SANT'ANNA LEGAL STUDIES

STALS / PANOPTICA BOOK REVIEW

Lucia Scaffardi,

Oltre i confini della libertà di espressione. L'istigazione all'odio razziale,

Padova: Cedam, 2009

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Lucia Scaffardi. *Oltre i confini della libertà di espressione. L'istigazione all'odio razziale,* **Padova: Cedam, 2009, pp. 310, euros 30.50.**

In the book under review the author deals with the problematic issue of the relationship between the freedom of expression and the repression of racial hate speech.

The work aims at investigating the possible limitations to be acknowledged to the freedom of expression in the case of racial hate speech, which is a very sensitive area that has already been analysed by comparative law and criminal law scholars.

In these pages, after having recalled the structure of the contribution, I will discuss the conclusions reached by the author.

This book is divided into two parts: in the first part, the author analyses the set of rules disciplining racial hate speech at the international and national levels, by distinguishing, with regard to the latter, two patterns of democracy: "militant" and "tolerant" democracies.

After this legal overview Scaffardi moves on to focus on the Italian case, paying particular attention to the legal provisions in force during the fascist period and then to the relevant criminal provisions adopted later on: law-decree no. 122/1993 adopted on 26 April 1993 (and converted into law by law no. 205/1993) and the incitement to racism (violent and non-violent) disciplined by law no. 654/1975 (then amended by law no. 85/2006).

In the last chapter of the second section, instead, the author studies the impact of EC and EU law on the national treatment of hate speech, analysing the possible interaction between supranational and national law.

From a methodological point of view it is worth noting the interdisciplinary approach to the chosen subject; law is always the product of a social event, certainly, but this way to proceed is particularly welcome in this ambit and explains the long pages devoted to the reconstruction of a misleading concept like that of "race".

In the final remarks the author recommends signing a new social deal, a "new conservative constitution" founded on the personalistic principle and that of equal social dignity, which are the two main principles of post-Second World War constitutionalism.

By this oxymoron ("conservative constitution") the author means a new social contract aiming at mixing the anthropological conception characterizing the constitution and the openness towards the possible contributions coming from the different communities independently of their racial origin.

Phenomena such as globalization, increasing migration and the erosion of frontiers favoured the emerging multiculturalism. A few years ago, Kymlicka distinguished two forms of cultural pluralism induced by these phenomena. "Multinational states" are states where a "national minority" (that is, a distinct national group, with a language and culture) lives. Such states are the product of the absorption of pre-existing states into other states. The second form of cultural pluralism embodies "polyethnic states", which are, on the contrary, states that experience immigration.[1]

This change in the state paradigm causes the necessity to rethink the cultural homogeneity that historically has characterized the state building process (the idea of the nation-state, which implies the vision of the constitution as a reflection of the cultural values of a national community).

One of the most important challenges of contemporary constitutionalism is thus related to the constitutional sustainability of such a constitutional diversity and this is precisely the perspective chosen by the author when dealing with the attempt to study and compare the different legislative models treating racial hate speech.

As stated, Scaffardi proposes a "conservative way" based on the evolutive interpretation of two fundamental values that are actually two sides of the same macro-principle: that of human dignity conceived as a key concept of contemporary constitutionalism.

However, this conclusion opens a Pandora's box since it relies on one of the most debated principles in constitutional law.

As McRudden pointed out, "despite its relative prominence in the history of ideas, it was not until the first half of the 20th century, however, that dignity began to enter legal, and particularly constitutional and international legal, discourse in any particularly sustained way. The use of dignity in legal texts, in the sense of referring to human dignity as inherent in Man, comes in the first three decades of the 20th century. Several countries in Europe and the Americas incorporated the concept of dignity in their constitutions: in

[1] W. Kymlicka. *Multicultural citizenship*. Oxford: Oxford University Press, 1995.

1917 Mexico; in 1919 Weimar Germany and Finland; in 1933 Portugal; in 1937 Ireland; and in 1940 Cuba. It seems clear that the combination of the Enlightenment, republican, socialist/social democratic, and Catholic uses of dignity together contributed significantly to these developments, with each being more or less influential in different countries."[2]

On that occasion, after a brief overview of the importance of dignity in the domestic dimension,[3] McRudden recalled how such a diffusion favoured the emergence of different conceptions of the same idea.[4]

Such a conceptual ambiguity may present some risks of judicial "use and abuse of human dignity".[5] According to some authors, human dignity, in fact, would emphasize communitarian values and the so-defined dignity-based modern constitutionalism would prefer to balance and harmonize rights with other political and social needs. "The widespread acceptance of such tradeoffs minimizes the importance of rights because courts review rights as part of a political calculus. By focusing on values such as human dignity, modern constitutionalism deprives rights of their special force."[6]

This is the essence of what I would call a "skeptical approach" to constitutional clauses, although in my view it is grounded on an evident misunderstanding of the concept of dignity as such (a constitutional good) on the one hand, and a particular technique for ensuring constitutional goods such as the proportionality test or the balancing test on the other.

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[2] Ibidem, 664.

[3] The most famous constitutional provision devoted to such a principle is art. 1 of the German *Grundgesetz* reading:

> (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all State authority.
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
> (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

The dignity discourse is strongly related to the idea of fundamental rights as the basis of the constitutional state. Something similar may be found in the Spanish Constitution, in Article 10, paragraph 1: "The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace."

[4] "However, as might be expected from the variety of differing approaches that are apparent in the historical development of the idea of dignity, there are some significant differences in the use of dignity in human rights texts. A more pluralistic, more culturally relative approach to the meaning of human dignity can be identified by looking briefly at some of the differences in the use of dignity language between the regional texts, and between the regional texts and the international texts." Ibidem, 673.

[5] N. Rao, "On the use and abuse of dignity in constitutional law", in *The Columbia Journal of European Law*, 2008, 201–256.

[6] Ibidem.

In other words, I think that following this reasoning the negative consequences of the use of dignity are not caused by the vagueness of its structure but by the judicial implications of its use and what this reveals.

In any case such a skeptical approach probably reveals the dark side of all the views relying excessively on the principle of dignity; even an open and procedural approach, based on the idea of the equal right to participate in the democratic process, may present some axiological prerequisites. In other words, dignity is another concept deeply rooted in the cultures of a community or, at least, it is not a neutral concept and because of its ambiguity, dignity may sometimes be a problem for integration rather than a solution.

Undoubtedly, such reflections go beyond the scope of the volume reviewed here and do not affect the value of the book, the purchase of which I recommend since it is well documented and presents an originality of its own.