belong to Islam. The question is therefore to understand whether and in what way democratic societies have to intervene to protect religions in cases like those of the Danish cartoons and of *Charlie Hebdo*.

THE LEGAL FRAMEWORK

Freedom of religion and freedom of speech are two fundamental rights, described in the Universal Declaration of Human Rights (UDHR) of 1948 as absolute rights that must be granted by governments without derogation.⁸ This means that there is no possibility to elevate the protection given to those rights because they are listed among the so-called “blue rights”⁹ of the UDHR. Freedom of religion is granted to everyone, irrespective of citizenship; its exercise is possible both in individual and associated form, in public or private; and it comprehends freedom to manifest religion or belief in teaching, practice, worship and observance (Article 18). In the same way, freedom of expression includes not only the possibility to hold opinions without any interference, but also to seek, receive and impart information and ideas throughout the media and with no frontiers (Article 19).

No limit is cited in either provision, and the purpose of the UDHR remains to affirm civil liberties against political power and all forms of totalitarianism. In 1966, the limits of these rights were made more explicit in the International Covenant

7 See Pakistan Penal Code (Act XLV of 1860), Act XLV of 1860, sec 295C. In the Quran, there is no crime of blasphemy, but only apostasy punished with the death penalty. Apostasy is, among other behaviours, an offence to the Prophet.

8 See Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), arts 18 and 19.

9 Freedoms listed in the UDHR are not classified any way. Although, very often scholars speak about two main generations of rights. The Blue rights are the first one and list civil, political and judicial liberties. The Red Rights, or second-generation rights, are socio-economic prerogatives. See Neyer A. 2012. *The International Human Rights Movement: A History*. Princeton, NJ: Princeton University Press. 63; Van der Ven JA 2010. *Human Rights or Religious Rules?* Leiden: Brill, 148.

on Civil and Political Rights (ICCPR).¹⁰ Articles 18 and 19 of this ICCPR assert the fundamental nature of these rights, but they also make clear that governments can impose limits only by law in order to protect public safety, order, health or morals, and long as they do not abridge the fundamental rights and those of others. Article 18 of the ICCPR establishes that everyone shall have the right to freedom of thought, conscience and religion, including the right to have or to adopt a religion or belief freely without any form of constriction and to manifest it, either individually or in community, in public or private. The freedom to manifest one's religion or beliefs may be subject only to such limitations prescribed by law and which are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others. The limits imposed on Article 19 providing for freedom of expression are almost the same, but with something more, because the law makes it explicit that the exercise of freedom of expression carries with it duties and responsibilities to respect of the rights of others. In other words, the law introduces the concept of balancing of fundamental rights: In an ideal society, each man or woman has to reflect before expressing ideas that could be potentially hurtful of the others, keeping in mind all the complex of rights stated at international level.

To secure society against an irresponsible exercise of freedom of expression, Article 20 of the ICCPR imposes, in a concrete manner, additional limitations affirming that law shall prohibit any propaganda of war as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This means that state signatories to the ICCPR have a specific duty to implement legislation directed to stop phenomena of incitement, keeping in mind that freedom of expression can only be limited within the scheme of Article 19(3), that is, by law and only if necessary to assure the respect for the rights or reputations of others and the protection of national security, public order, public health and morals. At the same time, Article 27 provides that states must ensure that the existing ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

MODELS OF PROTECTION

The legal framework designed at a global level identify two absolute rights, freedom of religion and freedom of expression, that have equal legal dignity. This underlines the necessity: (a) to make a balance between them in case of any contrast, and (b) to define better those limits that are necessary in a democratic legal system to protect

10 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Before 1966, only the European Convention of Human Rights (ECHR) made clear the limits of freedom of religion and freedom of expression. However, the ECHR is a regional/local charter not a universal one. See [European] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, and 8 which *entered into force* on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

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all the fundamental rights. Defining the limits to fundamental rights is not a simple legal task. To draw the line between freedom of religion and freedom of expression, a legal system has to decide upon model of protection of fundamental rights that may not grant an equal protection of both these rights. In terms of legal models, it is possible to identify at least two main schemes with some variations depending on the protection granted to religion per se or to the people who profess a religion.

Model 1: Protection of religion per se

This model is used in those states which decide to grant more protection to freedom of religion because religion is understood as a deep component of the national cultural identity.¹¹ This means, normally, a society in which only one religion enjoys privilege. The legal tools used to reach this result are the crime of blasphemy,¹² the crime of insult to religion¹³ and censorship. Historically, this model was used in Europe until the twentieth century in societies that were substantially religiously homogeneous, in which there was one majority religion, along with minority religious denominations that enjoyed a limited legal protection. From the perspective of freedom of expression, this solicitude for freedom of religion often resulted in restrictions of freedom of speech in religious matters through the use of censorship and prosecution of crimes of blasphemy and of insult to religion.

In multicultural societies, with a variety of religious denominations, granting protection only to one traditional majority religion can lead to social problems, especially if freedom of religion for all the individuals is formally granted in the constitution. To avoid these possible incongruences of the legal system, the same protection may be granted equally to all religions. This is the way chosen, for example, by Ireland in 2009 with the reform of its Defamation Act. Even if Ireland is a traditionally Catholic state, the crime of blasphemy has been extended to protect all religion represented in the Irish society, not only Catholicism.

This strategy of neutrality and equality among religion is not enough to avoid any possible restriction of freedom of expression. First, it is undeniable that conceiving a crime of blasphemy creates a class of ideas that cannot be freely expressed in a legal environment without running the risk of criminal liability. The Venice Commission in 2010 has underlined how the crime of blasphemy is not compatible with the values of Western democracies.¹⁴ Secondly, majority religions may be inclined to use the crime of blasphemy as tools to repress internal dissenters, thus limiting the theological debate inside the religious community.¹⁵ Thirdly, blasphemy could be

11 Such as Italy, Greece or Finland.

12 Such as Austria, Denmark, Finland, Greece, Italy, Ireland, Netherlands, San Marino, Lichtenstein, Israel and Turkey.

13 Such as Austria and Germany.

14 See Venice Commission. 2010. *Blasphemy, Insult and Hatred. Finding Answers in a Democratic Society*. Strasbourg: Council of Europe Publishing.

15 The *Ahmadi* are the disciples of Mirzā Ghulām Ahmad Qādiyāni (1835–1908), and they are Sunnis who believe that Ahmad is the *Mahdi* of the Islam, the Muslim Messiah who will

in itself a form of religious dissent and, from this point of view, could be conceived as a right to blaspheme as an expression not only of free speech, but also of freedom of religion itself. In this case, limiting these forms of expression could result in a possible limitation of fundamental human rights. Finally, yet importantly, in a blasphemy law model there is the question of whether protection is granted to non-believers. If atheism is considered to be merely a “negative religion”, then it is not allowed any protection in this kind of model, and non-believers are completely unprotected as group. The freedom of speech of atheists, in such circumstances may be severely restricted in favour of those belonging to religious denominations.

Model 2: Protection of people who profess a religion

This model focuses on protecting people and their fundamental rights. Freedom of speech, as also freedom of religion does, freedom of religion can be exercise in a very wide spectrum of actions with the only limit of the criminal law. Religion is not protected per se, but only so long as it is the expression of an individual belonging balanced with the freedom of expression or other fundamental rights. We can split this model into two sub-models.

Protecting individuals more than groups

This approach is typical of the religion jurisprudence in the United States, where freedom of religion is described as the “first freedom”, but free speech is worshipped more absolutely. There would be no American society without freedom of religion, freedom of speech and the other freedoms contained in the First Amendment to the U.S. Constitution.¹⁶ The roots of this model are traceable in American history and in the fight of the first colonies to affirm fundamental freedoms against the British monarchy.

The idea of a “free market of ideas”, even in religious matters, also characterises this approach. Anyone may express themselves on religious matters with no restrictions, so long as they not inciting the commission of crimes on religious ground. The United States Supreme Court jurisprudence is clear on this position, and the *Brandenburg* test is still the legal tool used by the American courts to decide whether an expression is legitimate or whether it is an incitement to crime.¹⁷ In

perfect Islamic revelation in the universal peace and brotherhood. For this reason, they are considered heretics and persecuted by the mainstream Islam. In Pakistan, they can be sentenced to death only if they proclaim themselves to be full Muslims. The same situations is shared in Iran by the *Bahá'í*, Shia disciples of *Bahá'u'lláh*, who in 1844 proclaimed himself *Báb*, or Muslim Messiah. For more information, see www.alislam.org and www.bahai.org

16 United States Constitution, First Amendment: “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; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” This amendment *entered into force* on 5 December 1791.

17 *Brandenburg v Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969). According to this fundamental decision of the U.S. Supreme Court, in order to restrain the freedom of speech, you must

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such an approach, which is extremely individualised, very often what is lacking is the protection of groups of believers. Religious denominations are not granted any form of protection as groups and this leads religious minorities to a sense of being without legal protection that might come from the promotion of the collective dimension of freedom of religion. Having pushed to the extreme the protection of freedom of speech in comparison to other fundamental rights, U.S. jurisprudence makes little room for a conception of crime of hate speech, which is incompatible with core understandings of a free society in the United States. Making hate speech crime can lead to a restriction of freedom of speech, unless it is confined to direct incitement.¹⁸

Balancing protection of individuals with the protection of groups

This second sub-model seeks to balance the protection of individuals with the protection of groups to which they belong, including religious or racial groups and any other collective identified by a common trait, such as sexual orientation, disability or ethnic origin. In other words, the fundamental rights of individuals will be subject to those limitations stated in the ICCPR, so to those limits can be allowed in a democratic society to protect the rights of others or public order. This may include the limitation of hate speech.

Hate speech is the legal tool, designed by legal scholars and legislators, to try to find a balance between freedom of speech, freedom of religion and protection of groups of people identified on a common ground, such as religion, ethnic origin, sexual orientation and so on. The Council of Europe's Committee of Ministers defines hate speech as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".¹⁹ In a society where hate speech is a crime under the criminal law, individuals can think whatever they want, because thought or conscience can never be restrained, but the manifestation of these thoughts in forms that are potentially able to incite to religious, racial, ethnic hatred or to discrimination and violence in the public arena are prohibited. The legal good protected in these cases

have at the same time: (a) fear of an imminent danger, (b) reasonable possibility that an illegal action will take place and (c) will of the agent to cause illegal action through his/her speech. On the constitutional debate around the compatibility of hate crime legislation with the First Amendment see, among others, Weinstein J. 1992. "First Amendment Challenges to Hate Crime Legislation: Where's the Speech?" *Criminal Justice Ethics* 2(2):6-15; Finkelman P (ed). 1996. *Controversies in Constitutional Law – the Development of Hate Speech Debate*, vol. I. New York: Garland Publishing Inc.

18 See Gellman S. 1991–1992. "Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Politics Dilemmas of Ethnic Intimidation Laws", *UCLA Law Review* 39:333-396.

19 Council of Europe. Committee of Ministers, Recommendation No. R 97(20) of the Committee of Ministers to Member States on "Hate Speech", adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies.

is human dignity, understood as the right of each person to feel as a member of society on an equal level without regard to religious belonging or national or ethnic origin, sexual inclination and so on. A person who suffers hate speech is humiliated individually, but also often by implication or reference to the group to which the individual belongs. The person is considered *de facto* as a minor citizen, a person with a minor dignity claim.²⁰

As for religion, hate speech legislation ends up protecting religious minorities against verbal and visual violence. Hate speech and hate crimes are a social construct, i.e. a legal product that comes from the translation of the conceptual category of “civil rights” into criminal law. Very often this type of legislation is designed to give minorities groups a symbolic form of protection more than an effective one.²¹ In other words, we have to appreciate if the judiciary concretely uses these laws to prosecute illegal behaviours or if they show any formal limits that makes them not useful. Hate speech laws are criminal laws and have to respect all the legal requirements and bindings of criminal laws in terms of effectiveness and preciseness of the formulation of the rules and in terms of intent of the agent. This legislation has to avoid the risk of censorship, so very often a protection clause for artistic expressions is present. Moreover, public prosecutors end up not using these rules because it is too hard to prove correctly the intent to stir up religious hatred pursued by the agent, so it is safer to prosecute for a basic form of crime instead of running the risk of the perpetrator being acquitted.

Apart from this, it is often extremely difficult to distinguish a general critique of a religion from an attack on believers or from incitement to religious hatred. The sentence “Islam is a religion of war” can be understood as a legitimate critique or as an incitement to religious hatred depending on the time, place and manner of the speech. Nevertheless, such a sentence can be also intended as an offence to the religious sentiment of Muslims or as a defamation of religion, changing completely the intention of the legislator and the purpose of the law and with the consequence of jeopardising the legal good protected by the law itself.

THE RABAT PLAN OF ACTION

In order to try a way to find a dividing line between legal and illegal manifestation of thought, a group of experts met at an OHCHR meeting in Rabat, Morocco, to provide all levels judiciary with a useful tool in helping draw the line between legitimate manifestation of thought and incitement to religious hatred. The resulting Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence is the

20 See Waldron J. 2012. *The Harm in Hate Speech*. Cambridge: Harvard University Press.

21 See Jacobs JB and Potter K. 1998. *Hate Crimes*. Oxford: Oxford University Press, 21; Bowling B. 1998. *Violent Racism: Victimisation, Policing and Social Context*. Oxford: Clarendon Press, 158.

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legal product of the four regional expert workshops organised by OHCHR in 2011, and adopted by experts at the meeting in Rabat, Morocco, on 5 October 2012.²²

The basic idea behind the plan is that blasphemy laws can be counterproductive, because they can restraint any form of interreligious dialogue and because of the idea that the law must protect people who profess a religion, not religion per se. The restrictions that can be imposed on the legitimate manifestation of thought – or, generally speaking, on free – are stressed in ICCPR Article 19(3). The provisions contained in Article 20 ICCPR are a specific legal standard that must be complied with, along with the provisions of Article 19(3). In order to be legitimate, each restriction has to conform to the three part-test of legality, proportionality and necessity.

Under these provisions, speech can be considered hate speech if it satisfies the following conditions:

- **Context:** Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.
- **Speaker:** The speaker's position or status in the society should be considered, specifically the individual's or organisation's standing in the context of the audience to whom the speech is directed.
- **Intent:** Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under Article 20, as it addresses for "advocacy" and "incitement", rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.
- **Content and form:** The content of the speech constitutes one of the key focus of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style and nature of arguments deployed in the speech or the balance struck between arguments deployed.
- **Extent of the speech act:** Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used (for example a single leaflet or broadcast in the mainstream media or via the internet), the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the

22 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR in 2011, and adopted by experts at the meeting in Rabat, Morocco, on 5 October 2012, addendum to the Annual report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013.

statement or work is circulated in a restricted environment or widely accessible to the general public.

- **Likelihood, including imminence:** Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.²³

It is clear from this list of requisites that only in a strict number of cases a manifestation of expression could be defined hate speech, due to the fact that the general principle is that freedom of expression has to be preserved.

THE RABAT PLAN OF ACTION: TWO CASE STUDIES

Let us now define the two case studies on which to ground the concept of hate speech and the utility of the Rabat Plan of Action. The first is the *Charlie Hebdo* case, which raises the issue of satire as a form of artistic expression, manifestation of free speech, or as a form of hate speech, defamation of religion or blasphemy. The second is the murder of Yitzhak Rabin, a case of religious speech, which presents the question of when freedom of religion and freedom of expression conspire to produce incitement to religious hatred.

The *Charlie Hebdo* cartoons case is tragically well known to the large public. On 7 January 2015 in Paris, when terrorist Muslim brothers attacked the newsroom and the editorial staff of the French satirical journal *Charlie Hebdo*, killing the main cartoonists and others on the staff. The attackers attacked the journal because it had published satirical cartoons and images that they said blasphemous of the Prophet and of Islam itself. I do not need here to describe the images that are freely available on the net and can be easily viewed. I only want to make a few particular points.

First of all, as noted above, the journal has treated equally all religions, because it was fairly blasphemous towards Islam, Catholicism and Judaism. It was intolerant, sharp and harsh in respect of all religions, without specifically targeting Islam. This means that there was no particular intent to persecute Islam or Muslims as a class of citizens in a way that would diminish their role in society. Moreover, it is at least questionable that the pictures were able to incite hate towards Muslims in France because of the particular social context and the offensiveness of the drawing itself. For sure, on many of these cartoons it might be possible to debate their artistic value and style, from a moral as well as an aesthetic point of view, but I think that it would be hard to affirm with no doubt the criminal law relevance of them without running the risk to censor legitimate forms of expression even if they are morally hurting.

Two decades before the *Charlie Hebdo* incident, in 1995, Yitzhak Rabin was murdered by an Israeli ultra-Orthodox man at the end of a rally in support of the Oslo Accords

²³ Rabat Plan, para 29.

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at the Kings of Israel Square in Tel Aviv. The murderer, Yigal Amir, an Israeli ultra-nationalist, radically opposed Rabin's peace initiative and particularly the signing of the Oslo Accords. Before the murder, ultraorthodox rabbis claimed Rabin was a *rodef*, which is a traitor of the Israeli cause. The evening before his death a group of rabbis was at his place proclaiming the *pulsa denura*, a sort of excommunication, a damn, which put a person outside the protection of the community. Murdering a *rodef* is an action that carries not a fine, but a blessing in biblical law.²⁴ Technically, Amir killed Rabin. However, the core question is the role played by the ultra-Orthodox rabbis: Do they have a responsibility? Of which kind? A moral one? Can we prove the rabbis pushed Amir to act, inciting hate toward Rabin?

From a religious freedom perspective, the rabbis simply exercised a free teaching prerogative, assuming Rabin was a *rodef*, a traitor, in biblical terms. They did not established that Rabin was to be killed in the way he was, but it is possible to say that their strong opposition to the peace policy of the Israeli prime minister could have strengthened the will of the agent to act. However, it would be difficult for a public prosecutor to reasonably and successfully prove this element at trial. On the contrary, if we assume that this type of discourse cannot occur in the public arena in order to avoid possible threats to public order, we are admitting censorship and deeply constraining free speech. In such a case, criminal law may not able to give a definitive answer to these questions.

Let us now use the Rabat Plan tools on the two case studies. Using the elements of the Rabat Plan test, I doubt that it would be possible to deny the publication of the *Charlie Hebdo* cartoons, just as it would be not possible to restrain the rabbis from pronouncing the *pulsa denura*. If we test each element of the Rabat Plan on the *Charlie Hebdo* case, the results are as follows:

- **Context:** The pictures were published in France, where the social environment is used to critique, even a very strong critique, towards religions in general, and where there is also a long tradition of free speech.
- **Speaker and extent of the speech act:** *Charlie Hebdo* was a satirical journal with a well-known desecrating aim in the Parisian cultural environment, but not so much in the global population. It was a minority journal, part of niche literature, so its danger was very low in terms of incitement to hatred toward any category of people.
- **Intent:** Stirring up hatred towards Muslims was not the intent of the cartoonists. On the contrary, the real aim was to attack all religions per se. At the time of cartoons' publication and in the previous issues, there were the same number of pictures to do with Islam, Catholicism and Judaism.
- **Content and form:** No doubt, the pictures were morally questionable and the artistic expression they conveyed was not of a high quality, but from a legal point of view, this is totally irrelevant for the reasons already expressed under the previous points above.

24 In the Rabin case, the International Rabbinical Coalition issued the *pulsa denura*. See Guiora AN. 2013. *Freedom from Religion. Rights and National Security*. Oxford: Oxford University Press, 38.

- **Likelihood:** The possibility that a French citizen would decide to act violently towards Muslims because of the *Charlie Hebdo* pictures would have been proximate to zero because of the French cultural tradition of free speech and critique of churches and religions in general.

Let us test each element of the Rabat Plan on the Rabin case:

- **Context:** Israeli society is a place where individual rights are protected and fostered in the public sphere, so the ultra-Orthodox rabbis' condemnation of the Rabin policy was an expression of free speech, but also of religious freedom, because they used religious discourse to condemn the Oslo Accords.
- **Speaker and extent of the speech act:** The rabbis were perfectly entitled to a religious discourse to condemn Rabin policy. Moreover, their speech was directed to a small proportion of Jews, the members of the ultra-Orthodox community.
- **Intent and likelihood:** It is questionable that they have the clear intent to cause Rabin murder or at least to incite someone to do it. In this sense, I assume that the proof of the intent would be nearly impossible. For the same reasons, I think that to make a prognostic judgment about the probability that someone could enforce the *pulsa denura* is extremely difficult.
- **Content and form:** The critique of Rabin's policy was harsh and maybe out of bounds, but, again, licit in a democratic, open-minded and free speech addicted society like the Israeli one.

So, even applying the Rabat Plan test to the *Charlie Hebdo* cartoons and to the rabbis' *pulsa denura* in the Rabin case, the publication of the cartoons and the Rabbis' discourse could not be censored. This leads to the conclusion, once again, that in those cases the protection of religious minorities was not granted or secured through the legal system with the legal tools provided by the criminal law. Moreover, it is clear at this point that the criminal law is not an adequate means to prevent conflicts between the effects of the exercise of fundamental rights.

THE MARRAKESH DECLARATION

The two case studies discussed in the previous section underline the strong need for an alternative set of legislation and legal tools to secure the protection of religious minorities without sacrifice of individual freedoms. In January 2016, Muslim scholars, religious leaders coming from more than 120 states and the representatives of Muslim international organisations signed the Marrakesh Declaration on the Rights of Religious Minorities in Predominantly Muslim Majority Countries.²⁵ It is an attempt to stress the importance of respect for and protection of religious minorities, even in those nations with a deep religious characterisation, such as the predominantly Muslim majority states in the Middle East and Far East. The Marrakesh Declaration also stresses the importance of individual freedoms,

25 Executive Summary of the Marrakesh Declaration on the Rights of Religious Minorities in Predominantly Muslim Majority Communities, 25-27 January 2016. Online at: www.marrakeshdeclaration.org

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establishing a concept of equal citizenship irrespective of the religious belonging. In so doing, it recovers the cultural and historic route of the Charter of Medina²⁶ declaring the Prophet Muhammed's teachings on the peaceful coexistence of different faiths to find a way to the prevent counter religious extremism and incitement to religious hatred in our modern times.

The attempt is a very good one, but it is not possible to ignore the limits of this Moroccan document. The Marrakesh Declaration is only a covenant. It is not legally binding on Muslim states, which are legally bound at an international level by the Islamic charters on human rights.²⁷ In these international agreements, although freedom of expression and freedom of religion are individual rights granted to everyone, nonetheless these rights must be conceded in the light of *sharia*, which remains the interpretative tool and the limit of the international agreements themselves. Minorities are to be governed as *dhimmi*²⁸ and that the right to change religion is not recognised and is deemed to be apostasy. Although the Marrakesh Declaration good attempt, it is not sufficient, because there is need for a new Muslim international agreement so legally binding and enforceable that it can foster the changing of minds in the Muslim world along the lines suggested by the statement itself.²⁹

26 The so-called "Charter of Medina" or "Constitution of Medina" is the most significant document that survived from the time of the Prophet Muhammad. It constitutes a "proto-Islamic public law", and created a new community, after his arrival at Medina in 622 CE. The term "constitution," however, is not appropriate because it mainly deals with tribal matters such as the organisation and leadership of the participating tribal groups. To learn more, see Arjomand SA. 2009. "The Constitution of Medina: a Sociolegal Interpretation of Muhammad's Acts of Foundation of the Umma", *International Journal of Middle Eastern Studies* 41:555-575.

27 See Universal Islamic Declaration on Human Rights (Universal Islamic Declaration of Human Rights, adopted by the *Islamic Council of Europe* on 19 September 1981/21 *Dhul Qaidah* 1401); Cairo Declaration (Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993)); Arab Charter 1994 (Council of the League of Arab States, Arab Charter on Human Rights, September 15, 1994, *reprinted in* 18 Hum. Rts. L.J. 151 (1997)); Revised Arab Charter 2004 (League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Intl Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008).

28 *Dhimmi* is an historical term referring to non-Muslims living in an Islamic state with legal protection. As citizens in the Islamic state, they were protected until they paid the *jizya* tax, which complemented the *zakat*, or alms, paid by the Muslim subjects. *Dhimmi* were exempt from certain duties proper of Muslims, and they did not enjoy certain political rights reserved for Muslims, but were otherwise equal under the laws of property, contract, and obligation. Under *sharia*, the *dhimmi* communities were usually subjected to their own special laws, and they were exempt from some laws applicable to the Muslim community. See Emon AM. 2012. *Religious Pluralism and Islamic Law: Dhimmi and Others in the Empire of Law*. Oxford: Oxford University Press.

29 By the way, it is quite strange that a declaration such as the Marrakesh Declaration was signed in a state environment – namely, Morocco – where religious minorities do not exist.

The declaration on apostasy made by the Moroccan council of *ulema*³⁰ in 2017 is a symptom of a new awareness of the Muslim word in this direction.³¹ In the document, the punishment of apostasy is no longer the death penalty, because apostasy is now considered more as a matter of freedom of religion and freedom of conscience than a political issue for the Muslim communities, both in Muslim countries and abroad. This element helps to reconsider the other faiths no longer as enemies of the *umma* (community of Muslim believers), but as communities that walk beside the main one, the Muslim one, trying to reach a common goal – the happiness and welfare of souls on the earth before than in the Heaven. In this sense, radical Islam loses an important argument for its narrative and for its hate speech discourse, in which the other religious groups are described as enemies of the Muslim community.

CONCLUSION

At this stage, I think that I have sufficiently explained why I am convinced that criminal law is not the right tool to regulate conflict between fundamental rights. In particular, the hate speech legislation and criminal law that already on these issues elicits some common criticism. First, the general prevention effect is scarce, because criminal law tends to regulate situations where a harm has already occurred. To prosecute an assault, for example, the crime has to be already occurred or at least an attempt of otherwise you go against the principle of effectiveness in the rule design. Second, criminal law is not culturally neutral, because is the product of culture and the legal system that derives from that culture. Criminal law in Western democracies, such as the U.S. or Italy, are not exactly the same: the historical, cultural and religious background give to the same principle a somewhat unexpressed common shared meaning that can be hardly grasped from a person that comes from another cultural and historical background. The concept of *bona fide*, for example, is not the same in Italy and in China. Third, there are technical problems that come with the designing of the single rule. For public prosecutors, this implies difficulties in reaching the legal proof during the process. If a law is not designed in a proper manner according to the fundamental principle of the legal system, it can be difficult to implement its use in the common law life.

From the analysis above, we can conclude that conflicts between fundamental rights cannot be regulated exclusively through criminal law and crimes like hate speech and incitement to religious hatred. In fact, if we address these problems only from a criminal law perspective, a number of open issues remain in the background. First of all, there is the definition of “hate”. It is not a simply dislike,

30 The Oxford Dictionary defines *ulema* as a body of Muslim scholars who are recognised as having specialist knowledge of Islamic sacred law and theology. See <https://en.oxforddictionaries.com/definition/ulema>

31 It is true that Morocco is going thorough a period of renovation and evolution, taking into account that it did not sign the Universal Declaration of Human Rights in 1948 and the International Covenant on Civil and Political Rights in 1966.

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but it is characterised by the will to provoke the worst evil to its victim.³² Having said that, there is always the risk that a judge will not be able to distinguish hate from a legitimate, but perhaps very rude form of critical speech, without running any risk of censorship. Secondly, there is negationism.³³ To distinguish it from a true and genuine historical analyses is so difficult that the European Court of Human Rights applies the Article 17 European Convention on Human Rights to secure decisions on it.³⁴ The idea of the Court is that when there is a case where negationist thesis are involved, there is no need to evaluate the compatibility of the thoughts expressed with the Article 10 of the European Convention of Human Rights. The incompatibility of these ideas with the values of the Convention is stated as such. Thirdly, I doubt that a hate speech victim can react violently in a truly democratic environment – otherwise, a private justice mentality will transform our societies in anarchical directions. Not so many people could be ready to start a speech back reaction against a verbal abuser.³⁵ Fourthly, some forms of harsh, violent, mocking satire or artistic expressions can be easily confused with hate speech or inciting to hatred. So, the problem of how effectively and efficiently protect minorities remains.

For all these reasons, I assume that the contemporary societies need different tools to manage these situations that not relay on law intended in a narrow, technical sense. In the short term to midterm, the ethical codes for the press could help in avoiding episodes like *Charlie Hebdo*. Perhaps instruments of restorative justice could help to address the possible consequences of episodes hurtful not only for the single victim but also for his/her entire community.³⁶ In the longer term, I think that it is necessary to rediscover the meaning of fundamental values and rights, as well as their corresponding duties. Every human action carries a moral, individual

32 See Iganski P. 2008. *"Hate Crime" and the City*. Bristol: The Policy Press. 2, 40, 85.

33 Negationism is a particular form of revisionism that ends in denying the Hebrew Holocaust. See Warburton N. 2009. *Free speech: a very short introduction*. Oxford: Oxford University Press. On this point, see also the case of David John Cawdell Irving, who in 1996 engaged a trial for defamation against the historian Deborah Lipstadt. She had called him a Holocaust denier in Lipstadt DE. 1993. *Denying the Holocaust: The Growing Assault on Truth and Memory*. New York: Penguin Books. Irving lost the trial and the English court found that Irving was a Holocaust denier, anti-Semite and racist, who persistently and deliberately misrepresented and manipulated historical evidence. In addition, the court found that Irving's books had distorted the history of Hitler's role in the Holocaust to depict Hitler in a favourable light.

34 *Garaudy v France*, n. 65831/2001.

35 See Gelber K. 2002. *Speaking back – the Free Speech versus Hate Speech Debate*. Amsterdam-Philadelphia: John Benjamins Publishing Company, 117.

36 "Restorative justice is a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process. [...] Restorative justice comes in many forms. The most common in Europe and North America is victim-offender mediation." See Braithwaite J. 2004. "Restorative Justice and De-Professionalization", *The Good Society* 13(1):28-31.

responsibility before a legal one. In this sense, every person act is a political action because it declares which kind of society the actor is fighting for. Social constraint may be even more efficient if it is based on a set of shared values. In this process, religious denominations can help and work to foster interreligious dialogue through the mutual understanding of the proper cultural roots of each single religious group, building respect and reciprocal acceptance. In so doing, a new set of shared values can be defined even in the multicultural and multi-religious society if a proper and recognised role is granted to all the social actors.

Above all, I think that melting pot societies – both Western and African – can learn a lot from the Rabat Plan and the Marrakesh Declaration. First, it is a useful legal tool for solving potential conflicts between fundamental rights. Second, it is an attempt to find a shared way to peaceful coexistence. Following this path, the Kingdom of Bahrain Declaration³⁷ and the Beirut Declaration³⁸ also underline that religious tolerance and respect are the necessary basis to foster peace and development for all the human beings. In the end, only politics that encourages religious freedom and freedom of expression in civil society at all levels can make hate speech and hate crimes relics of the past.

37 The Kingdom of Bahrain Declaration, Manama, 3 July 2017. Online at: <https://www.thisisbh.com/the-kingdom-of-bahrain-declaration>. His Majesty King Hamad bin Isa Al-Khalifa: “When you wave ‘Hello’ to your neighbour walking to church on Sunday or to the Synagogue on Saturday or to the mosque on Friday then you are an active agent for coexistence. It’s those small acts of kindness that turn coexistence to an enshrined part of our DNA, an indispensable part of our being as humans.”

38 In March 2017, the Office of the UN High Commissioner for Human Rights (OHCHR) launched its initiative on “Faith for Rights” with an expert workshop in Beirut. The Beirut expert workshop on 28 and 29 March 2017 built upon the Rabat Plan of Action in light of its increased relevance given the aggravated trends of incitement on various grounds. The workshop participants drafted a holistic narrative of the human rights responsibilities of religious leaders of which the Rabat Plan of Action provides a central component. Beirut Declaration on “Faiths for Rights” (F4R), 28-29 March 2017. Online at: <http://www.ohchr.org/Documents/Press/21451/BeirutDeclarationonFaithforRights.pdf>