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Disagreement, Free Speech and Cancel Culture

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CLAUDIO NOVELLI (ED.)

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Cancel Culture: An Essentially Contested Concept?

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1. Introduction

Some weeks ago, in Turin, during a prominent Italian book festival, the minister of equal opportunity, known for her conservative stance on family and gender issues, was interrupted and silenced during her book presentation. In Rome, on the same day, activists fighting climate change poured black liquid (charcoal) into the Trevi Fountain to protest investment in fossil fuels. In Western liberal democracies, such events are increasingly sparking public discourse about the state of free speech and the proper methods of expressing dissent. For example, on July 7, 2020, 150 intellectuals and academics, including Noam Chomsky and Steven Pinker, signed an open letter criticizing what they saw as a rise in censorship and intolerance in public discourse. They voiced concern over exclusionary practices in liberal or left-leaning circles, where diverse opinions are typically welcomed. The petitioners emphasized that not just subversive or offensive views, but also those challenging prevalent social narratives, faced censorship.

Of course, also right-wing movements exercise forms of censorship. Examples include the boycott of Budweiser for partnering with a transgender influencer, and Governor Ron DeSantis's enactment of Florida's 'Don't Say Gay' bill, banning school discussions on sexual orientation and gender identity. Nonetheless, the term “cancel culture” tends to be applied to left-wing initiatives.

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While there are legal and cultural tools in these political landscapes to manage the normative tension between free speech and dissent, the discourse often seems disordered. Confusion has been increasingly exacerbated by the growing reliance, mainly in the media, on the notion of *cancel culture* (or *cancellation*), which offers an alternative perspective on similar phenomena. According to one the most compelling definitions, the term denotes those: "collective strategies by activists using social pressures to achieve cultural ostracism of targets (someone or something) accused of offensive words or deeds" (Norris 2023, 148). More radically, cancel culture can be seen as an ideological purge or, *mutatis mutandis*, as a penalty akin to the Roman law from the Imperial era, the *damnatio memoriae*. Indeed, it is not uncommon for these cancellation practices to target deceased individuals, aiming to discredit, erase, or modify their legacy.[1]

Although its roots lie in the journalistic lexicon, cancel culture has distinctive features that could define it as an independent concept. It can be seen as a peculiar instance of the normative tension between free speech and expression of dissent. What sets it apart is that it acts as a social norm – triggering a social sanction rather than a legal one – that rarely infringes on free speech but more often complicates it through the voluntary and legitimate engagement in ostracizing practices. Generally, it implies the complete non-acknowledgement of the targeted individual's (or group's) authority or credibility, with no real room for compromise.

However, the varied meanings, references, and nested position within disputed political concepts (e.g., free speech, dissent, and rule of law) provoke conceptual confusion. Also, the concept frequently faces criticism for its instrumental use as a tool to undermine any form of dissent or protest, echoing right-wing circles' ideological use of the notion of political correctness. As recently noted by Amia Srinivasan, ostracism is perceived as

[1] A case in point involves Puffin Books' revision of Roald Dahl's children's books. They hired sensitivity readers to identify and substitute language that may be considered offensive in today's context.

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cancellation when initiated by the left, but when carried out by the right, it is viewed as an exercise in free speech (Srinivasan 2023). As we will discuss in the next section, this 'aggressive' use is actually a distinctive trait of the concept. Hence, despite its potential for ideological manipulation, the concept maintains its descriptive relevance for a variety of situations.[2]

Viewed from this angle, cancel culture seems to align with Wittgenstein's category of family resemblance concepts, lacking necessary or sufficient conditions for membership but holding a series of discontinuous patterns of similarities among its aspects. Unfortunately, family resemblance leaves unresolved the question of why specific sets of overlapping resemblances are chosen over others. Therefore, we need to adopt an analytical approach for a more structured understanding of cancel culture.

Given the space constraints of this editorial, I consider framing cancel culture as an essentially contested concept (ECC), according to the theory of Walter B. Gallie, with the aim of establishing a groundwork for a more productive discourse on it.

1. Is Cancel Culture Best Understood as an Essentially Contested Concept (ECC)?

Walter B. Gallie developed the idea of essentially contested concepts (ECCs) in a famous essay published in 1956 (Gallie 1955). Gallie's argument can be broken down into two claims: (1) certain concepts are open to such a broad range of interpretations and applications that it is impossible to establish a universally correct usage, resulting in contestation between competing conceptions (the *contestability claim*), and (2) disagreements over the appropriate use of these concepts are inevitable and endless (the *essentiality*

[2] Think of the student protests against Bret Weinstein in the US, the Roald Dahl case, or the controversy against the Montanelli statue in Italy, but also the de-Russification initiatives in post-Soviet countries.

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claim) (Swanton 1985). In Gallie's view, concepts such as art, democracy, power, and freedom belong to this category.

To sharpen his theory, Gallie offered seven criteria to identify ECCs: Appraisiveness, Internal Complexity, Diverse Describability, Openness, Reciprocal Recognition, Historical Exemplars, and Progressive Competition. Let us see if cancel culture can be fruitfully analysed through this analytical framework.

(a) *Appraisiveness*. ECCs carry both descriptive and evaluative weight Their value can be positive or negative, and this assessment is not required to be clear-cut. For example, democracy can be viewed as either positive or negative, depending on one's political orientation. Likewise, some people see cancel culture as a threat to free speech, arguing that certain social and online trends stifle open discourse and inhibits people's willingness to express their views for fear of being cancelled. On the other hand, some argue that it is a positive tool for holding individuals accountable for their actions and statements, especially when legal or institutional structures fail to do so.

(b) *Internal complexity*. ECCs aggregate diverse elements, practices, and values, linked more by a 'family resemblance' than by stringent membership criteria. At the same, the high internal complexity of an ECC implies that it cannot be usefully disaggregated into simpler elements. Thus, to understand an ECC, it is crucial to uncover its connections with other concepts, thereby expanding the wider conceptual system it is embedded within (Connolly 1993). This seems to be the case of cancel culture, as the notion encompasses many different practices – e.g., public shaming, boycotting, social ostracism, deplatforming, revisionism – and can apply to a wide range of situations – e.g., from sexist or racist behavior to opinions about economic policies or gender identity.

(c) *Diverse describability*. The inherent complexity of ECCs is reflected in the varied estimations of each component's relative weight by different users. This results in diverse descriptions of the concept. As for cancel culture, some may emphasize sabotage practices, highlighting the censorship component,

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while others may stress the empowerment function of vulnerable or minority groups, underscoring the social justice component.

(d) *Openness*. ECCs must be open in the sense that they must be adjustable during the time, including or excluding novel situations from their scope. While the term is a recent invention, the behaviours and attitudes it encompasses have long-standing roots. Its intension and extension have expanded over time, partly because of the increased centrality of the digital media, and now cover a wide range of facts. Importantly, as societies redefine the boundaries of what is considered "cancel-worthy", they indirectly renegotiate their standards for acceptable behaviour, proportional dissent, and, albeit informally, the boundaries of free speech.

(e) *Reciprocal Recognition*. Each user must recognise that her use of ECCs is challenged by other users using different usage criteria. Gallie proposes that the use of an ECC often entails either an aggressive or defensive stance against competing interpretations. Cancel culture may fit this criterion as its users are conscious of rival interpretations they might challenge or against which they might defend their own use. However, several scholars consider this criterion unnecessary to decree the essentially contested nature of concepts (Collier, Daniel Hidalgo, e Olivia Maciuceanu 2006).

These five criteria would be enough to consider a concept *radically contested*. For essential contestedness, Gallie adds other two criteria:

(f) *Historical Exemplars*. Gallie posits that ECCs are anchored to original, authoritative exemplars (i.e., prototypes), acknowledged by users despite disagreements. Without this common reference point, disagreements would merely stem from a term's multiple applications to different things, rather than contestation over the same concept; the concept would be merely ‘confused’ and not essentially contested. Although its broad range of referents makes challenging to assess whether cancel culture adheres to this criterion, it can be anchored to to widely recognized, paradigmatic exemplars. These mainly originate in social media, targeting public figures for their sexual or discriminatory misconduct.

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(g) *Progressive competition*. Lastly, Gallie asserts that continuous debate among competing views of an ECC fosters improved argumentation and progressive agreement on the original exemplar. This criterion may be unclear or hard to apply, especially to newer concepts like cancel culture, where the benefits of progressive competition can only be assumed prospectively.

From this perspective, we seem to have three possibilities: (1) cancel culture is an ECC, (2) it is a radically contested concept, or (3) it relies on ECCs but is not primarily one itself. Undoubtedly, cancel culture embodies numerous key attributes typical of ECCs. However, being an ECC is not a binary property, and it is not necessary for all seven criteria to be equally met. Given the lack of clear-cut answer about such categorization, it is more beneficial, as Ehrenberg proposes (Ehrenberg 2011), to prioritize a functional assessment: is cancel culture best understood as an ECC? Which means, for instance, does this help us in grasping its historical and dynamic evolution, identifying incompleteness in theories of the concept, contextualising competing interpretations and finding compromises among them? I shall address this final point in the conclusions.

2. Reaching Incomplete Agreements on Cancel Culture

One of the most critical aspects of cancel culture is the lack of compromise in conflicts between differing viewpoints. To this end, the ECC's approach can be valuable as it rationalizes enduring disagreements and reveals the unlikely existence of a universally accepted definition of any concept. In other words, it uncovers the values and assumptions behind competing interpretations, offering insight into ideological and philosophical disparities fuelling debates.

All this can foster dialogue and promote what Cass Sunstein called *incompletely theorized agreements*, suggesting that individuals can concur on specific outcomes without agreeing of the overarching principles or theories

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that justify these outcomes (Sunstein 1995). This mirrors Rawlsian's reflective equilibrium, a state of coherence among beliefs attained through adjusting general principles and particular judgments. In both cases, people may adjust their beliefs at different levels of abstraction to reach an agreement, aided by mid-level principles which may serve as the common ground. So, for instance, even if high-level theories of justice or morality fail to align, agreement is possible on more specific, mid-level principles: e.g., the principle of clear and present danger, which asserts that government regulation of speech is only permissible for imminent and substantial threats (Moreso e Valentini 2021).

If there is a functional justification for categorizing cancel culture (or cancellation) as an ECC, and this fosters incompletely theorized agreements, then this paves the way for a future avenue of research on the ethical mid-level principles that offer concrete solutions – potentially assisting with coordination issues (e.g., policies) – or enhancing the public discourse on cancel culture. For instance, principles such as "intention vs. impact" or "proportional response" could act as mid-level bridges between high-level and irreconcilable theories about cancel culture.

Cancel culture is a form of societal self-defense that becomes prominent particularly during periods of substantial moral upheaval and can lead to the solidification of incompatible viewpoints if it is indiscriminately demonized. I propose that intermediate agreements and principles of reasonableness can help refocus the debate on cancel culture towards democratic discourse, without blanket justification for every instance. In this context, asserting that cancel culture is an 'essentially contested concept' does not dismiss the potential of achieving consensus on its shared core meaning or societal role. Like other similar ECCs, such as democracy or rule of law, it highlights the importance of contestations in shaping our collective understanding of the concept.

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3. Conclusions

Growing prominence of social justice and inclusion in public debate within liberal democracies is not met with an equivalent freedom to engage in this debate. This phenomenon is sometimes labelled as cancel culture. To bring clarity to this intricate concept, I have suggested framing it as an essentially contested concept with seven defining characteristics. Then I have suggested that, also within the constraints of an ECC, we can achieve a form of agreement, though it may be incomplete.

In this issue, authors tackle the topic of cancel culture from quite similar perspectives, investigating cancel culture in the context of limits to free speech regulation. We feature three focused pieces on cancel culture and one miscellaneous paper.

Dorina Pătrunsu's article ("Is the public moral instigation against inappropriate free speech moral/legitimate? Two arguments against the cancel culture") argues that the cancel culture, which aims to prohibit hate speech, paradoxically undermines free speech and political freedom. Indeed, this would extend State power over individuals, impeding free interaction, not just confrontational dialogue. Pătrunsu supports this thesis with two key arguments: (a) the functionalist and (b) the legitimacy arguments. The former contends that hate speech bans are unlikely to reduce hatred and aggression. The latter contends that the assumption for which democracy could be more than reconciling differing interests or broadening social acceptance is false. Therefore, cancel culture poses significant risks to democratic pluralism and personal freedom.

Sigri Gaini' article ("Democratic Formation as the Response to a Growing Cancel Culture") focuses on the debate regarding hate speech laws in liberal democracies. Gaini posits that these laws can simultaneously protect minority groups and shield against unjust demands for speech restrictions. Also, Gaini

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argues that these laws reflect democratic formation, signifying that minority respect and protection should be inherent in a modern, enlightened democracy. In particular, Gaini anchor this viewpoint in democratic principles like dignity, equality, civility, and critical thinking. On the other hand, the author suggests that phenomena like cancel culture and 'extreme political correctness' represent a decline in democratic formation, often linked to our increased focus on technological advancement, juxtaposed with a decreasing emphasis on critical thinking in education.

On a quite different note, *Rosa Manzo*'s article ("Does cancel culture call into question the protection of artists' rights of expression? A study in the light of the case-law of the European Court of Human Rights") delves into cancel culture's impact on the relationship between artistic works and the values they invoke. Manzo underlines that cancel culture questions whether historical art pieces that contradict modern democratic ideals should be amended or removed; it further probes if pieces depicting colonization or slavery can have a place in our museums despite their clash with current democratic values and the modern concept of statehood. Against this background, the paper provides an overview of cancel culture's origins and evolution, an examination of artistic freedom protection in International and European law, a discussion on the European Court of Human Rights' stance on artistic freedom, specifically regarding European Literature Heritage.

Finally, the issue contains a miscellaneous paper by *Henrique Marcos* ("From Fragmented Legal Order to Globalised Legal System: Towards a Framework of General Principles for the Consistency of International Law"). Marcos' paper emphasizes the shift from fragmentation to general principles in International Law Commission's (ILC) approach, underscoring the interconnectivity of international law norms. The paper spotlights the role of these principles as sources of rights, obligations, interpretation aids, and legal reasoning guides. It argues that a principles-based framework can bolster the consistency of international law, making it the ideal legal system for a globalized world. Against this, the manuscript discusses how fragmentation

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reflects globalization paradoxes, presents the dominant systemic view of international law, suggests a reason-based scheme for norm reasoning, and advocates for a principles framework for legal consistency.

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Is the Public Moral Instigation Against Inappropriate Free Speech Moral? Two Arguments Against the Cancel Culture

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ABSTRACT

My aim in this article is to show that cancel culture is self-contradictory, being defeated by the very stakes behind it. The fundamental objection is that the prohibition of hate speech parasitizes free speech and political freedom, contributing to the extension of the state's discretionary power over individuals by blocking any free and reciprocal interaction between individuals, not just the aggressive or potentially conflicting one through public discourse. The first argument against cancel culture is called the functionalist argument. Through this argument, the aim is to identify the problems of functionality, and the crux of objection is the *low probability of diminishing hate and aggressive thoughts among individuals*. The second argument against cancel culture is called the legitimacy argument. The crucial objection here is the very assumption that *democracy could be more than something that hopes for "reconciling divergent interests" or expanding "environmental acceptability."* This assumption is false, even if it is attractive; therefore, cancel culture is not only dysfunctional but also illegitimate. In conclusion, in light of the above arguments, the activation of cancel culture through various operationalizations comports high risks endangering not only democratic pluralism but even the possibility of being free.

Keywords: cancel culture, democracy, freedom of expression, hate speech, value-pluralism

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1. Introduction

It is almost unanimously accepted that freedom of expression is not only an inalienable individual right but one that is indispensable for liberal democracy and the rule of law.[1] On the other hand, this inalienability is not by default respected. Many individuals in democratic societies are abused by others' free speech and discriminated for their own freedom of expression. Hate speech and conflict are not absent from democratic society.

Moreover, there is the idea that democracy rather fails in fulfilling democratic ideals (Sandel, 1998; Crouch, 2004; Brennan, 2016). The voting system, legal system, constitutional courts, political activism, and lobbyism are by default dysfunctional, and often ideological. These mechanisms are not sufficiently effective to provide political accountability or to diminish discrimination in society, obtaining on the contrary dissatisfaction and even greater distrust among people. Free speech *de facto* is very unequally distributed in a democratic society (Strossen, 2018; Howard, 2018). Various powerful political groups in society monopolize speech and reduce the extent of democratic dialogue (Tsesis, 2009; Floridi, 2015; Sorabji, 2021). As such, diminishing abuses of freedom of expression is not only necessary in ensuring a pluralistic framework appropriate to a democratic and liberal society but is fully legitimate (Brown, 2004; Cohen-Almagor, 2001, 2006).

The main assumption implied here is that as soon as we start to think seriously about what democracy and its institutions mean, and what the relationship is between the democratic idea(l) and democratic reality, we discover that common sense is quite an inadequate guide (Arblaster,1994). In this regard, free public discourse has lost almost all credibility, finding itself in an even worse situation, being full of confusions and errors of judgment,

[1] See in this order Meiklejohn (1948), Kelsen (1955), Heinze (2016), Strossen (2018), Howard (2018), etc., who consider free speech even more, namely, as an intrinsic constituent of democracy; free speech is not linked empirically but rather substantially/conceptually to democracy, so that, to talk about democracy and oppression or prohibition free speech means a contradiction, some conceptual fallacy.

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exaggerations, and lacking empathy, consideration, and trust or good faith (Sorabji, 2021). It is also in a paradoxical situation, its censorship being considered in contemporary democracies as a way to protect the freedom of individuals and democracy itself. It might be said that public discourse and free speech, once the proper basis of democracy (Kelsen, 1955; Hyland, 1995; Barendt, 2007; Weber, 2009; Heinze, 2016; Howard, 2018), seem to become the enemies of democracies and their citizens (Delgado and Stefancic, 1992; Matsuda, 1993; Gould, 2005; Cohen-Almagor, 2006; Waldron, 2012).

It follows undoubtedly that stronger institutions and mechanisms[2] are needed to make democratic desiderata efficacious and social cooperation workable. Because all these rights are fundamental elements of a democratic society, reconciling the right to freedom of expression with other rights, such as the right to freedom of thought, conscience, and religion or the right to be free from discrimination can become a source of problems. "Finally, there is the risk of conflict between freedom of expression and the interdiction of all forms of discrimination in those cases where exercising this freedom is used to incite hatred and shows the characteristics of hate speech" (Weber, 2009, 3).

Miklos Haraszti (2012) observes that legally speaking it isn't easy to work with the limitations of free speech:

> The painful reality is that we do not have a universally applicable agreement that could guide legitimate speech limitations. Article 19

[2] European Court of Human Rights (ECtHR) and other jurisdictions such as the Human Rights Committee (HRC) or EUCJ etc. are the most known of them. Anne Weber's *Manual on Hate Speech* (2009) is very helpful, presenting all these legal mechanisms and instruments but also in clarifying the concept of hate speech and guiding policymakers, experts, and society as a whole on the criteria followed by the ECtHR in its case law relating to the right to freedom of expression. Help in understanding "whether and under what circumstances legal prohibitions of religious hate speech violate the right to freedom of expression" can be found in Erika Howard's book *Freedom of Expression and Religious Hate Speech in Europe* (2018), displaying an overarching and complex perspective on various issues and incompatibilities freedom of expression raised across all over Europe. Regulating social media and various Internet platforms, as Sorabji (2021) mentions, raise new institutional demands, targeting deceptive and manipulative messages circulating in virtual media. Berggruen Institute Report (2020), Perrin (2020), are only a few examples of proposing new legislation and new methods of enforcement against such misuse of speech.

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> of the Universal Declaration of Human Rights (UDHR)[3] gave an unreserved promise of a universal right to free speech; after twenty years of consensus labour, it has been balanced out by, among other concessions to state regulation, Article 20 of the International Covenant on Civil and Political Rights (ICCPR)[4], which expressly prescribes legal restrictions on hateful incitement. As a matter of principle, and of logic, it has always been inescapable that any universal standard reconciling Article 19 with Article 20 would have to tend toward the minimal intrusion principle. If a universal standard allowed individual governments to define punishable hate speech or incitement as they pleased, it would be either not universal or not a free speech standard. (2012, xv)

However, imposing penalties for some form of expression because of its hatred content, most of Western democracies consider it is a matter of value pluralism, expecting their legislatures and courts to limit the democratic freedoms of some citizens in order to safeguard the interests of other citizens.[5] Moreover, many defenders of these penalties consider all these formal institutions insufficient. Public discourse needs to be revisited by the public itself. Bigotry and bigots are the main source of hate speech and tolerating this kind of free speech manifestations contributes to intolerance.[6] To be sure, Gould noticed,

[3] "Article 19 provides: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (*apud* Haraszti, 2012, xv)" (original note).
[4] "Article 20(2) specifically states: Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law (*ibidem*)" (original note).
[5] See in this order Heinze (2016, 3).
[6] Karl Popper in his book *The Open Society and His Enemies* discussed this paradox of tolerance, making strong remarks regarding tolerating the intolerants. He considered, that "if we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them" (Popper 2013, 581).

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> institutions form the building blocks – being either a formal instigator of legal meaning or serving as a vehicle to introduce new ideas about law and rights – but ultimately we miss the true power of rights construction if we focus so narrowly on government and especially the courts" (Gould, 2005, 9).

The cancellation and boycott of undesirable public speeches and those who promote them, once democratically unjustified and contested, are now the tools considered both moral and effective in rejecting all deviations from that common sense that any public discourse should have.

All these are very confusing because free public discourse was always deemed as something that could be dangerous, and democracy was always claimed as a space and a way for defending this common public opinion. As Heinze rightly remarked,

> We face a complicated dialectic. With each step, our reasoning strays ever further from democratic foundations. At one remove from democratic processes, the right of free expression protects unpopular speakers by limiting the ability of legislatures or judges to silence them. The right carves out an exception to the rule of democratic processes in order to safeguard democracy itself. At a second remove, however, hate speech bans place limits *upon* those limits. That second step equally aims to protect vulnerable citizens, and so to preserve democracy. But then at a third remove, those hate speech bans must face limits of their own. Legislatures and courts must determine how far they extend. They must therefore place *limits on the limits on the limits* imposed upon democracy. (Heinze, 2016, 4)

According to this kind of dialectic, less democracy means more democracy (Heinze, 2016, 73). Protecting individuals from free public speech becomes the new deal of democratic political management, the new standard of being democratically involved, and the new logic of citizenship (Borgmann, 1992;

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Weinberg, 2020; Vallor, 2021). More protective involvement and cancelation of immoral or misuse of free speech would mean more in the prevention of all forms of expression which spread, incite, promote, or justify hatred, and more social egalitarianism.

My aim in this article is to show that cancel culture is self-contradictory, being defeated by the very stakes behind it. The fundamental objection is that the prohibition of hate or offensive or bad-faith speech or immoral behaviour parasitizes free speech and political freedom, contributing to the extension of the state's discretionary power over individuals. Firstly, I review the most recent and important advocacies in favour of cancel culture, emphasizing those that argue that various forms of censorship of free expression will not only broaden and enhance the framework of inclusiveness but also strengthen, although indirectly, pluralist democracy and trust in it. There are two arguments in favour of cancel culture that, I consider, prevail in the ethics of public democratic attitude towards the manifestation of free speech. *Making democracy accountable* and *silencing hate* are the most attractive benefits behind them. Because they are legitimate expectations and democratic requirements, they would also represent strong normative arguments in favour of cancel culture.

Secondly, I will develop two normative arguments against cancel culture. The first argument is called the functionalist argument. My aim here is to identify the problems of functionality, and the crux of objection is the *low probability of diminishing hate and aggressive thoughts among individuals*. This objection is, in fact, sufficient to reject the cancel culture in connection with claims to increase pluralism and cooperation. The second argument is called the legitimacy argument. To completely reject cancel culture, we must not only show that it is dysfunctional but also provide reasons that it is illegitimate. The objection here regards the very assumption that *democracy could be more than something that hopes for "reconciling divergent interests" or "expanding acceptability."* Even if it is attractive, this assumption is false.

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An important disclaimer is that democracy is not reducible to efficiency. Majoritarian, representative, or deliberative procedures simplify the decision-making process and may lead to more coherent approaches to political issues, and the results might, in fact, justify sacrificing alternatives or unanimity for the sake of efficiency. However, the best democratic procedures don't preclude injustice. So, equally important is what we lose or sacrifice not only what we gain by using improved or more efficient procedures (Hyland, 1995, 100). Thus, cancel culture, even if it would improve functionality, could not be coercively imposed without a significant loss of freedom and democracy, *i.e.*, legitimacy. To have a voice in expressing intolerant issues is necessary but not necessarily legitimate.

Another disclaimer is that democracy is not without dangers. However, the closer a community comes to realizing the democratic ideal of self-governing, the greater the extent of citizen participation in government becomes, and the more the conventional distinction between government and governed is dissolved. In such circumstances, categorizing democracy simply as a method of providing benefits or satisfactory decisions for all is misleading. The alternatives to democracy, however, are better than democracy. But if we compare democracy with the dictatorship of an individual (however benevolent or egalitarianist it may be) or the domination of a minority (however competent it may be) democracy is the least evil. In the absence of democracy, more would suffer from injustices. Knowing all these about democracy, the issue of the institutional restructuring of democracy remains open (to prevent it from generating the dangers it is supposed to protect us from). So, any improvement of democracy outcome should not be considered the best outcome – once the optimum is assumed, there would be no room for opposition or contestation claims[7], which is contradictory to democracy.

It follows that irrespective of what the justificatory limits of democracy are they cannot dismiss or ignore the autonomy of individuals. Therefore, any

[7] The best outcome or efficiency, says D. Friedman (1997, 211), "is the attainment of a state of affairs in which any other improvements are no longer possible".

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conflict between moral and social which needs to be solved in practice, as Dahrendorf pointed out (1997, 73), is not without individual values' costs. More specifically, the issue is whether the legitimate liberal procedural democracy "can provide a justification for democracy to individuals whose fundamental values lose out in the democratic process" (Talisse, 2009, 27).

Or, just because the outcome provided is possibly the best ever, the democratic authority can only be, unquestionably, justified, demanding full compliance to individuals to consume the outcome legitimately provided (Raz, 1987). For individual autonomy reasons, promoting cancel culture can generate high risks that endanger diversity and democratic pluralism, that is exactly what it promises to entail and improve.[8]

2. The Case for Cancel Culture

A legitimate democracy is not necessarily a just democracy (Talisse, 2009; Weale, 2013 and 2019; Somin, 2016; Brennan, 2016). This idea is attracting more attention nowadays, the accountability of democratic institutional framework being one of the biggest problems in justifying the legitimacy of democracy.[9] This means that even if cooperation problems are diminished more than ever, and marginalized minorities have unexpected opportunities to voice their concerns in the political process, "there still remain, however, the situations, particularly that of the permanent minority, in which these considerations seem to fail to reconcile democracy and justice" (Hyland, 1995, 93).

However, the idea of limiting democracy in order to strengthen it is not a new one. *De-democratizing* democracy is a way to protect the individuals

[8] "This demand for the autonomy of oppressed groups attempts to avoid two extremes, as Fisk observes. On the one hand, if each group pursued its own interests in isolation, there could be no combination that would defeat its oppressors. On the other hand, a combination that required some of the groups to modify their interests so drastically that they lost their identity would make a mockery of autonomy" (Fisk, 1992, 480).

[9] For this reason, epistocracy, lottocracy, technocracy, scholocracy, or justocracy are increasingly deemed reliable alternatives to it.

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who constitute democracy (Heinze, 2016, 3). That is why in a society of free and responsible individuals, the word *constitution* must come before the word *democracy* (Pejowich, 2000, 7). Individual rights must be protected by *the rule of law* against the majority rule or dominant public opinion in any decent democratic society. The main ethical and normative concern is the respect for the autonomy of each individual in the conditions of the cooperation problem, *i.e.*, in those conditions in which promises of freedom and equality for all are kept (Hayek, 1960; Fisk, 1992; Sunstein, 1993; Barro, 2000).

The point here is that any defence of democracy is grounded negatively, following that it will always be based on the greater shortcomings of alternative political systems (Znaniecki, 1940, 189; Toulmin, 1950, 67) or on the confidence, not entirely reasonable, that there will be a next democracy better than the last (Talisse, 2019). Consequently, it means to admit that the hope for better results (Sowell, 1981) is not costless. On the contrary, it is costly for individuals (Buchanan and Tullock, 1962) and also for the institutional framework to be changed accordingly (Coase, 1988; North, 1990).[10] All these imply that finding conditions for feasible democracy does not make democracy accountable.

Democratic accountability is proved by enhancing the political situation of individuals, and, if possible, of the most vulnerable of them, not in improving democracy. So, the reason and the purpose of *making democracy accountable* is the protection of individuals. The political vulnerability of individuals reflects the vulnerability of democracy (Heinze, 2016). For instance, how democratic, van Mill (2017) wondered, is the society that allows or prohibits speech that identifies specific individuals and groups as less than equal? How

[10] These costs are known as *social interdependence costs* (Buchanan and Tullock 1962). These costs comprise two different types of costs (internal and external), as various economic approaches of democracy mention. The internal are costs of the decision-making process, that is, *opportunity and transaction costs* (Coase, 1937) and *rule change cost*s or *path dependency costs* (North 1990, 93, 94). External costs are costs of the effects of the decision-making process, that is, the "costs that individual expects to endure as a result of the actions of others over which he has no direct control" (Buchanan and Tullock 1962, 28) or disadvantages of different kinds that hit the individual as a consequence of a decision the individual is not supporting.

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to democratically react to bigotry, racism, homophobia, misogynies, and other hateful manifestations? Stanley Fish not only tries to warn us about this rising rate of hate in public free speech but also he is convinced "that at the present moment, right now, the risk of not attending to hate speech is greater than the risk that by regulating it we will deprive ourselves of valuable voices and insights or slide down the slippery slope towards tyranny" (Fish, 1994, 115). According to Fish, a strategy to increase accountability is to make efficient hate speech ban (or free expression censorship) rather than blame it.

Therefore, to make *democracy accountable* means to promote the silence of hate as a reliable public interest, and to s*ilence hate* means to have contributions in making democracy accountable. This type of reasoning creates the case for cancel culture.[11] Consequently, this means not only broadening and enhancing the framework of inclusiveness but also strengthening, although indirectly, pluralist democracy and trust in it.

3. Is Cancel Culture Adequate, Morally and Functionally, to Restore the Basic Constitutional Democracy?

This question has recently captured the attention of journalists, political scientists, politicians, and philosophers. Many of them claim that it is necessary to have a voice in society and that it is equally necessary that what you say is not offensive or hate-producing. The arguments are a mixture of

[11] The key paper which sparked contemporary interest in the topic is "A letter on Justice and Open Debate", published in *Harper's Magazine* (2020), signed by 153 public figures arguing against "an intolerance of opposing views, a vogue for public shaming and ostracism, and the tendency to dissolve complex policy issues in a blinding moral certainty". This letter was followed by a second one, "A More Specific Letter on Justice and Open Debate", organized by lecturer Arionne Nettles, signed by over 160 people in academia and media, criticizing *Harper's* letter as a plea intended to further silence already marginalized people and protect bigotry. See for this Schuessler (2020), Roberts (2020), etc. There are academic analyses considering that cancel culture is a phenomenon that should not be ignored, as Norris (2021) recently tries to argue. Others believe that the concept of cancel culture should be improved, as Bright and Gambrell (2017) propose, to be transformed from "calling-out" to "calling-in" in order to make accountability issues more "humane, humble, and bridge-building". See also for a better understanding of what cancel culture means Clark (2020).

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principle and political calculation, reflecting the idea that cancel culture is morally right and that it will prove beneficial. The arguments pros and cons I try to build cast a sceptical eye on both claims, by emphasizing how complex political morality and democratic strategy can be. Hence, I try to suggest that, while there are good reasons to worry about hate propaganda and harmful discriminating speech in established democracies, the case for cancel culture is implausible and unpersuasive.

I will start in this section with some conceptual points about what is broadly meant by cancel culture, before presenting the arguments in its favour. The principled arguments for cancel culture rely on the claim that cancelling hate speech is morally justified as a way to silence hate and to make democracy accountable. Such hate propaganda and the failure of the courts to diminish and penalized it, it is claimed, is an unjustified exploitation of free speech right– an inalienable democratic right – and, unless curbed, are likely to undermine it and also to undermine the trust in democratic institutions and law mechanisms. The pragmatic arguments are that cancel culture is necessary not only to combat discrimination and bigotry in democratic societies but also to restore the source of constitutional power in participative civil society. Bringing politicians and jurisdictions closer to the communities and more aware of their duties in public policies and, also, to assure that those who provide and profit from hateful behaviour are never tolerated in democratic societies is the main reason behind them. I will then evaluate the strengths and weaknesses of these claims, concluding with their implications for democracy.

The term “cancel culture” is not easy to work with, especially in democracies. On the one hand, as Howard notices, given that the right to freedom of expression is not an absolute right, restrictions under certain circumstances are permitted, “one of the reasons this right can be restricted is when this is necessary for the protection of the rights of others” (Howard, 2018, 1). This kind of protective reasons makes Cohen-Almagor critically observe that:

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> the claim that citizens have rights that the state or the government is obligated to guarantee does not mean that the state may not, under certain circumstances, override these rights. Citizens have a right to freedom of expression, but the state can limit that right in order to prevent a threat to public order, the security of the state, or third parties in need of protection (such as children) (Cohen-Almagor, 2006, 5).

Rights equally protected in established democracies compete each other, Weber remarks, such that "in some circumstances, freedom of expression can be a threat to the right to respect of privacy". It can be followed that "the right to freedom of expression can thus be limited by the right to freedom of thought, conscience or religion" (Weber, 2009, 3). But these observations show rather the opposite: because this right is absolute any curbing or cancelation of it, needs to be carefully examined. It follows that grounding the cancelation on the premises that this right of free speech is not absolute or competing with other rights is rather misleading. In fact, we should have strong justificatory arguments for curbing or cancelation this right in a democratic society.[12]

Some philosophers consider that rejecting or cancelling the right to freedom of expression because it offends or expresses an outdated mentality creates room for paternalistic claims and domination (Haraszti, Chomsky, Walzer, Strossen, etc.). In this respect, Malik points out that "it is meaningless to defend the right to freedom of expression for people with whose views we agree. The right to free speech only has political bite when we are forced to defend the rights of people with whose views we profoundly disagree" (Molnar and Malik, 2012, 84). It is more than reasonable to admit that "free

[12] This conflict the freedom of expression has with other rights constantly gives troubles to courts and legislatures to balance them. For instance, European Courts of Human Rights states: "Freedom of expression is vital in a democratic society. It is in everyone's interests that it should be upheld, provided that this is not at the expense of other important rights. All rights, however, carry responsibilities, especially when those exercising them have the potential to affect other people's lives" (apud Cohen-Almagor 2001, 2).

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speech for everyone except bigots is not free speech at all" (Molnar and Malik, 2012, 84). Holmes, earlier, pointed out that "every idea is an incitement" (1919) but "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate" (Supreme Court Justice Oliver Wendell Holmes, 1929, apud Strossen 2018, 7).[13]

The concept of cancel culture can be understood in the following ways that, at least, highlight its presumed connections to democratic theory and practice. Firstly, cancel culture represents the new concept of expressing the reconciliation failure given accountability issues. It seems to be the promise of enhancing this undesirable state of affairs; its emergence is derived from the short supply of social justice and the inefficiency of hate speech prohibition. It is also seen as the real hope in forever stopping various evils threatening democratic society: hate speeches and their voices (hatemongers), racist or discriminatory behaviours, or various imbalanced powers and political rights. Some argue that:

> to many people, this process of publicly calling for accountability, and boycotting if nothing else seems to work, has become an important tool of social justice – a way of combatting, through collective action, some of the huge power imbalances that often exist between public figures with far-reaching platforms and audiences, and the people and communities their words and actions may harm (Romano, 2020).

[13] See United States v. Schwimmer, 279 U.S. 644, 654-55 (1929). According to Molnar and Malik (2012, 84), this proposal represents a classic statement in Anglo-American jurisprudence. In this respect, Strossen (2018, 7) considers that Justice Holmes did not mean by this statement that government may therefore suppress every idea, but rather the opposite: that government may suppress speech only when it directly causes specific, imminent, and serious harm.

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Secondly, cancel culture involves public shaming as a way to limit the probability of a misconduct emergency.[14] It has an educational-civic purpose, showing the people in an exemplary style how to behave in a civilized and decent society, as any liberal and democratic society claims to be. Once "these offenders were identified and their personal details exposed online, they were hounded, verbally flogged and effectively expelled from the community" (Mishan, 2020), which is considered a definite improvement in justice and citizenship. Cancel culture is seen as an "emergent phenomenon of online collective judgment as performing a vital function of moral and political levelling, one in which social media enable the natural ethical consequences of an agent's speech and acts to at last be imposed upon the powerful, not merely the vulnerable and marginalized" (Vallor, 2021). The highest moral virtue in this educational civic project is self-cancellation or voluntary self-restraint (Sorabji, 2021). Finally, hatred can be truly silenced, creating space for an open and authentic debate.

Thirdly, cancel culture is not about free speech but rather about the fuzzy limitations of free speech. So, there is an intrinsic difficulty in grasping the "real" sense of this generally employed confusion. For this reason, it is a controversial concept either in the debates about free speech and freedom of expression or in practice, being many times used ideologically and instigative. As Beauchamp (2020) noticed:

> Cancel culture, the target in so many of the free speech jeremiads, is a notoriously fuzzy concept. It is often taken to refer to all of the following things at once: allegedly widespread self-censorship in elite intellectual institutions, a rise in vicious social media mobbing, and the firing of non-public figures for allegedly racist or bigoted behaviour.

[14] As Velasco (2020) pointed out, "cancel culture is a form of public shaming initiated on social media to deprive someone of their usual clout or attention with the aim of making public discourse more diffused and less monopolized by those in positions of privilege."

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Fourthly, cancel culture means freeing from the "leash of the rule of law" not only governmental power but also that of the multitude, creating room for increasing the discretionary power of the state and the domination of individuals. The problem, as Strossen argues, is that "hate speech laws are more problematic than speech regulations that are constitutionally permissible"; authorizing government or public opinion "to enact 'hate speech' laws or rules would unleash public's power to suppress any speech whose message is disfavoured, disturbing, or feared" (Strossen, 2018, 37). All these are symptoms of intolerance and illiberalism.[15]

Fifthly, cancel culture is an accident. It comes from the unlikeliest place: a joke (Romano 2020); a game from Black culture **(**Dudenhoefer '17 2020); a spontaneous phenomenon but fully explainable and, also, justified as any form of protest in democracy:

> Cancelling is a way to acknowledge that you don't have to have the power to change structural inequality. You don't even have to have the power to change all of the public sentiment. But as an individual, you can still have power beyond measure (Anne Charity Hudley, *apud* Dudenhoefer '17 2020).

Sixthly, cancel culture is the by-product of the failure of hate speech censorship to be effective (as many philosophers and social scientists consider; see Braun, 2004; Gould, 2005; Baker, 2012; Strossen, 2018), a way to boycott political decisions or public opinions of some people considered defamatory. Its spontaneous emergence reflects the social need to restore democratic practices and social justice that the defensible hate censorships promised to provide but failed.

These conceptual issues have ethical implications. And, intentionally or not, they contribute to the case for cancel culture. It starts with and is based on the justifications involved in hate speech prohibitions, the main assumption being linked to deep scepticism that hate speech prohibition

[15] See note 10.

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works and that the public defamation attitude decreases. *Making democracy accountable* and *silencing hate* are the most attractive benefits the cancel culture promises. They also are considered both legitimate expectations and democratic exigencies which need and should be fulfilled.

For these reasons, I consider that two arguments in favour of cancel culture can be constructed in the ethics of public democratic attitude or citizenship towards the manifestation of free speech. These arguments purport to show that cancel culture is both necessary and justified and compatible with democratic requirements.

4. Two Arguments for Cancel Culture

In this section, I will try to show that the case for cancel culture is supported by at least two arguments. The strategy I follow is to use the most prominent arguments in favour of limitations of freedom of expression and the censorship of hate speech and identify a logic of the rational and moral justification of cancel culture which overlaps with what democratic culture represents.[16] The first argument I will develop is the silencing-hate-based argument in favour of cancel culture (A); the second is the making democracy accountable-based argument in favour of cancel culture (B).

4.1 A) The Silencing-Hate-Based Argument in Favour of Cancel Culture

P1. Modern democracies fail to protect the interests of vulnerable groups. (Delgado and Stefancic, 1999 and 2003; Pareck, 2012; Matsuda, 1993).

P2. Liberal rights are universal and equal only in the abstract, while, in practice, they are systemically used to favour dominant interests, thereby undermining equal citizenship and equal treatment of unequal/divergent interests (Heinze, 2016).

[16] See in this respect Mendes, Ringrose, and Keller (2018), who consider cancelation or calling-out as a way to restore justice in society by exposing the silent abusers, hidden by their public image or power; also, see Reddy and Andrews (2021), whose pros argument consists in recovering accountability in a democratic society, etc.

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P3. Freedom of expression counts equally for any citizen in democratic societies, but the interests of those affected by hateful speech should count even more.

Therefore,

C1. According to those who promote cancel culture, the expectation that legislatures and courts "limit the democratic freedoms of some citizens in order to safeguard the interests of other citizens" (Malanczuk, 1997) is entirely reasonable and fully legitimate.

C2. Limiting hate speech in a democratic society is a matter of moral and civic responsibility.

But,

P4. These limitations are not always visible and effective (Gould, 2005; Howard, 2018).

Therefore,

C3. People in a democratic society want "public guarantees" (Waldron, 2010) that offensive conduct is diminished (Romano, 2020; Reddy and Andrews, 2021).

P5. These guarantees are "provided in part by the government; presumably, this being a justification for laws prohibiting at least some hate speech" (Baker, 2010, 61), but it is not enough.

C4. Cancel culture aims to silence hate, to cancel the voice of the hatemongers in society, thus contributing to defeating hate propaganda and diminishing democratic vulnerability (Ng, 2020; Bromwich, 2018; Velasco, 2020; Sorabji, 2021).

C5. Cancel culture is necessary and legitimate.

4.2 B) The Making Democracy Accountable-Based Argument

P1. Hate propaganda aims to undermine the credibility of hate censorship (Braun, 2004; Rauch, 2014), of the idea that hate speech is unacceptable (Pareck, 2012), and of the court's decisions and punishments for the offenders or hatemongers (Baker, 2012; Strossen, 2018).

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P2. The promoters of cancel culture claim, contrary to all those who suspect other things, that what is in focus is not the Harm-Principle but rather the very definition of harm: the Millian idea of "harm as damage to interests" is very suggestive here because hate propaganda unquestionably damages individual interest, private or public and hate speech censorships protects them.

P2. What is at stake is the legitimacy of rules limiting free speech: whose rules are the rules of free speech? *Mutatis mutandis*, whose interests are affected or protected? It seems that cancel culture is about the rules of free speech and the authority of those rules.[17]

P3. Most of them are deemed to be responses to democratic accountability deficit – hate speech censorship protects individuals and their interests – known either as *the "no one being harmed again"* rule or *the "never happen again"* rule.

P3'. The rules of hate speech censorship based on these cautions are rules based on prudential arguments.

A1. The driving assumption of hate speech censorship arguments is that harm can be prevented if and only if we do not forget what we all know about racism, sexism, homophobia, bigotry, etc., in terms of the impossibility of quantifying the deep and various sufferings that the individuals had to endure. The results of empirical studies might be epistemically redundant but not necessarily irrelevant. We can admit that they can only reveal what we already know, that is, hatred is destructive, but we cannot say we are fully aware of this phenomenon. Hatred destroys human lives and sometimes entire communities. We are invited not to be hypocrites: no matter how philosophically controversial the concept of harm is and no matter how conjunctural hatred is, we cannot deny that hatred is evil, or that suffering is not evil.

The assumption mentioned above is coherent with the other two:

[17] I will not present here all the arguments behind hate censorship.

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- that of democratic unanimity (which implies formal autonomy) according to which all individuals, *de facto* not only *de iure*, are entitled to the same consideration and dignity, and

- that of democratic inclusiveness (which implies equality), according to which the interests of every individual *de facto*, not only *de iure*, private or public, are as important as anyone in a democratic institutional framework irrespective the sexual orientation, skin colour, performance, or religious beliefs.

A2. Any offensive or hateful remarks regarding these matters are intolerable. They should be punished by law or by public opinion: the colour of skin, sex, sexual orientation, and religious beliefs come from the private sphere and are intangibles or taboos for the rest of the public. They are considered immutable characteristics.

A1 and A2 show no inconsistency between cancel culture and democratic-liberal culture.

Therefore,

C1. It follows that the target of cancel culture is to promote those rules and institutions considered reliable for *not damaging interests* in a democratic society.[18]

C2. Cancel culture is a normative system of rules which can adjust more naturally the Constitution to day-to-day life.[19]

Mutatis mutandis,

[18] Fisk considers that this kind of democratic society requires relative autonomy rights, not strong autonomy rights: "These rights channel the efforts of oppressed groups in ways that take account of the fact that these groups are working within a common social framework where isolated challenges to oppression have little chance of success. So, with a right to relative autonomy, democracy is not so limited that it will fail to reduce oppression" (1992, 482).

[19] Constitutionalism, Gould argues (2005), is often dependent on formal, governmental constructions of the Constitution to create public understanding. Cancel culture shows that the bounds of a constitutional right may be reinterpreted without the courts or governmental institutions giving their blessing. This supposition suggests other strategies for those who seek to bring about legal or social change. Rather than relying on legal mobilization to influence the courts or political organizing to change legislation, there is power in co-opting other institutions within civil society to spread one's view of mass constitutionalism.

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P4. Those who are prosecuted and condemned for their offensive or hateful speech are, after due process, victimized by society and making their hate inoffensive and non-relevant for the accountability of democratic institutions. For instance, as Braun suggests, "presumptions of innocence, burdens of proof, legal defences, and rules of evidence are all central in a criminal trial. Due process is as important as the substantive merits of the case. The hatemonger is turned into the 'accused' – the oppressor transformed into the oppressed" (Braun, 2004, 146).

It follows that:

C3. Democratic and institutional rules do not manage to prevent individuals' harm and their interests damage (for instance, "in error-prone, if not error-driven, criminal trials, an aura of social legitimization may embellish the message of the defendant. If the defendant is granted a retrial because of defects in the first trial, he will claim moral victory and persecution. The message of hate is turned into the message of the 'hated'", as Braun (2004, 147) proves. Also, as he continues, "through various procedures, vices, and errors of trials, the hatemonger is carefully groomed, his message rehearsed, and his meaning sanitized of its more unpleasant warts. Legal packaging dresses up the messenger and his meaning, putting the wolf into sheep's clothing" (Braun, 2004, 147).

Therefore,

C4. Public opinion can intervene if the trial of a hatemonger fails in order to restore the real aim behind the due process and the real message for what he is being prosecuted. According to Mill, this conclusion is consistent with the Harm Principle or Liberty Principle – "Some rules of conduct, therefore, must be imposed, by law in the first place, and by opinion on many things which are not fit subjects for the operation of law" (2015, 9) – and also that each person "should be bound to observe a certain line of conduct towards the rest. This conduct consists ….in not injuring the interest of one another; or rather certain interests which, either by an express legal provision or by tacit understanding ought to be considered rights" (Mill, 2015, 73).

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C5. Cancel culture makes the effect predicted by hatemongers' trials happen so that regardless of the court decision, their hate message not being distorted by a favourable court decision, and their voices stopped even if they won the process. In the case of hate speech regulation, as Gould remarks, opponents did not simply criticize public institutions for violating the First Amendment, they denounced all who would limit open discourse, making the argument of hate censorship a failure, and the prosecuted hatemongers victorious (see Gould, 2005, 8).

C6. Cancel culture efficiently silences hate, defeating *de facto* hate propaganda and eradicating vulnerability.

C7. Cancel culture is a technical/functional system of norms/rules.

C8. Cancel culture is covering an institutional deficit, making democracy accountable.

In conclusion,

C8'. Cancel culture is efficient and justified, being consistent with *Liberty Principle* and enhancing democracy exigencies.

These arguments try to show that cancel culture is not a danger to democracy but rather required by democracy itself[20], being obsolete, losing trust among citizens, and creating circumstances for conflict and hatred rather than cooperation and solidarity, which contributes to its continued delegitimization. Even if it seems bizarre, this happens not because of a deficit but because of excess. Democracy is overdone, says Tallise, being marked by "two closely related social phenomena that are ascendant and seemingly accelerating in many modern democracies, namely *political saturation* and *belief polarization*" (2019, 35). This means that there are too many politics and too many irreconcilable beliefs around democratic society. Less

[20] According to Nwaevu (2019), cancel culture is not the problem of democracy but democratic culture itself: "The power to cancel is nothing compared to the power to establish what is and is not a cultural crisis. And that power remains with opinion leaders who are, at this point, skilled hands at distending their own cultural anxieties into panics that – time and time and time again – smother history, fact, and common sense into irrelevance. Cancel culture is only their latest phantom. And it's a joke". See also Manavis (2020), who considers that cancel culture does not exist.

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democracy is a better democracy or should be "less democracy for the sake of more democracy" (and this is not just a way of mocking the improvement of democracy!).

It is necessary to be outlined, Gould argues, that "courts are only a starting point in establishing the meaning of rights and law, for the concept of free speech is by far one of the most socially constructed notions (at least in American law and culture)" (Gould, 2005, 7). He adds further that constitutional construction occurs in civil society among other influential yet non-governmental institutions and also that we need to distinguish between Constitution and mass constitutionalism in order to better grasp the idea that "the essential arbiter for legal meaning is civil society and its institutions, which themselves construct constitutional law" (Gould, 2005, 8).

A strategy for doing this, Talisse (2019) suggests, is "to put politics in its place". This does not mean reducing popular political power, or that of the common individuals, for their supposed political ignorance or public irrationality. The accountability of democracy resides in each individual's political action and power in trying "to reverse the saturation of social life by politics, in trying to shrink somewhat the footprint of democratic politics on our shared social environment" (Talisse, 2019, 32). Technically or practically, all we have to do is to take attitude, a direct and firm public attitude, to all offensive, hateful, or inadequate speech or behaviour. Prohibitions and punishments for the injuries provided by freedom of expression seem rational and justified. But are they?

Summarizing, the case for cancel culture consists, firstly, in that it is a necessary means to combat the twin evils of hate propaganda and democratic vulnerability and to do so with no significant costs. Cancellation has no significant costs because it is not about the right of freedom of expression but about the limitations of free speech and the conditions of these limitations to be effective. The real debate here, as Beauchamp emphasizes, is not about the principle of free speech or the value of liberalism, because liberalism requires

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placing some boundaries on acceptable speech to function. Instead, this is a debate *within* liberalism over who gets to define the boundaries of speech.[21]

Secondly, the case for cancel culture is meant to be democratic in two ways: it diminishes vulnerability and increases accountability. These aspects of the case for cancel culture make it attractive even to those who disagree with any minimal infringement of individual autonomy. Nonetheless, I will argue that the democratic case for cancelling hateful free speech has not been made, contrary to those who believe the opposite. The value of civic participation is very important in a democratic society, but no society will be democratic if this participation disregards reciprocity and equality in creating rules. So, I will show that even on the most benign interpretations cancel culture is at odds with democracy and its principles.

5. Why Not Cancel Culture? A Case Against it

In this section, I try to build a case against cancel culture, offering two normative arguments. The first argument is about functional legitimacy, which aims to show that cancel culture does not satisfy the promises made. The critical objection is the low probability of reducing hate and aggressive thoughts among individuals. The second argument is about moral legitimacy. It aims to reveal the tacit and false presuppositions behind the cancel culture idea and the unintended ethical consequences. One of these tacit, but false presupposition cancel culture employs is that democracy *could be more than a hope* for "reconciling divergent interests" or "expanding acceptability" etc.

These arguments are not based on empirical data, but they are not without empiric predictability. Finding errors in politically attractive ideas is an effective means of not promoting and reinforcing them in the real world (Dahrendorf 1997). They are neither slippery-slope arguments; the reason behind them is not to predict an inevitable slide into censorship and tyranny but rather to show that cancel culture although an ethical proposal is not by

[21] See Beauchamp (2020).

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itself ethical. On the other hand, the logical possibility of censorship and tyranny, even improbable, cannot be ignored. This has a fundamental implication: legitimacy is a necessary condition for gaining justice in society, but this only means that it is possible that legitimate institutions can create injustice in society. This injustice is necessary to be taken into account. Therefore, formally, even if cancel culture might represent a legitimate system of rules, it does not mean that its outcomes will always be in accord with its presumable justice.

6. Is Cancel Culture Functional?

Regarding the functional argument, hate speech censorship represents the particular way in which conceptual antagonisms and speech conflicts can be instrumentalized without diversity being dissolved in any way. Whether at the level of arguments or talking about institutional designs, the call for democracy in any rule or law derives from the individuals' need to express their opinions, to discuss and make decisions. Even if they do not understand each other and do not think alike, they are equally entitled to say their point of view, persuade, argue, negotiate, or overbid to get what is deemed as being just, correct, or desirable.

As Braun (2004, 145) emphasizes:

> Politics contextualizes the dilemma of hate repression. Politics is about the "how" of silencing hate. However, the "how" of silencing hate is more than just politics. It is also a practical question. It is about not just what is or might be but also what can and cannot be. Defensible hate censorship needs to do two things. First, it must be *effective*. Second, it must be *successful*.

Unfortunately, it fails in both of them. The philosophical problem here is not that the interests of an individual cannot be modified but rather that no

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modification is necessary, justified/legitimate because of its anticipated benefits. In political practice, it should be essential to realize that any public interest has opportunity costs and is not legitimately enforceable by default. This also means that:

> the impossible and the inevitable do not come pre-labelled in our social and political world. We can never know what really was possible, except in a trivial sense that whatever actually happened must *ipso facto* have fallen within a feasible set. Without some understanding of what might have been, however, we are incapable of evaluating social order as it is. (Goodin, 1982, 125)

The aforementioned passage helps us to jump to another truth the political philosophy reveals and a problem for the empirical world: political and social problems are formally without solution, compatibility between political ideas being impossible, in principle. This means that in political reality or the decisional process, however democratic it may be, any solution to a practical or social problem could not be definitive, irrevocable, or self-enforceable. Any political decision should be a voluntary compromise between aspirations, values, attachments, and ways of individuals' lives – which for sure might be considered stable and functional once made but just contingently, any voluntary consent regarding a political decision not being necessarily accepted or respected. The presupposition of freedom itself gives the dilemma. Braun (2004, 142) says this dilemma is not a problem of lack of social or political will to silence intolerance. It resides in the very nature and limitations of hate censorship.

The arguments developed by Strossen (2018), Baker (2012), Braun (2004), etc., are strong arguments against the efficacy of hate speech censorship. They are enough to show, not necessarily to convince, that hate will not be silenced but somehow increased.

As Braun (2004, 164) remarks:

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> hate censors, particularly progressive hate censors, lament the lack of political will to make hate censorship socially more effective. However, they do not fully appreciate the dilemma of censorial success. Hate censorship is not unsuccessful because it is ineffective. It is unsuccessful because it represses. The more it represses, the more unsuccessful it becomes. Success by silencing is self-contradictory because effectiveness in silencing is self-defeating.

Baker considers that the prohibition of hate speech is counterproductive and leads to even worse results:

> There are at least six reasons for this: (1) allowing and then combating hate speech discursively is the only real way to keep alive the understanding of the evil of racial hatred; (2) forcing hate speech underground obscures the extent and location of the problem to which society must respond; (3) suppression of hate speech is likely to increase racists' sense of oppression and their willingness to express their views violently; (4) suppression is likely to reduce the societal self-understanding that democracy means not eliminating conflict through suppression – what Justice Jackson described as the unanimity of the graveyard – but rather moving conflict from the plane of violence to the plane of politics; (5) legal prohibition and enforcement of laws against hate speech are likely to divert political energies away from more effective and meaningful responses, especially those directed at changing material conditions in which racism festers, material conditions of both the purveyors and targets of hate; and (6) the principle justifying prohibitions and the specific laws prohibiting hate speech are likely to be abused, creating a slippery slope to results contrary to the needs of victims of racial hatred (including jailing the subjects of racial hatred for their verbal responses) and to the needs of other marginalized groups. (2012, 77)

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Similarly, Strossen considers that there is a lack of correlation between "hate speech" laws and reduced discrimination or violence, which is not surprising in light of several features of such laws, which make them ineffective in reducing hateful speech and thus in reducing the harms that such speech is feared to cause (2018, 139).

Let us imagine that all I want to say is forced by a strict moral norm of speech. Is the result of what I will say a result of free expression? More than this, if I were forced to refrain from saying things that hurt or offend but in which I believe, does that mean I would have different feelings towards those I would like to address? *Mutatis mutandis*, if I were forced to apologize to those whose dignity I injured through my freedom of expression without believing in the respective apologies, does it mean that I have contributed to the restoration of my dignity and theirs? Moreover, should I not have the freedom to speak if I harm by what I speak, being convinced that what I am doing is good? Because for me to apologize for the "evil" I have caused without being convinced is not a sign that I have changed my way of thinking. If I am a good person, whatever this might mean, does it follow that I am a good thinker or that I think well? I will learn something from this censorship, but not what followed through the imposition or obligation to choose or retract my words. For instance, the freedom to speak depends on the power others have over me and the right to speak is based on power and abilities. I learn what I should not learn in a democratic society, namely that power is the source of law and individual rights and not that the law is the source of power. Also, I learn that some of us are more tangible than others, which is what hate censorship wants to prevent. The hate will still be there and even more intense. In practice, you cannot reduce or eliminate bigotry simply by banning it, says Molnar and Malik (2008).

In an economic language, we would say that freedom of expression has visible costs from the very moment when the decision either no longer depends entirely on the individual who decides or creates positive or negative externalities (this does not mean that if the decision belongs to you, it will not

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cost – its cost is given by the very thing you sacrifice when you choose, namely another choice you would have made if you had not chosen the one you just chose). At the same time, we derive from this a criterion of legitimacy (or a meta-rule): any content of a right or an interdiction, therefore also that of freedom of thought and expression, must be negotiable. Otherwise, any content not only risks being arbitrary, but it is also arbitrary. So, any issue of freedom of thought and free speech reflects an issue of unanimity. Morally speaking, you cannot justify the content of freedom (autonomous actions) without the presumption of unanimity – it is enough for a single goal to counterbalance the other for the decision to become complicated. Going further, it is enough for a single individual to oppose this content for this desire to lose its functionality; the legitimacy of the content of freedom will be maintained as long as unanimity on it is not the result of a voluntary compromise. Although the compromise is most often invoked in the appeal to the legitimacy of a decision-making content or another, it does not represent a functional meta-rule. A legitimate meta-rule is the rule of cooperation. It does not assume that the individual would not be cooperative but rather that the possibility of disagreement should be considered, even if its probability could be small or remote or eliminated from the discussion.

The mistake implied here is to think that the conditions that increase the probability of penalizing hate speech also increase the probability of silencing hatred and improving the democratic environment. In other words, it is enough to find out under what conditions hate speech will be reduced so that their imposition is not problematic for reducing hatred. Or, the constraints imposed to limit the language of hate will decrease the probability of the occurrence of hate.

Nevertheless, the best conditions under which an individual regularly conforms are not the same as those under which an individual should conform: the highest probability of silencing hate, for instance, does not exclude the possibility of doing the opposite of what is most likely, *i.e.*, to hate. What I claim is not that individuals would be unwilling because they

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would be unable to make their commitments "fungible items" or transactional (Talisse 2009, 21) but that it is questionable that their willingness should be based on this. Even if we accept a moral obligation to comply with civil responsibility, it does not immediately follow that compliance should always be legally enforced.[22] However, most will agree that it does not automatically follow that the democratic state should penalize this "non-conform behaviour" and coercively makes compliance effective due to other values which might be legitimately violated by these authoritative/punitive measures.

Hatred and its expression by no means disappear, and we need to face this reality, not because it would not be morally necessary or technically impossible, but rather because it is something inconceivable. Given this conceivability limitation, as Heinze – and others before him (Baker 2012; Braun 2004) – says:

> a sufficiently (which does not mean 'fully', as that would be a more elusive idea) democratized society turns hate speech into a different type of phenomenon. Prejudice continues to work its way through society, but in tandem with multilateral counterforces, both official and informal, which can be more effectively harnessed against hatred without the state needing to diminish citizens' speech prerogatives within public discourse nor to 'cancel' them from the democratic agora (2016, 72).

Therefore, keeping the hate speech under cancelation dictate is not by default uncoercive. Freedom of expression will be the first parasitized by cancel culture.[23] And, this phenomenon, as Norris (2021) argues, is not a

[22] A line of criticism could be opened here, civil (moral) responsibility and political obligation being the cases that might be enlightening for the issue (Pareck, 1993; Lyons, 2013). The idea is that not all the promises made should be kept, and not all those promises that have not been kept should be penalized or coercively enforced, even if both promises are made in absolute autonomy and self-deliberation.

[23] In this respect, Pope Francis warns us that "cancel culture is rewriting the past," is "a form of ideological colonization, one that leaves no room for freedom of expression," saying that it "ends up cancelling all sense of identity". See in this order Kington (2022).

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matter of imagination. Two combined factors are involved. One is the *spiral of silence*,[24] which "describes situations where, for fear of social isolation or loss of status, people are hesitant to express authentic opinions contrary to prevalent social norms" (Norris, 2020, 16). Cancelation, this way, is a contributing factor as to why people are hesitant to voice their own minority views on social media sites in fear that their views and opinions, specifically political opinions, will be chastised because their views violate the majority group's norms and understanding. The second is the *cultural backlash*,[25] which shows that "socially conservative values usually continue to prevail as the majority view in many developing countries". An unintended consequence is that "the more that individuals feel that their opinion reflects majority opinion, however, the more willing they become to voice it in public discourse" (Norris, 2020, 16). Cancel culture, unintentionally, can create polarization and domination.[26]

The misleading is clear: the best rules/rulers and the best common outcome make obedience look self-evident or not coercive. However, as natural as it is to seek the truth, so unnatural is to obey it. The truth, in other words, no matter how compelling it may be, is not self-constraining; it cannot have a causal efficacy of its own. We need to accept the endogeneity of truth: knowing what to say or ought to say is not something you would do or must do, regardless of your circumstances. Circumstances matter, they usually activate freedom of expression and choice, not conformity to rules.

The most invoked and justificatory presupposition in accepting functionalism is that no matter how legitimate an institutional framework is

[24] According to Noelle-Newman, who created the theory of the spiral of silence, "individuals' willingness to express his or her opinion was a function of how he or she perceived public opinion" (1984, 3). See also Glynn, Ostman, and McDonald (1995), Scheufle and Moy (2000), Hampton et al. (2014) etc.
[25] For details regarding this concept's development, see Norris and Inglehart (2019).
[26] See in this order Schulte (2021), Manchester (2021). They state that cancel culture is worrying as a social and political phenomenon, making people feel unsecured and threatened for what they publicly say and feel. Also, the cancel culture increases anxiety, primarily by lacking affordances for forgiveness and mercy, not for judgment and personal accountability" (Vallor, 2021). For these reasons, Bright and other academics consider that cancel culture should be improved, proposing alternatives to it. See Bright and Gambrell (2017).

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it is impossible to satisfy all the individuals' needs in justice. But, even if we consider this to be uncontroversial true, it does not mean that it is something just as the unsatisfied people to swallow their dissatisfactions in justice. So, as Baker points out, given these alternative empirical possibilities, the debate is not between idealistic but uncaring "liberal" defenders of free speech and fierce opponents of the worst forms of racism. Instead, the pragmatic debate is about different empirical predictions concerning the most effective strategy for opposing racism (Baker, 2012, 71), which by default are insufficient even necessary. The reason for what they agree on their suboptimal well-being situation is precisely the chance they have in the democratic framework to change their situation – to identify it, to voice it publicly, and to demand by improving it. The reason implied in this demand is as reasonable as that prudential above: not paying the political cost of taking into account this possibility, even that the probability of the effective change is pretty diminished, means paying high costs in institutions' trust and individual accountability and civil obligation. It is a risk any workable and functional democratic society should take into account because its accountability counts.

7. Is Cancel Culture Legitimate?

Rules, institutions, and laws matter. They influence the mentalities and actions of individuals in a society, but individuals matter more. This is also what pros cancel culture try to preserve. This entails that no matter how necessary, efficient, or democratic institutions are, they cannot follow the role they have to fulfil beyond individuals' evaluations, irrespective of their morality or speech. The implicit assumption when discussing fair or unfair rules is that they must be evaluated according to the results they produce. The results matter, but if we accept this assumption, the effect is sometimes downright absurd.

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Regarding the moral legitimacy of cancel culture, the requirements to be achieved should be the same as any desirable system of rules should fulfil. Accordingly, they should:

1. reconcile divergent interests (Buchanan and Tullock, 1962);
2. diminish uncertainty and create predictability (Hayek, 1960; North, 1990);
3. diminish oppression, enfranchising individuals who cannot use *de facto* their "deontic powers" to express their interests (Fisk, 1992; Searle, 2005);
4. increase acceptability environment and mutual respect (Cohen and Rogers, 1983; March and Olsen, 1989; Estlund, 2008);
5. constraint and enable opportunities (Hodgson, 2006).

My purpose in this section is to show that cancel culture contradicts all these requirements.

The main presupposition in the arguments for cancel culture is that free speech and freedom of expression are not absolute values even though they may be the most valuable in a liberal democratic society. So, although free speech is an important value, it is not the only one. Therefore:

> values can be and often are in competition, and the resolution of a conflict between them will involve calculations of probability (*If we do this, what risks do we incur*?) and the weighing of the costs of choosing one over another (*If we go with value X, how much of value Y will we sacrifice*?). The name for this weighing is 'balancing',

says Fish (2019, 22), and the decision to favour one value or another is a matter of compromise and negotiations based on empirical facts. All these decisions are not only rational but also reasonable. They refer to real forms of life, concrete individuals, and trustworthiness norms for living standards. According to Fish, the boundaries of free speech cannot be set in stone by philosophical principles (van Mill, 2017). The world of politics decides what we can and cannot say, not abstract philosophy. Given this, he suggests, that there is no Principle of Free Speech; free speech is about political victories and defeats: for instance, the First Amendment, he says, is a participant in the

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partisan battle, a prize in the political wars, and not an apolitical oasis of principle (Fish, 2019, 8).

All these make van Mill (2017) to say, that the very guidelines for marking off protected from unprotected speech are the result of this battle rather than truths in their own right. That is why "no such thing as free (non-ideologically constrained) speech; no such thing as a public forum purged of ideological pressures of exclusion" (Fish, 1994, 116). It follows that speech always occurs in an environment of convictions, assumptions, and perceptions, *i.e*., within the confines of a structured world. This is the way it is, and this is an indisputable fact. The thing to do, according to Fish, is to get out there and argue for one's position. To conform to this fact is not only rationally opportunistic but also morally. It is a matter of being responsible and solidary. Also, Pareck tries to convince us that accepting free speech as an important value means accepting others' no less important: "Human dignity, equality, freedom to live without harassment and intimidation, social harmony, mutual respect, and protection of one's good name and honour are also central to the good life and deserve to be safeguarded. Because these values conflict, either inherently or in particular contexts, they need to be balanced" (2012, 43).

The dilemma is obvious: the aim of political freedom is not to dismantle value conflict issues, and precisely in this, the inviolability of the Liberty Principle consists. In other words, political freedom (*e.g.*, free speech, freedom of expression and action, etc.) is feasible as long as any deemed resolution of the conflict between values is not necessary but contingent. It follows that the infringement of this principle is produced if and only if the conflict among values is diluted, that is, whenever it is assumed that some political value is or should be epistemically and morally objective and *ipso facto* predominant in society. So, there is a battle, as Fish says, but no objectivity is implied here, only a manifestation of political power, arbitrary, and not a manifestation of individual political freedom. The plea for individual freedom is not to dilute value pluralism. However, on the contrary, individual freedom presupposes that every value is as objective as any other,

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and this objective status that every value has brings interests hierarchy conflict or value conflict. There is no absolute scale of these values/interests because everyone's value/interest is absolute.[27] Making objective differences between values means making objective differences between individuals, the actual holders of values. The normative constraint is also obvious. We cannot reduce a value to another because we cannot legitimately reduce an individual to another. So, the autonomy and its prospect, and not the power of one against the other, is the legitimate outcome any political battle should legitimately have.

Mutatis mutandis, to be politically or economically vulnerable, even in a liberal democratic society, is nothing new. There are a lot of institutional mechanisms trying to diminish this vulnerability or, even better, to eradicate it: the presumptions of equal freedom for all and equal treatment irrespective of the contingent inequalities are the principled normative features of the democratic institutional framework. This normative principle makes *de iure* any individual invulnerable in a democratic society, even if *de facto* any individual is vulnerable to various degrees. On the other side, to declare, that *de iure* some are more vulnerable than others, means to create a pass for dependency and subordination, that is, for paternalistic claims and domination of the most vulnerable upon those less or invulnerable. The more vulnerable people are, the more attention, care, and specific rights/powers are needed but also interventions and regulations. If the rules keep being revised after seeing the result, then even respect for the rules no longer makes sense. The rule of law is suppressed. However, vulnerability is not necessarily a disability, but it will definitely become one once the vulnerability is institutionalized and it has to be morally and legally compensated. Furthermore, if we can get something from this vulnerability, it becomes rational to play the vulnerability game, on the principle that if one gains, all

[27] Value-pluralism assumes that any value is as objective and absolute as another, that is why there is no intrinsic, absolute, or objective hierarchy The ideas of value pluralism, the objectivity of values, and their irreconcilability are remarkably analysed by authors such as Berlin, Raz, Gray, and so forth.

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should gain. The moral exigence of solidarity will be transformed into a coercion and arbitrary instrument. The proofs of reciprocity and fair equal results can become something that is always invoked and never obtained, creating a kind of spiral of vulnerability, according to which, using the analogy with the spiral of silence, a person will mistakenly understand that she will be protected only if she is vulnerable. Playing the vulnerability game or hiding the real preferences become moral standards. But this means justifying an irrational and unjust society.

Moral conflict and unlimited autonomy are the sources of cooperation problem. In addition, although the cooperation problem seems to involve functionality issues, the "solution" is guided neither by proper knowledge of what should be decided nor proper algorithms about how to be decided.

Let me explain. There is a pervasive idea that if individuals would respect each other, do their due diligence, and respect the rules of free speech, not only would they be good citizens or responsible people, but society, miraculously, would be one in which everyone wishes to live. Moreover, a world without hatred, crime, deficiencies, incompetence, and corruption, without eccentrics or mavericks, would be even better, the best world ever imagined. However, the puzzle emerges once these public interests/ideals of best societies are put on the table. This best-ever imagined world is also one in which everyone's private or public life would be strictly regulated and censored. Liberty upsets patterns, Nozick said (1974, 160). So, what at first sight seems to be self-evidently true and praiseworthy, at a closer look, will highlight confusions or misjudgements as famous as they are dangerous.

On the one hand, many of the political alliances are endogenous to the social environment in which we were born and continue to live (Pareck, 1993; Murphy, 2003; Talisse, 2019). Therefore, many of the demands, we must fulfil, either are not ours, or we do not recognize them as such, or by recognizing them, we do not consider it necessary to fulfil them. So, we often speculate about the possibility of not being what we are and ought to express or be. Individuals choose goals, and there is no criterion for ordering them

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and no particular device to fulfil them accordingly. Human relationships do not just produce compliance and harmony; they speculate on opportunities or other possibilities. Their choices create unintended consequences and conflict. The misleading is obvious: as natural as it is for individuals to live together, so unnatural is the harmony among them.

On the other hand, the problem of cooperation is not that individuals are not co-operators but rather that they are free and rational, meaning that the problem of cooperation could not be solved, reasonably speaking, without taking into account the costs of cooperative interactions. Considering that some good effects, *e.g.*, silencing hate, are produced because some efficient causes are involved, *e.g.*, cancel culture or other coercive institutions, means ignoring the actual mechanisms behind the cooperation process. A rationalized society is not necessarily a free society, so disregarding the real mechanisms behind the cooperation process means disregarding the cooperation problem, and finally disregarding the freedom of individuals and their claims in justice. To understand, describe, or explain cooperation in society means to differentiate between various levels of choice and different kinds of interests relative to those levels of choice (Vanberg and Buchanan, 1988, 140). Ignoring these cooperative costs means committing the "functionalist error" (Vanberg and Buchanan, 1988) or employing the "democratic fallacy" (Sowell, 1982). It means confusing the characteristics of the democratic process with the results of the democratic process. It also means confusing some sort of regularity in society, which is incidentally repetitive, based on habits and customs, creating social rules, intrinsically challengeable, with necessary or natural regularities, which are based on natural laws, impossible to be changed. Briefly, suppose the rate of hate in society decreases. In that case, the most probable cause is not the cancellation of hate speech but rather other institutions and rules: the reciprocity-based rules and coordination-based rules are probably the most responsible for bringing solidarity, *that is* silencing hate in society and increasing social cohesion.

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Therefore, living in a strict moral society is not the most desirable thing, given that in this society keeping moral order and conformity to it is dominant and prior to any other public value. This also means that not even the best possible world is not necessarily less tyrannical than the worst world. Thus, cancel culture, even if it would generate an enhancement in functionality, could not be coercively imposed without a significant loss of freedom and democracy, *i.e.*, legitimacy.

In fact, cancel culture *desideratum* conceals a composition error/fallacy, which shows that difficulties in solving freedom of expression are not just technical or operational but substantial. The fundamental assumption here is that no institutional framework can ultimately reduce the distance between moral disagreement about substantive and freedom of choice, no matter how good or legitimate. The legitimacy calculus is not without remainder, and this remainder tends to be increased, and legitimacy decreases whenever the legitimacy mechanism requires absolute compliance with legitimate rules and institutions. The low probability of stable aggregation or solving cooperation problems is not a matter of individual responsibility or effective censorship. The low probability of stable agreement has an internal logic, given by this irreducible distance solicit.

Not dismantling value conflict "holds first, that each person's human life is intrinsically and equally valuable and second, that each person has an inalienable personal responsibility for identifying and realizing value in his or her own life" (Dworkin, 2006, 160). Ignoring this intrinsic disharmony between interests and the means for them is not without normative consequences. The most undesirable one is creating a self-sufficient contingency based exclusively on the idea of reconciling *ad litteram* divergent interests. After various negotiations and bargaining, the best decisions can be made, and the best outcomes can be provided, which is of no particular interest to anyone, not even to those who negotiate. This misleading strategy creates unintended effects that must be imposed

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regardless of the undesirable result. Enduring these effects equally is not exactly what everyone wants from this reconciliation.

The conclusion is that rules should not be evaluated only through their results but also through how they are decided and introduced. An accepted assumption when we talk about justice in a democratic society is that the rules should be introduced with the consent of the parties. Those who consider the legitimate rules beyond this contingent compromise and conformity to it make democracy vulnerable. Democratic vulnerability does not come from epistemic or moral incompetence. But from the mistaken idea that it could be more than a hope for the best results. We choose democracy because it does not pretend to provide the truth, the good, or the happiness. But, away the idea that democracy is simple. Although fragile, the equilibrium among various uncomfortable incompatibilities is the democracy stake. Cancel culture helps with nothing.

The main problem here is not the coercive effects cancel culture provides, but rather the arbitrary coercion any democratic institution should try to prevent and eradicate. Cancel culture is arbitrary; therefore, it is inconsistent with the stakes in legitimacy and efficiency it supposes to have and definitely in deep contradiction with democratic principles.

8. Conclusions

Cancel culture rather fails to satisfy the democratic requirements creating the opposite results, that is polarization, distrust, fear,[28] and arbitrariness. The freedom and duty of expressing in-tolerance differ from repressing intolerance and intolerants in a democratic society.

The freedom "to have a voice," even if this voice is only one's and all the rest is in opposition to it, is sufficient, as John Stuart Mill famously said, to

[28] It is not necessary to empirically prove this fear. "Perceptions, by themselves, are important for the social construction of reality. If people say that they feel social pressures to confirm with predominant values, or that they self-censored their authentic words or actions to avoid ostracism, then we should take them at their word" (Norris, 2020, 17-18).

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allow that person to speak and consequently any constraint against it is illegitimate. This is a fundamental ground in liberal democracy and an individual's fundamental right. It substantially defines individuals in interaction with other individuals and makes them equally invulnerable, even if this invulnerability contingently is never guaranteed or secured. But it is for sure valid, that enfranchising marginalized voices does not imply disenfranchising the more powerful voices, but the creation of a greater space of opportunity for all, which obviously will almost spontaneously change the balance point of these forces. The idea is not to cancel but to permit and include. Cancel culture is not able to fill the gap between having a voice and deliberating, "which requires the joint exercise of collective intentions, cooperation, and compromise as well as a shared sense of reality on which to act" (Vallor, 2021).

For this reason, the stake of institutions is not just to coerce individuals to make conformity and cooperation effective but rather to create conditions for a specific power type within interhuman relationships, that of "deontic power" (Searle, 2005). This power establishes what is permitted and what is forbidden between them, a power creating rights and recognition, civic obligations, rewards, and punishments, but besides all, it is a power that gives equality before and against the laws. Because individuals matter, they cannot be silenced, even if they are mischievous or immoral. Cancel culture is a culture of fear and suspicion and not one of cooperation and trust, and this unintended consequence is enough to be taken seriously as a real threat. It risks endangering diversity and democratic pluralism, and even the possibility of being free. A democratic society is not a society of cancelling. Cancelling the individual voices means cancelling individuals.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Democratic Formation as the Response to a Growing Cancel Culture

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ABSTRACT

There is an ongoing discussion among scholars as well as among the public about whether liberal democracies should have laws against hate speech. Proponents of hate speech laws argue that these laws play a crucial part in liberal democracies since they help ensure the protection of basic rights, such as every citizen being treated equally with respect. Opponents of hate speech laws, on the other hand, argue that hate speech laws are a threat to freedom of (political) speech and that, hence, these laws are illegitimate in a liberal democracy. I argue that hate speech laws can actually work *both* as a protection for minority groups, while at the same time *also* as a defence against unreasonable demands for restrictions on (political) speech. Further, I argue that laws against hate speech are an expression of democratic formation, meaning that the respect for, and protection of, minorities should be an inherent part of an enlightened and educated modern democracy. I present *an argument from democratic formation*, which builds on foundational pillars of democracy such as dignity, civility, equality, and critical thinking. I hold that phenomena like cancel culture and 'extreme political correctness' are a result of a tendency towards the decline of democratic formation in modern society in general – something, which springs from, inter alia, decades of a growing focus on technological development, while at the same time a decreasing focus on critical thinking in the educational system.

Keywords: democratic formation, liberal democracy, freedom of speech, hate speech, cancel culture, democratic principles

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1. Introduction

One of the most important components needed in order to uphold liberal democracy is an educational system that focuses on the democratic formation of its pupils and students, and the development of critical thinking is probably the most vital part of democratic formation. It is, indeed, what a liberal democracy – and hence self-governance – is built on, for where citizens are not able to criticize political decision-making and the passing of laws, there is, really, no self-governance. The possibility to criticize political decision making is not merely based on the lawfulness and right circumstances for this, but just as much – or even more – on the personal skills needed in order to be able to both think and express oneself critically. These skills do not develop independently and must therefore be an inherent part of the aim of our educational system.

There are, of course, other terms such as 'democratic education' and 'civic education' that cover some of these same aspects. However, I have chosen to use the term 'democratic formation' as it has a broader meaning than the other two – and as it explicitly focuses on other facets than merely the educational. Education is, indeed, also a broad term which not solely refers to the educational system, but also to a more general and overall 'societal education'. Nevertheless, the connotations of the term 'education' are more specific than the ones of the term 'formation', and thus, the term formation opens up to something broader and less distinct than the term 'education'.

In this paper, I argue that democratic formation, i.e. critical thinking and civility, strengthens democracy on two levels: on the one hand, it works as a defence against undemocratic tendencies such as cancel culture and demands for restrictions on speech, while on the other hand, it strengthens tolerance and respect for one's fellow human beings, including people who are at risk of being disadvantaged, such as people belonging to minority groups.

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While self-governance can be seen as the foundation of liberal democracy, critical thinking can be seen as the foundation of self-governance.

One recurring expression among democracy scholars, e.g. Meiklejohn (1960) and Habermas (1986) is *mutual recognition*, which they point to as being a necessary component in any democratic society. Habermas points to "structures of mutual recognition" in political discourse and emphasizes that mutual recognition is the very foundation for democratic rights (Heyman, 2008, 178).

Mutual recognition and mutual respect among citizens is something which is also born out of democratic formation. Respect and recognition are values which transcend religious and national backgrounds, political opinions, societal status, etc., and in liberal democracies, these values must, first and foremost, be learnt in the educational system, both as ideas, but just as importantly, as practical implementations of actions which make them tangible experiences.

In the first part of the paper, I present *an argument from democratic formation* and explain its position in the free speech discussion. In the second part, I discuss the contemporary challenges of cancel culture and the growing demands for restrictions on speech which have been on the rise during the last couple of decades. The third part is the conclusion.

2. The Argument from the Democratic Foundation

There are a number of strong arguments in the free speech debate which defend laws against hate speech. Jeremy Waldron (2014) argues that laws against hate speech protect people's right to be treated equally with respect and dignity as members of society. Stephen Heyman (2008) has developed the *liberal humanist approach* which recognizes human beings' dignity as inviolable, and thus, sees protection against hate speech as a crucial component of any liberal democracy. Dignity is also mentioned in the preamble of the International Covenant on Civil and Political Rights:

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> [...] in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person […][1].

According to hate speech laws in European (and other) countries, hate speech is, in general, defined as *coarsely degrading and generalizing speech which targets members of minorities, based on specific external characteristics such as religion, skin colour, ethnicity, or sexual orientation*. The laws vary a little in their formulations among the different countries, but the basic lines are in general the same.[2]

The argument from democratic formation builds on existing arguments proposing for laws against hate speech, but unifies aspects of these arguments, such as dignity, equality and the right to be met with respect with other interrelational and societal factors such as civility and tolerance. Hence, this argument covers a broader spectrum than (most of) the older arguments that defend laws against hate speech, e.g. Waldron's argument (2014) about the right to be treated equally with respect.

The argument from democratic formation is predominantly born out of the challenges that a cancel culture, and growing demands for restrictions on speech at universities and other institutions, have presented.

Cancel culture has been on the rise during the last couple of decades. It started in the US but later also expanded to other countries. Cancel culture covers the phenomenon where one or several (often prominent) people have been invited to a University or another institution to give a talk, but then become 'cancelled' shortly before they are supposed to come. This is usually

[1]Retrieved February 01 2023: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights
[2] See e.g. Retrieved May 08 2023: https://futurefreespeech.com/global-handbook-on-hate-speech-laws/

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due to someone, often a student, discovering that the person invited has expressed a controversial opinion, e.g. on his/her private social media platforms.[3] The consequences of the 'cancellation' often reach much further than the one, specific cancellation and can sometimes shut the respective victims of cancel culture out of other social settings and events for months or years. A thorough report (Kaufmann 2021), which concludes that cancel culture is a growing phenomenon both in the US and in Europe (only with a delay), was published in 2021.

The argument from democratic formation is based on the premise that in order to maintain liberal democracy and the principles that uphold it, citizens of any democratic society must be democratically formed – first and foremost through the educational system, but also more generally in society. The responsibility that the educational system carries is, indeed, reflected in educational laws and curricula.

Democratic formation covers the 'personal integration' of democratic principles and ideas – most importantly of critical thinking – but also of tolerance and acceptance of others, both in terms of their identity (national and religious origin, skin colour, sexual orientation, etc.) as well as in terms of their views and perspectives on general (political) matters. It is the integration of a civilized orientation, i.e., an orientation which reflects respect for and recognition of one's fellow citizens. The integration of these principles and values is what maintains a liberal democracy in balance, while the absence of them will lead to a decline of democracy. One could also say that democratic formation is a premise for reaching a society dominated by public reason.[4]

I hold that in order to maintain a balanced democracy, where the above-mentioned principles and values are in place, laws against hate speech must

[3] It could also be that someone (e.g. a student) finds an old quotation from this person, which they find problematic. The quotation could be years – even decades – old. There are, of course, a number of other circumstances that can lead to a person being 'cancelled'.
[4] Here understood as a broad term maintaining that moral and political rules in society can only be justified by taking into account all the citizens of a given society. Habermas (1986) is one of several contemporary scholars who is advocating this.

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be implemented since accepting hate speech is also accepting the violation of core democratic principles. From the principle of respect for, and recognition of, one's fellow citizens follows the responsibility to protect the members of minority groups who are in danger of being victims of hateful and degrading speech. What characterizes the argument from democratic formation is its standpoint, which rejects cancel culture and (unreasonable) demands for restrictions on speech in, e.g., universities, *while at the same time,* defending laws against hate speech.

One crucial component in relation to having hate speech laws in place is the symbolic message that it manifests, namely that hate speech is unacceptable, and that consequences will follow when hate speech is expressed. This is an important point, because some scholars, e.g., Eric Heinze (2016), stress that in countries with implemented hate speech laws, both hate speech and hate crimes are widely spread, and thus, the laws do not make a significant difference. I hold that the above mentioned symbolic purpose of the law is of utter importance, since it first expresses the non-tolerance of any violation of peoples' dignity, and second, it *does* follow up with tangible consequences, when people are convicted of hate speech – and hence, the victims can regain their dignity and achieve a form of vindication.

While it is common to hear critique of cancel culture and 'extreme political correctness' from the same scholars who oppose hate speech legislation, the standpoint of the argument from democratic formation presents a more nuanced perspective in the free speech debate. The argument holds that:

1) When democratic principles and values, first and foremost critical thinking, are an integrated part of one's person, this leads to the rejection of cancel culture as well as of the growing demands for restrictions on speech (i.e., speech which would fall outside what is considered hate speech according to functioning hate speech laws). At its core, critical thinking, and other democratic principles such as tolerance for differing political opinions, do not align with the demands to limit people's political (and perhaps controversial) expressions. Restricting people's views on political or societal

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matters is contradictory to the very idea of critical thinking. First, critical thinking is, by nature, what will often be interpreted as controversial thinking (and, hence, what is in danger of being restricted). Second, the premise for one´s own freedom of critical thinking is, indeed, that others enjoy the same. Further, critical thinking and freedom of expression is a premise for self-governance, which, in turn, is what liberal democracy is founded on. This leads to the standpoint that if the core democratic principles are integrated as a result of democratic formation, one will, indeed, oppose cancel culture and the demands for restrictions on (controversial) political speech.

2) On the other hand, these same democratic principles will also lead to the standpoint that hate speech, i.e., coarse degrading and generalizing speech targeted towards members of (minority) groups, is unacceptable in liberal democracy, and hence, it should be prohibited by law. Just as it is unacceptable to limit people's freedom to express (controversial) political opinions, it is unacceptable to tolerate hate speech in liberal democracy. As much as the freedom to express one's own political views is a premise for liberal democracy, respect for every citizen, i.e., *not* de-humanizing and coarsely degrading members of minority groups, is also a premise for liberal democracy.

The argument from democratic formation hence argues that one needs to strike a balance in the free speech discussion – a balance between tolerating controversial political expressions while at the same time *not* tolerating generalizing, dehumanizing, and coarsely degrading speech.

Further, the argument points to a link between democratic formation, the passing of hate speech laws, and the dismissal of cancel culture. The passing of hate speech laws are of crucial importance in this connection since they are what creates the tangible balance between the defence of freedom of political speech (when one can point to the limits that hate speech laws set, one can dismiss the demands for setting limits on 'controversial' opinions, i.e., one can dismiss cancel culture) and the respect for human beings' dignity (one does not tolerate hate speech against minorities). If democratic formation

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does *not* lead to the passing of hate speech laws, it might, with time, bend towards compromising the rights of minorities in the name of freedom of political speech. On the other hand, a society with *democratically uneducated citizens* might bend towards compromising freedom of political speech in the name of minority rights.

I hold that the US society reflects both of these tendencies. First, by being a liberal democracy which takes pride in its democratic values such as freedom of speech, and second, by having an educational system which has declined in democratic formation during the last couple of decades, as a result of the ever dominating focus on technological development. Hence, there is a paradox in the American society which is at the very root of the development of cancel culture: the American view of their own identity is that of being 'true' liberal democrats, ever upholding democratic values, whilst the reality is that democratic formation is declining and, hence, that they are faced with cancel culture and 'extreme political correctness'.

3. Hate Speech Laws and Political Expressions

Hate speech laws have been passed in all Western countries, apart from the US (Sumner, 2015). Most of these hate speech laws were passed during or shortly after World War II, as a reaction to the degrading and humiliating speech, which Jews were victims of. Later, the laws have developed to also include other minority groups who have been, or are, the targets of hate speech.

To give a couple of examples, the 'British Public Order Act 1986' prohibits (by its part three) "expressions of racial hatred, which is defined as hatred against a group of persons by reason of the group's colour, race, nationality (including citizenship) or ethnic or national origins".[5]

[5] This is the first – and most foundational – part of the Act. For further details, see Retrieved December 21, 2022, the official UK legislation webpage: https://www.legislation.gov.uk/ukpga/1986/64#:~:text=An%20Act%20to%-20abolish%20the,provide%20for%20the%20exclusion%20of

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In Danish Criminal Law, §266b is usually referred to as 'The Racist Law' ('Racismeloven'):

> Those who publicly or intentionally spread a message through a verbal or other kind of expression by which a group of people are threatened, ridiculed, or degraded because of their race, colour of skin, national or ethnical origin, religion, or sexual orientation, will be punished with a fine or imprisonment of up to two years.[6]

By comparison, the abovementioned British Act can give up to seven years of prison. (Most hate speech laws, however, have a sentence of up to somewhere between two and five years.)

As seen in these two examples, hate speech laws protect groups in general which means that the targeted groups do not necessarily need to represent minorities. The best example of this is probably hate speech targeted against women. However, in most cases hate speech *is* targeted against minority groups (Waldron 2014), even though the law also does protect majority groups. The principle of 'equality before the law' must, obviously, be upheld, also in cases of hate speech.

Hate speech laws are narrowly defined and are, really, a protection against what one used to call *group defamation* or *group libel* (Waldron, 2014). The laws protect – as do defamation laws on an individual basis – people's rights to dignity, autonomy, and a reputation. The difference is that where defamation laws protect specific named individuals, hate speech laws protect unnamed individuals, who belong to specific minority groups.

The narrow definitions of hate speech, according to functioning hate speech laws[7], do not, indeed, include (most of) the forms of speech which are demanded censored at many universities and other institutions these days. This is one of the strengths of having formulated hate speech laws, which is

[6]'The Danish Criminal Law', §266b. My translation. Retrieved December 21, 2022: https://danskelove.dk/straffeloven/266b

[7] 'Functioning' here simply means hate speech laws that are actively – and regularly – enforced in the countries that have implemented them.

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rarely spoken about, namely that hate speech laws can work *both* as a protection of members of minority groups who are at risk of being targets of dehumanizing and degrading speech, while *at the same time,* they can work as a protection against unreasonable demands for prohibiting certain political expressions. When one has functioning hate speech laws to refer to, it is easier to reject cancel culture and the demands for limiting certain political (and perhaps controversial) speech. The balance between these two aspects of freedom of speech can also be regarded as a reflection of the necessary balance of principles in liberal democracy – a balance which seems to be missing in much of the contemporary discussion about democratic principles and ideas.

There is a tendency among scholars, as well as among the public, to *either* defend complete freedom of speech and thus argue against hate speech legislation *or* to defend hate speech legislation, including the defending of cancel culture and censorship of certain political speech at universities. I argue that democratic formation leads to a more balancing perspective which defends critical thinking while at the same time also defending members of targeted minority groups against hate speech. If one turns to older works, one finds related ideas, although differently perceived and expressed, of course, since 'minority rights' and similar contemporary concepts were non-existent at that time. In *A Letter Concerning Toleration,* John Locke expresses both: "The *Sum* at all we drive at is, *That every Man may enjoy the same Rights that are granted to others.*" (1983, 53), as well as:

> It is not the Diversity of Opinions, (which cannot be avoided) but the refusal of Toleration to those that are of different Opinions, (which might have been granted) that have produced all the Bustles and Wars, that have been in the Christian World, upon account of Religion. (1983, 55)

As seen in these quotations, Locke mentions both the *equality of rights*: that all people shall have the same rights, as well as the *toleration of differing*

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opinions. Locke's expressions do, indeed, reflect the foundation on which the argument from democratic formation is built. One sees some of the same ideas in Mill's *On Liberty* (1859), but unfortunately these thoughts (both Mill's and Locke's) have been simplified and turned into rigid forms of liberalism in most contemporary interpretations.

Political expression is founded on the ability to think critically. Without this ability, one will either reproduce other people's political opinions or not express any opinion at all. Thus, political expression is one of the key elements that democracy is built on – or as Alexander Meiklejohn (2000, 91) put it: "The unabridged freedom of public discussion is the rock on which our government stands."

The argument from political speech, which is probably the most widespread argument among scholars who oppose laws against hate speech, generally covers what Meiklejohn expresses in this quotation. The argument from political speech is usually seen as standing in opposition to arguments that defend laws against hate speech such as Jeremy Waldron's (2014) argument about the right to be treated equally with respect as a citizen, and Stephen Heyman's (2008) *liberal humanist approach* which emphasizes people's right to being protected against the violation of their dignity. The argument from democratic formation seeks to combine these apparently different approaches.

The point is that functioning hate speech laws in Europe and other countries overall protect (minority) groups against hate speech without compromising freedom of political expression.[8] There are, of course, incidents where hate speech and political speech do 'overlap', and in these cases, the outcome depends on varying circumstances.[9] However, the

[8] There are, however, examples of abuse of hate speech laws in some countries. What characterizes these countries is that they are typically non-European or European countries with weak democracies or 'democracies' with authoritarian governments, e.g., Turkey. They will use their hate speech law (article 216 of the Turkish penal code) to shut down voices who criticize the regime or the country's religion (Islam).

[9] These circumstances may be about how many people are affected by the speech, how important the political message is, etc. In the end, it will usually be up to the judge of the

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important point is that the hate speech laws are, as earlier mentioned, narrowly formulated – something which ensures that they are not easily misused or overly extended, e.g., by politicians with certain political agendas. In cases where hate speech and political speech do overlap, and where the outcome is in favour of enforcing laws against hate speech, one can argue that the political message most often could have been formulated in ways which would not at the same time have expressed hate speech. It is important to emphasize, however, that sometimes the outcome should be in favour of the political speech, e.g. when the political message is of great societal importance.

There have been several complicated cases in different European courts regarding the overlap of hate speech and political speech, and sometimes the cases go all the way to the European Court of Human Rights. The reason that these cases find their way there is, indeed, a reflection of the dilemma whether there *can be* a balanced judgment between the right to freedom of speech, on the one hand, and the right to dignity and equality, on the other hand. One well known example of such a case is the *Perinçec v Switzerland* case[10]. Perinçec was first sentenced by the Criminal Court in Switzerland for having violated the law against hate speech, but later the European Court of Human Rights decided on the contrary, based on article 10 ECHR: the right to freedom of expression.[11]

Some contemporary free speech scholars, e.g., Erica Howard (2019), argue against hate speech laws, but at the same time, do *not* argue for absolute freedom of speech. Howard suggests that restrictions on speech are acceptable only in cases of incitement to violence (or incitement to hatred

respective case to decide whether the speech is to be considered as hate speech (and the person who expressed the speech thus be punished) or as political (and thus legal) speech.

[10] See Retrieved May 08 2023: Judgment by the European Court of Human Rights (Grand Chamber), Perinçek v. Switzerland, Application no. 27510/08 of 15 October 2015, http://hudoc.echr.coe.int/eng?i=001-158235

[11] See also Retrieved February 02 2023: https://globalfreedomofexpression.columbia.edu/cases/ecthr-perincek-v-switzerland-no-2751008-2013/

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which may lead to violence), on the one hand, or in cases of 'religious hatred', on the other hand. The problem with Howard's argumentation is that hate speech which is neither expressed nor interpreted as incitement to violence in reality also does lead to a growing number of hate crimes – something which has been proven through several independent surveys.[12]

The main idea is that when one has laws against hate speech, one protects members of (minority) groups against defamatory, degrading, and dehumanizing speech – but one does also have the authority to reject censorship of speech which falls outside of these laws. When one does *not* have any laws against hate speech, however, as the case is in the US, it becomes more difficult – and perhaps less legitimate – not to accept the demands for censorship on certain forms of speech, coming from members of targeted minority groups. And the consequences of these circumstances are, as we have witnessed, cancel culture and ever growing demands for censorship on political speech, which clearly falls outside of what European hate speech laws prohibit.

The fact that minorities have not had a law to protect them against hate speech has more or less forced them to demand to be protected against discriminatory, defamatory, and degrading speech at their educational institutions, workplaces, etc. The problem is that these demands have gone too far and have therefore turned into a serious threat to freedom of political expression.

Implemented hate speech laws in liberal democracy are a sign of societies that take seriously the democratic principles of equality and mutual respect. As Heyman (2008, 183) says:

> […] public hate speech violates their (the targets') rights of citizenship as well as the basic principles that should govern democratic debate, which depends on mutual respect among free and

[12] Results from a number of studies have shown a causality between hate speech (without the expression of 'incitement to crime') and hate crimes, see for ex: Cardiff University (2019) and Eggebø, H. & Stubberud, E. (2016).

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> equal citizens. In these ways, both private and public hate speech violate the most basic right of all, the right to recognition as a human being.

If one does not recognize one's fellow citizens as human beings through showing them basic recognition and respect, one has simply opted out of democratic debate. How can one call something a debate or a discussion (something which must build on two or more people's exchange of expressions), if one does not have any rules to follow, but is of the opinion that one should be allowed to utter coarsely degrading and defamatory expressions about one's discussion partner/opponent? The very first rule in order to engage in democratic discussion is necessarily that all interlocutors show each other basic respect and mutual recognition. Heyman (2008, 178) also states: "[…] hate speech transgresses the most basic ground rules of public discourse." What is perhaps the most interesting of Heyman's views (2008, 179) is his reflections on freedom of political speech as being a *relational matter* and a *relational right*. Heyman (2008, 179) sees freedom of political speech (according to the First Amendment to the Constitution of the United States of America) as "a right to interact with others as free and equal citizens who are engaged in discourse on matters of common concern."

Seeing freedom of political speech as a relational right rather than an individual right forces the parts engaged in a political discussion to cooperatively take responsibility for the process of the discussion, i.e., to take responsibility for respecting the democratic principles of mutual respect and recognition for each other. Heyman (2008, 178) also highlights Habermas' idea of political rights as being forms of "communicative freedom", a term, which Habermas uses in relation to the aim for mutual understanding through reasoned discourse.

Seen from this perspective, hate speech laws are no threat to political speech – or as Heyman (2008, 179) puts it: "Thus, the duty to refrain from speech that denies recognition to others is not one that is imposed on public discourse from the outside, but one that is inherent in the concept of political

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speech." Heyman points to the concept of political speech as speech free from disrespect or disregard of one's fellow citizens and interlocutors. Further Heyman (2008, 179) argues that: "[…] although some forms of political speech should be protected despite their impact on rights, this is not true of hate speech because it falls outside of a proper understanding of political debate".

Based on the standpoints of Heyman and Habermas as well as of Waldron, I argue that hate speech laws are not a threat to political speech and democratic rights – quite the contrary.

The argument from democratic formation reflects very well the thoughts of Habermas and Heyman on political speech. Seeing political speech from Habermas' and Heyman's point of view, contrary to the view among scholars who oppose laws against hate speech and defend absolute freedom of speech, e.g., Ronald Dworkin (2006) and Eric Barendt (2005), opens up a more balanced approach to the freedom of speech debate, which is the main aim of the argument from democratic formation. This, I hold, is the most democratic solution to the foundational challenges in the freedom of speech debate. It is a solution which protects citizens from being victims of hate speech, while at the same time also protects citizens from being 'cancelled' due to their political opinions.

4. A Growing Cancel Culture and Demands for Censorship on Political Speech

I argue that cancel culture is a reflection of a decline in democratic formation. People who defend cancel culture believe that they are in their right to prohibit certain political views from being publicly expressed and, by that, perhaps from gaining influence. Sometimes the speech that cancel culture actively censors might have fallen under the definition of hate speech, according to (European) hate speech laws, and in these cases, one might support the idea of prohibiting someone to express themselves in, let's say a US university

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(since the US does not have laws against hate speech). But the important point is that in most cases, the 'cancelled speech' would *not* be defined as hate speech according to functioning hate speech laws – it would simply be defined as (controversial) political speech.

There are, of course, many examples of this in the media. One example from 2022 is the case about Michael Stoil who was a human rights professor at George Washington University. Stoil was fired as a result of students' demands after they found out (from Stoil himself) that he had used the N-word in a conversation with the vice provost, in order to explain that the N-word was inappropriate. The irony is that Stoil was fired for a word he used while arguing against racism. It is also important to stress that Stoil never used the N-word in class.[13]

Defenders of cancel culture take on a position which denies certain political speech space in the public discourse. This is a radical position which, at least to some extent, is related to totalitarianism: it only accepts certain political views to be expressed publicly, and the views which are in opposition to the accepted ones are being censored.

One can ask oneself why cancel culture has not been dealt with in a more constructive way, i.e., why one has not been able to stop the cancelling and the censorship of specific political expressions which have been going on at several universities and other institutions during the last years? One reason is no doubt the lack of hate speech laws in the US. As earlier mentioned, cancel culture started in the US, but has later (as most tendencies do), also spread to Europe. This is very well documented in the previously mentioned report (Kaufmann 2021). If the US had laws which protected minorities against hate speech (and these laws were formulated as, or close to, European hate speech laws), they could more easily have dismissed any demands for censorship of

[13] See Retrieved November 08 2022 from: https://www.dailymail.co.uk/news/article-11272437/George-Washington-University-professor-canceled-enraging-class-n-word-discussion.html.

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speech which clearly would not fall under the definition of hate speech according to the functioning law.

I argue that cancel culture, hence, is a consequence which comes in the form of a backlash from not having passed hate speech laws in the US. Further, I argue that cancel culture is also a consequence of a decline in democratic formation in society more generally. This decline in democratic formation is, on the one hand, reflected by a non-critical approach to censoring certain political expressions and views which takes place at many universities and other institutions. On the other hand, it is reflected by the lack of respect for and the lack of taking the responsibility for members of minority groups who are targets of hate speech.

Many defenders of cancel culture do, indeed, see themselves as defenders of democracy. When they demand censorship of certain political views and deny certain public figures the right to, say, give talks at universities, they see this as acts which protect minority groups (such as people belonging to the LGBT movement) against hate speech – and thus, they view their acts as democratic: they view them as acts that fulfil the democratic duty to protect minorities and to make sure that the minorities' voices are not silenced.

One can, certainly, sympathize with the need to protect minorities against 'real' hate speech, meaning speech that would be defined as hate speech according to functioning (European) hate speech legislation. One can also claim that it is contradictory to defend European hate speech legislation[14] while rejecting cancel culture, in cases where cancel culture is dealing with the exact same forms of speech that the European hate speech laws prohibit. However, trying to defend some parts of cancel culture, while rejecting others (namely those that 'cancel' speech which does *not* fall under the label of hate

[14] The reference to European hate speech legislation is, of course, general, but the different laws against hate speech in European countries all represent the same basic message of prohibiting coarsely degrading speech which generalizes a group based on external characteristics, such as skin colour, religion, nationality, sexual orientation etc. For a general overview, see e.g. Retrieved May 08 2023: https://futurefreespeech.com/global-handbook-on-hate-speech-laws/

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speech according to European hate speech laws) is, simply, an almost impossible task.

When one does not have a law – and thereby a judge – to set the limits for and make the judgments of possible hate speech, one ends up with disputes and clashes that are hard to come to any agreement on. It is also important to stress that this is, in reality, exactly what has taken place in the US: Universities and other institutions have sympathized with minorities which have been the victims of hate speech. These respective universities and institutions have thus supported the targeted minorities in (some of) their demands for censorship on speech and 'cancellations' of speakers.[15] The problem is that the good intentions from the universities and institutions have then, unintentionally, led to the development of unreasonable demands for censorship, and a cancel culture that violates basic democratic principles.

The most serious problem is that there are no hate speech laws in the US to point to and that the defenders of cancel culture have gone too far. They are following their own agenda and demanding censorship of political opinions which they simply do not agree with. This is, indeed, a problematic tendency, and as earlier mentioned, a tendency which has some totalitarian leanings. The other side of the coin in the free speech debate in the US is the view that there should be absolute freedom of speech and that cancel culture is a reflection of what hate speech laws stand for. But – as previously emphasized – this is *not* the case since the speech that tends to be censored through cancel culture mostly does not fit under the definition of hate speech according to implemented hate speech laws elsewhere.

The main point in this discussion is, thus, that both defenders of cancel culture and defenders of absolute freedom of speech are compromising core democratic principles in their pursuit of either protecting certain political perspectives and agendas that they think they are in their right to do through

[15] Another reason for the support from the universities may be their dependency on a certain number of students and student fees and, hence, the universities might (in some cases), feel 'forced' to support the demands for a cancel culture and restrictions on speech.

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censoring specific political views (from cancel culture's point of view), *or* protecting all political speech and by that, not accepting limits on hate speech based on the concern that it may compromise freedom of political speech, e.g., through a so-called 'chilling effect' (from the point of view of absolute freedom of speech).[16]

Hence, both of these approaches compromise democratic rights in ways that a more balanced approach does not. If we base our approach on the view that political speech is relational, rather than individual, and that its premises are mutual recognition and mutual respect among the interlocutors, we reach the aim of protecting *both* freedom of political speech as well as citizens from being victims of hate speech through *so-called* 'political speech'. First, the relational approach to political speech requires people to express themselves respectfully, and hence protects members of minorities from being targets of hate speech in political debates, and second, this approach also does not accept cancel culture, since the mutual respect and mutual recognition demanded in public democratic discourse implicitly implies that all citizens are entitled to express their political opinions.

The earlier mentioned report (Kaufmann 2021) points to a number of concerns in relation to academic freedom and growing demands for censorship on political speech at universities. One of the report's main conclusions is that there is a prioritization of progressivism over liberalism at universities – performed through the support of 'political correctness' (Kaufmann, 2021, 9).

The question to pose, then, is *why* this prioritization is taking place. And the response to this, I argue, is what I have already touched upon in this paper, namely that the lack of hate speech legislation in the US has led to minorities taking matters into their own hands by demanding restrictions on

[16] "Chilling effect" is a term which explains a reaction that hate speech laws can create among the public: some people will hold back their (legal) political opinions – or practice 'self-censorship' – because they fear that their expressions might be illegal and that they, thus, can be prosecuted (and perhaps convicted). Hate speech laws can, hence, according to this view, 'chill' public discourse.

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discriminating, degrading and insulting speech. An appropriate following question then is why this is taking place now – and has done so during the last couple of decades – and not earlier? The response to this is, indeed, complex. I have in a previous article (Gaïni, 2022, 17) elaborated on these circumstances:

> One reason could be that minority rights have been on the rise more or less all over the world in recent years and that this also leads to stronger demands from minority groups in relation to restrictions on hate speech. […] Another reason could be the rise of the internet, which exposes minorities much more to hate speech than before.

The main cause for the demands, however, probably remains the lack of hate speech legislation in the US. And the similar tendencies that are also seen in European countries, only with a delay (Kaufmann, 2021), seem to simply reflect what happens with most American tendencies: they find their way to Europe – and other countries – after a time.

The delay of a cancel culture which is seen in e.g., Canada and Britain reflects how American tendencies influence other countries, even though these countries are not facing the same foundational challenges which have led to a cancel culture (in the US) in the first place. This means that although a country like Britain does have laws against hate speech, the country is still having to deal with a growing cancel culture. The dimensions of it aren't as far-reaching as in the US, however, and as Kaufmann's report shows us, the cancel culture in Britain (as in Canada) is delayed with a period of about 5 years. The delay in itself clearly indicates that these countries have been influenced by the tendencies in the US.

An obvious question to pose is, hence, whether the abovementioned component undermines the point that hate speech laws can function as a protection against cancel culture. I argue that it does not. First, the spreading of cancel culture is much less expansive in Britain and Canada than it is in the US, and second, the reason for the growing cancel culture in these

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countries (contrary to in the US) is not based on a lack of protection of minorities. Thus, the challenge in these countries, as opposed to in the US, is not that minorities aren't protected against hate speech. Rather, the challenge is not to accept that the tendencies coming from the US, i.e. cancel culture, gain any serious influence on the practice of freedom of speech (e.g. at universities and on campuses) in these countries. It is also important to notify that this has, indeed, already been done to a considerable degree, such as by passing a 'Higher Education (Freedom of speech) Bill' on May 12, 2021.[17]

The key task of our educational system is reflected in educational laws and curricula. This task is to support pupils and students to develop critical thinking and to encourage them to become active, democratic citizens (who can contribute to a well-functioning democracy). Hence, democratic formation is still at the heart of our educational system, i.e. the educational system in the Western world. At least in theory. The question is whether the focus on critical thinking and democratic principles and rights has, in reality, declined, although it has not been taken out of any educational laws or curricula. During the last couple of decades, there has been tremendous focus on technological development and innovation, and my claim is that this has taken considerable attention from the core educational aim – namely the one of developing critical thinking.

I hold that many of the tendencies that we are witnessing in terms of the weakening of liberal democracy, such as cancel culture and growing demands for censoring certain political speech at universities – but also very specific incidents, such as the infamous "United States Capitol Attack" which took place on January 6, 2020 – are due to this shift which has been taking place in the educational system, as well as in society in general, and which, as a consequence, has weakened the general ability to think critically and to

[17] For more information, see e.g., Retrieved January 29 2023 from: https://www.gov.uk/government/news/universities-to-comply-with-free-speech-duties-or-face-sanctions

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understand that core democratic principles must actively be upheld in order to maintain a functioning democracy.

Further, I claim that one of the biggest pitfalls in the change of focus in the educational system (as well as in society in general) is that people lose sight of what the premises for upholding democracy are. These premises are first and foremost the ability to think critically, and by that, to have the skill to argue against governmental decisions (in a civilized way), and second, to understand the imperative importance of democratic principles and rights, such as the right to freedom of (political) speech, the right to equality, the right to safety and privacy, etc. If one does not comprehend these premises, one can easily take democracy for granted, unaware of the fact that one is, really, contributing to its decline by practicing cancel culture and extreme 'political correctness'.

The difference between hate speech legislation and cancel culture lies in their different approaches to democratic principles and rights. While implemented and functioning hate speech laws, as we know them, are carefully formulated in order to maintain *both* the rights of members of minorities *and* the right to freedom of political speech, cancel culture does not take into account the latter element. In fact, it overrules this right by acting out the idea of "the end justifying the means". When one compromises people's right to freedom of speech by censoring and 'cancelling' them from public events, based on their political opinions, it is indisputable that one is violating basic democratic principles. Hence, the difference between cancel culture and functioning hate speech laws is significant.

The rationale for not having passed any law against hate speech in the US is their tradition of viewing freedom of political speech as an absolute right which cannot be compromised in any way (Sumner, 2015). The problem with this view on political speech is 1) that it defines all speech – even hate speech – as being political speech, and 2) that it sees political speech as individual speech which does not obligate one to take into account the recognition of and respect for other parts in a political discussion/the public discourse.

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If one regards political speech from the points of view of Meiklejohn, Habermas, and Heyman, one liberates the discussion from whether hate speech should be counted as political speech. Their view on political speech is that it "should be understood as discourse between individuals who recognize one another as free and equal persons and members of community" (Heyman, 2008, 178). I hold that the definition of political speech as being relational is the interpretation which mostly takes into account basic democratic principles. If one respects the basic rules of democratic discussion or public discourse one does not express oneself through hate speech. Attacking others with hate speech, in this case, simply means opting out of democratic discussion.

Jeremy Waldron (2014, 100) emphasizes how hate speech implicitly is public and, thereby, affects the public good:

> Hate speech and group defamation are actions performed in public, with a public orientation, aimed at undermining public goods. We may or may not be opposed to their regulation, but we need at least to recognize them for what they are.

Waldron's emphasis on the effect hate speech has in the public is another aspect of the responsibility that Habermas and others point to in relation to political speech. The key aspect is that if one follows democratic principles when taking part in public discourse, one does not cross the line where political speech turns to hate speech. Hence, in one's approach to and definition of political speech lies the solution to the challenge of *both* protecting freedom of political speech *and* protecting members of minorities against hate speech.

If one looks at the historical views on political speech, the indication is that the interpretation of political speech tended to be less disputed than is the case today. As I have argued elsewhere:

> However, there are circumstances that indicate a much more 'straightforward' interpretation of political speech in the times of the

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> Enlightenment and the century after than what the tendency among many scholars is today. First, there are implications that what we nowadays call hate speech was not counted as political speech – or as speech of any value. An example of this is when Mill writes that one should ignore "distasteful citizens" in the third chapter of his essay *On Liberty* (Mill 1859). Mill argues for the utter importance of freedom of speech, but clearly counts "distastefulness" – or what scholars nowadays might call low value speech or hate speech – as speech without any value. Second, the aim was to promote critical thinking and political (as well as personal) freedom, something which was born out of the oppression of citizens – a tendency which had been dominating for the preceding centuries. The foremost aim was to be free to criticize every oppressor and every institution of power. In this context, the protected speech would implicitly be political. Hence, the aim was to criticize authorities – not to mock and degrade minorities (Gaïni, 2022, 2-13).

When scholars such as Eric Barendt (2005) claim that hate speech fits under the definition of political speech, they are neither acknowledging that responsibility follows with participating in public discourse, nor are they recognizing that the consequences of accepting hate speech as a legitimate part of democratic discussion violates basic democratic principles. There are a number of surveys which have demonstrated that hate speech leads to discrimination of the targeted minority groups, e.g. on the labour market, and – more seriously – that it also leads to hate crimes.[18]

I hold that US scholars who defend absolute freedom of speech – and hence, argue against any form of hate speech laws – must come to the realization that their approach has proven to be counter-productive. This is reflected through the consequences that the lack of hate speech laws in the US has led to, namely, that members of minority groups have felt unprotected and let

[18] Results from a number of studies have shown a causality between hate speech and hate crimes, see e.g. Williams, Burnap, Javed, Liu and Ozlap (2020) and Eggebø & Stubberud (2016).

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down. From that, a cancel culture has developed, which, in turn, has left the US with greater demands for censorship at universities and other institutions than is the case of countries with functioning hate speech laws.

5. Conclusions

Cancel culture is a growing phenomenon and a democratic problem, first and foremost in the US (but also in other countries, only with a delay). The defenders of cancel culture are demanding censorship and the 'cancellation' of specific political views that they disagree with.

In the US there are no laws against hate speech. I hold that this is one of the reasons that cancel culture has developed since minorities have not felt protected against hateful speech, which in turn has made them (and their supporters) set demands for censoring certain forms of speech at their educational institutions and workplaces. However, this has gone too far, and the speech, which is being censored and cancelled is most often speech which would not fit under the label of hate speech according to functioning (European) hate speech laws.

I argue that the main reason for the development of cancel culture is the decline of a so-called democratic formation, first and foremost in the educational system, but also more generally in society. Democratic formation chiefly covers the ability to think critically and the ability to take on individual responsibility in order to act according to democratic principles, such as showing mutual respect and mutual recognition when engaging in political discourse.

Further, I argue that democratic formation can work *both* as a protection against cancel culture and extreme 'political correctness' *and*, at the same time, also work as a protection against hate speech targeted towards minorities, for example by passing hate speech laws. Democratic formation will namely lead to the seeking of a balance in the pursuit of reaching both of these foundational democratic principles: the freedom to express political

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opinions (through critical thinking) as well as the protection of minorities from being victims of hate speech.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Does Cancel Culture call into Question the Protection of Artists' Rights of Expression? A Study in the Light of the Case-law of the European Court of Human Rights

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ABSTRACT

Cancel culture calls into question the relation between artistic productions and values which these productions revoke. While it is widely accepted that art should not bear any constraints which might lead to censorship, it is open the discussion whether art works from the past should be removed or amended in light to the current democratic values endorsed by the western community. This leads to a set of questions: will old art crafts find a place in our museums even if they depict scene of colonization or slavery openly in contrast with the democratic values and the modern concept of statehood? To what extend the artistic freedom should be taken into account when it comes to historical art manufactories which remind old-fashioned values? The paper is structured as it follows: the first section will give an overview of the cancel culture movement, its genesis and its more recent developments. A second section will focus on the protection of artistic freedom of expression and its current state of art in the context of International and European law. The third section will discuss the jurisprudence of the European Court of Human Rights concerning artistic freedom of expression, with particular regards to the concept of European Literature Heritage. The last section will conclude.

Keywords: art, cancel culture, ECHR, ICCPR, ICESCR

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"The work of art may have
a moral effect,
but to demand moral
purpose from the artist is
to make him ruin his
work."
J. W. von Goethe

1. Introduction

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2. Cancel Culture: The How, the What and the Why

The term "cancel culture" is common and divisive. Although public discourse is peppered with it, its meaning, its implications and its scope are debated in and out the academic community. The term was chosen over several other new words added to the Macquarie dictionary of Australian English in 2019.[1]

The dictionary's entry for cancel culture describes it as "the attitudes within a community which call for or bring about the withdrawal of support from a public figure".[2] However, scholars have not agreed on a common definition (Clark, 2020). Some has defined it as "collective strategies by activists using social pressures to achieve cultural ostracism of targets (someone or something) accused of offensive words or deeds" (Norris, 2023).

Others have described it as "phenomenon of publicly ostracizing someone (or something) who was accused of acting controversially and/or making questionable remarks" (Wong, 2022). What it can be agreed on is that the notion literally means removal and destruction of culture. The term itself has a contradiction that of erasing culture. In spite of the debate surrounding its definition, it is almost unanimous the consensus about the genesis of it which has arisen in the context of the Black Lives Matter movement breaking out in the US following the atrocious killing of a black man George Lyon (Romano, 2019). Initially the notion was used to cover the protests which aimed to tear down and stain historical monuments, in particular those monuments recalling people or events against to the abolishment of the slavery in US.

Lately the notion of cancel culture has been used to describe a wider type of protests which have been aiming to withdraw a vast majority of historical

[1] The Sydney Morning Herald, *Cancel culture is the Macquarie Dictionary's word of the year for 2019*, 2 December 2019, available at https://www.smh.com.au/culture/books/cancel-culture-is-the-macquarie-dictionary-s-word-of-the-year-for-2019-20191202-p53fzy.html (accessed 29 June 2023).
[2] Macquarie Dictionary, *The Committee's Choice and People's Choice Word of the Year 2019*, available at https://www.macquariedictionary.com.au/resources/view/word/of/the/year/2019 (accessed 29 June 2023).

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items, including statues, books, movies which contain expressions or notions representing even indirectly values set in contrast to the current democratic values.

A call for withdrawal of those mentioned historical items has touched cultural and historical figures from the far past to the most recent past. A couple of emblematic cases can be dared to be mentioned. The most recent case concerns the request of withdrawal of a Disney movie for being accused to evoke racial propaganda due to a racist depiction of one of its characters. Similarly, Roald Dahl's children book have undergone into an operation of rewriting due to the use of contentious words.[3] The call for cancel culture has touched a number of artistic expressions, movies, books and last but not least paintings. In the context of climate change protests, cancel culture concerns have been the reasons why a group of climate activities have been throwing soup, mashed potatoes and cake at Andy Warhol's Campbell's Soup Cans at the National Gallery of Australia. The protestors have argued that the painting itself represents a symbol of wild capitalism which has been accounted as one of the causes of the climate crisis.[4] All these cases have one element in common, that is to concern artistic items which has been produced way back in the past. *Sanctimony Literature* is the new label for those productions which result amended by envious values coming from the past (Rothfeld, 2021). The cancel culture calls into question the relation between art crafts and values which art revokes. The question is to what extend our current values can be projected into the past? Ultimately the question is whether the artist freedom of speech as used in the past can be limited because of the changing culture of today.

[3] CNN, Roald Dahl book changes spark censorship spat, 21 February 2023, available at https://edition.cnn.com/style/article/roald-dahl-censored-gbr-scli-intl/index.html (accessed 29 June 2023).
[4] The Guardian, *Climate activists target Andy Warhol's Campbell's soup cans at National Gallery of Australia*, 9 November 2022, available at https://www.theguardian.com/culture/2022/nov/09/climate-activists-target-andy-warhols-campbells-soup-cans-at-australias-national-gallery (accessed 29 June 2023).

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3. International Law and Art

At a quick glance art and law appear as two distinctive subjects. One is often leads to think that law "meets" art when the latter becomes suitable of being published or sold. Questions of property and compensation have been dealt by copy right laws enacted at international and domestic levels. The relation between art and law has been object of a special study carried out by the European Union Agency for Fundamental Rights (FRA). The report has pointed out a deeper level of relation between art and law.[5] According to the report, art shares with international law, specifically with human rights law a tight relation because "[B]oth are concerned with questions of what is (and what is not), humanity, identity, dignity, of communicating empathy, of the transformation of lives, of visions for the future and of the mission of mankind, of the full development of the person. Both are universally applicable". In this view, art and law share a common path being mutually instrumental to a better understanding of humankind. Specifically, while art questions what is "to be", human rights empower people to be who they are.[6]

On the same line of reasoning, the 2013 Report of the Special Rapporteur in the field of cultural rights and the right to freedom of artistic expression and creativity acknowledges art as "an important vehicle for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, worldview and meanings assigned to their existence and development. People in all societies create, make use of, or relate to, artistic expressions and creations."[7]

It does not come therefore as a surprise the right to artistic expression has been traditionally seen as part of the right of freedom of expression: paintings,

[5] European Union Agency for Fundamental Rights (FRA), *Exploring Connections between Arts and Human Rights*, Report of a High-level Expert Meeting on 29–30 May 2017, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017_arts-and-human-rights-report_may-2017_vienna.pdf (accessed 29 June 2023).
[6] *Ibid*.
[7] A/HRC/23/34, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, *The right to freedom of artistic expression and creativity*, 14 March 2013.

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art crafts are nothing but "expressions of ideas imparted in form of art".[8] Human rights law interweaves with art at an earlier stage of the artistic process, namely in the moment of artistic creation.

The formulation of the right to artistic freedom came later along the journey to the approval of human rights law. Article 19 of the 1948 Universal Declaration of Human Rights (UNDHRs) states the right to freedom of expression without an explicit mention to the artists (Asbjorn, 1992). A reference to the artists' rights is in Article 27 which recognizes the right freely "to participate in the cultural life, to enjoy the arts together with the right to the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author". The UNDHR has greatly informed the wording of subsequent human rights treaties (Asbjorn, 1992). States indeed declared their commitments to the principles of the Declaration when they signed the UN International Covenant on Civil and Political Rights (ICCPR),[9] which includes under Article 19 the protection of freedom of expression (Novak, 2005; Joseph, Schultz and Castan, 2000, 3-4; Asbjorn, 1992). Article 19 (2) states that expression 'in the form of art' is protected. Human rights instruments are living instruments whose interpretation follows the rule of the Vienna Convention of the Law of the Treaties as well as the interpretation provided by human rights bodies. On a couple of occasions, the United Nations (UN) Human Rights Committee (HRC), the international body which monitors and supervises implementation of the ICCPR, together with the Committee on Economic, Social and Cultural Rights have been asked to clarify the limits and contents of the artistic freedom., The UNHRC, has specified in its General Comment 34 that 'non-verbal expression' includes 'images and objects of art'.[10] The ICCPR provides protection to the artistic freedom as a prolongation of freedom of

[8] *Shin v Republic of Korea*, UN doc CCPR/C/80/D/926/2000, 16 March 2004.
[9] International Covenant on Civil and Political Rights, 1966
[10] UN Human Rights Committee, 'General Comment 34', UN doc CCPR/C/GC/34, 12 September 2011.

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expression. An additional level of protection it granted to it from by reason of its integral part in cultural life. Indeed, the right to artistic expression falls as well into the traditionally known category of cultural rights, together with right to education, linguistics rights, access to culture. As acknowledged by the 2013 Report of the Special Rapporteur:

> Artists may entertain people, but they also contribute to social debates, sometimes bringing counter-discourses and potential counterweights to existing power centres. The vitality of artistic creativity is necessary for the development of vibrant cultures and the functioning of democratic societies Artistic expressions and creations are an integral part of cultural life, which entails contesting meanings and revisiting culturally inherited ideas and concepts.[11]

The UN International Covenant on Economic, Social and Cultural Rights (ICESCR)[12] recognizes the role of art in cultural development. Article 15 of ICESCR protects the rights to take part in cultural life and freedom of creative activity. In addition to that, Article 15 (3) calls Signatories States to adopt steps necessary for the conservation, the development and the diffusion of culture, which includes arts. On this specific the Committee on Economic, Social and Cultural Rights has stressed that the right to take part in cultural life encompasses the right of everyone "to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity."[13] The Committee has as well underlined the expression "cultural life" is an explicit reference to culture as "a living process, historical, dynamic and evolving, with a past, a present and a future."[14] The Committee shares the view that cultural life is a dynamic and inclusive concept both in terms of time and place.

[11] Report of the Special Rapporteur cited, par. 3.
[12] International Covenant on Economic, Social and Cultural Rights, 1966.
[13] Economic and Social Committee, General Comment n. 21, E/C.12/GC/21.
[14] *Ibid*.

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Few decisions in the United Nations system relate to artistic freedom. Unfortunately, the lack of cases does not mirror the lack of actual threats to artistic expression. As it has been noted, this may be mostly due to the fact there is lack of knowledge about international human rights law by bodies involved in the arts (Joseph, 2020). In the scope of the present paper, a couple of cases are worthy to be mentioned. Both cases could contribute to shed a light on the understanding of the content and limits of Article 19 ICCPR. The HRC found that the Republic of Korea had violated article 19 of ICCPR by convicting a painter for a painting deemed to be contrary to the National Security Law. On the occasion, the HRC has reiterated that Article 19 ICCPR must be understood as protection to the right to expression in any form, including the artistic one. The case itself shows as well the complexity lying behind the interpretation of any artistic work. In the specifics, the artist Hak-Chul Shin claimed instead that the painting represented his utopian view of a unified Korea, influenced by his childhood memory of rural life. This case demonstrates how an artwork can carry different meanings to different people, and those meanings can differ from the one intended by the artist. It is therefore not by chance that the UN Special Rapporteur in the Field of Cultural Rights has warned that "Artistic expressions and creations do not always carry, and should not be reduced to carrying, a specific message or information."[15]

The Working Group on Arbitrary Detention found that Lapiro de Mbanga, a Cameroonian musician and songwriter, had been arbitrarily detained.[16] Lapiro was accused to have supported the local riots in different ways, including releasing a new song "Constipated Constitution". The working group found a violation of Article 19 of the ICCPR concluding that the song "Constipated Constitution" was simply a political statement and did not incite

[15] Report of the Special Rapporteur *cited*, par. 37.
[16] A/HRC/WGAD/2011/32, Opinions adopted by the Working Group on Arbitrary Detention at its sixty-first session, 29 August–2 September 2011, No. 32/2011.

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anyone to violence. This case demonstrates how important is to set a line between an artwork and the use that a community makes of it. In other words, the artwork and its meaning should be considered existing independently from the way the society has made use of it.

Both aforementioned Covenants have represented an important caveat for a number of international legal instruments encompassing the right to artistic freedom, including the UN Convention on the Rights of the Child (Article 13), UN Convention People with Disabilities (Article 30), the American Convention of Human Rights (Article 13) and its Protocol in the area of Economic, Social and Cultural Rights (Article 14). At regional level, the Arab Charter for Human Rights also contain such explicit provisions under Article 42, article 10the European Convention for the Safeguard of Human Rights and Fundamental Freedoms under Article 10, the African Charter on Human and Peoples' Rights under Articles 9 and 17. All European states are signatories or have ratified both these covenants.

In addition to the two UN Covenants, protection of freedom of artistic expression lies within the Guiding Principles of the UNESCO 1980 Recommendation Concerning the Status of the Artist, which recommends member states to protect and to defend artists in their freedom to create, and that they be given the full protection of their rights as provided under human rights law. Freedom of expression is also referred to as a fundamental right within the UNESCO 2005 Convention on the Promotion and Protection of the Diversity of Cultural Expressions which counts 150 members plus the European Union. State signatories are required to report on their adherence to the UNESCO 2005 Convention every four years in what is known as the Quarterly Periodic Review process. In October 2021, the European Parliament passed a comprehensive resolution on the status of the artist that provides a framework for improving working conditions for artists.

Specifically, the resolution urges "all Member States to fulfil their responsibility and obligation to foster and defend artistic freedom in order to

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uphold the fundamental right to freedom of expression and to ensure that EU citizens can freely enjoy artistic creations and participate in culture, and urges the Commission to sanction those Member States that fail to comply with their obligations; invites the Commission to carry out further research into the topic and prepare a roadmap for achieving better protection of freedom of artistic expression in Europe; calls on the Member States to jointly establish a structured dialogue among artists, legal experts and relevant stakeholders to determine common standards for freedom of artistic expression and develop and implement relevant guidelines."

The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are the updated and amended versions of the previous treaties, the Treaty on European Union (or Maastricht Treaty of 1992, subsequently amended by the Treaty of Amsterdam 1997 and the Treaty of Nice 2001) and the Treaty on the European Community (TEC). The amendment took place through the Lisbon Treaty of 2007 which allowed, among other things, a better delineation and better division of the functions of the European Union and the Member States, eliminated any reference to an EU Constitution, while strengthening the protection of fundamental rights with the assumption of the Nice Charter. Therefore, the TEU and the TFEU become the treaties on which the European Union is founded and have the same legal value. With regard to culture and the defence of freedom of expression, reference may be made to Article 3.3 TEU (*ex* Article 2 TEU) and Article 167 TFEU (*ex* Article 151 TEC), freedom of expression and information (art.11), freedom of assembly and association (art.12), freedom of arts and sciences (art.13).

4. Right to Artistic Expression in Light of the ECHRs Jurisprudence

The European Convention of Human Rights does not explicitly protect cultural rights as such, unlike other international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights.

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However, the European Court of Human Rights, through a dynamic interpretation of the different Articles of the Convention, has gradually recognized substantive rights which may fall under the notion of "cultural rights" in a broad sense.

The Court has underlined the importance of artistic expression in the context of the right to freedom of expression (Article 10 of the Convention). Article 10.2 of the Convention lists exceptions to freedom of expression, referring to restrictions prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights (ECHRs) has addressed far more cases regarding art than any other international human rights body (Joseph, 2020). How has the ECHRs jurisprudence developed with regards to the freedom of artistic expression?

In general, the ECHRs has applied a high level of protection when it has dealt with artistic works such as novels, poems, paintings in spite of the restrictions applicable to the to the freedom of expression in spite of the small number of cases held by the Court (Polymenopoulou, 2016).

In the case of *Müller and Others v. Switzerland* (24 May 1988, Series A no. 133), the Court pointed out that Article 10 covered freedom of artistic expression recognizing that "it afforded the opportunity to take part in the exchange of cultural, political and social information and ideas" (§ 27) and it concluded that this imposed on the State a particular obligation not to encroach on the freedom of expression of creative artists (§ 33). In the case of *Alınak v. Turkey* (no. 40287/98, 29 March 2005), the Court went even further on the obligation no to encroach concerned a novel about the torture of villagers that was based on real events. The Court noted as follows: "…

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the book contains passages in which graphic details are given of fictional ill-treatment and atrocities committed against villagers, which no doubt creates in the mind of the reader a powerful hostility towards the injustice to which the villagers were subjected in the tale. Taken literally, certain passages might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was a novel, a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media" (§ 41). The Court pointed out that "the impugned book [was] a novel classified as fiction, albeit purportedly based on real events". It further observed as follows: "… even though some of the passages from the book seem very hostile in tone, the Court considers that their artistic nature and limited impact reduced them to an expression of deep distress in the face of tragic events, rather than a call to violence" (§ 45). Following the Court's line of reasoning, the artwork in question provides a fictional representation of a real event. Because of its fictional character, the artwork cannot be interpreted in the light of the historical events to which it is inspired.

In its 25 January 2007 judgment in *Vereinigung Bildender Künstler v. Austria* (no. 68354/01, 25 January 2007) concerning an injunction against the exhibition of a painting considered to be indecent (a painting which had been produced for the occasion by the Austrian painter Otto Mühl, showing a collage of various public figures, such as Mother Teresa and the former head of the Austrian Freedom Party (FPÖ) Mr Jörg Haider, in sexual positions), the Court based its findings on the same principles as those that previously illustrated. The Court observes that "artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10" (§ 26). However, the Court declares in paragraph 33 of that judgment:

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> […] that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.

The Court seems to opt for a case-by-case judgment whether instances of limitations emerge.

In its Grand Chamber judgment *Lindon-Otchakovsky-Laurens and July v. France* ([GC], nos. 21279/02 and 36448/02, ECHR 2007-IV), the Court had to examine whether the conviction of the author and publisher of a novel (introducing real characters and facts) for defamation of an extreme right-wing party and its president (Mr. Le Pen) amounted to a violation of Article 10. The Court referred to its case-law on artistic creation (§ 47), it stated that "novelists – like other creators - and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, 'duties and responsibilities" (§ 51). The Court does not contest the conviction for defamation declared by the French courts. According to the Court, there was no need to make a distinction between fiction and real facts in this specific case because the impugned work was not one of fiction but introduced real characters or facts (§ 55).

In the judgment *Akdaş v. Turkey* (no. 41056/04, 16 February 2010), the Court developed its case-law on freedom of artistic expression and the protection of morals. This case may be considered one of the most relevant to the scope of the present analysis. The case concerned the conviction of a publisher with a heavy fine for the publication in Turkish of an erotic novel by Guillaume Apollinaire (dating from 1907) and the subsequent decision to seize of all the copies of the book. The Court considered that the view taken

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by the States of the requirements of morality "frequently requires [them] to take into consideration the existence, within a single State, of various cultural, religious, civil or philosophical communities". Building on its past jurisprudence on this issue, the Court launched the concept of a "European literary heritage" and set out in this regard various criteria: the author's international reputation; the date of the first publication; a large number of countries and languages in which publication had taken place; publication in book form and on the Internet; and publication in a prestigious collection in the author's home country (La Pléiade, in France). What is interesting from the point of view of the right of artistic freedom is that the Court concluded that the public of a given language, in this case Turkish, could not be prevented from having access to a work that is part of the European heritage (§ 30). The Court not only appears to fully embrace its original line of reasoning according to which artworks should not be read in light of the events which have inspired them but it also stretches its own jurisprudence to the point to endorse the concept of "European literary heritage".

When assessing the character of some of the expressions contained in the artistic work which might justify the limitations set by the State, the Court has taken into account a set of criteria: the first one being, the limited impact of the form of artistic expression at stake (especially novels or poems, compared to films), which generally appeals to a relatively narrow public compared to, for example, the mass media; the second one being the artistic nature of the work in object which the Court uses to define in terms of "fiction" with due exclusions to those work who contains a full representation of real facts and circumstance; third one being accounted as part of the European literary heritage which echoes the UN definition of culture in as to culture as "a living process, historical, dynamic and evolving, with a past, a

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present and a future."[17] The Court appears to suggest that the past cannot be erased as being itself an integral part of a chancing cultural process.

5. Conclusions

The present article has been questioning about the potential clashes between the artistic freedom of expression and the instances claimed by the cancel culture movement. After a brief introduction to the cancel culture' main instances, it retraced the journey of the artistic freedom of expression in the field of international law, specifically in the context of human rights. It followed a detailed presentation of a significant number of international and regional legal instruments which are primarily meant to provide protection to artistic creation in broad sense. From there this work has explored a set of contentious case brought before the UN international dispute settlement mechanisms as well as before the ECHRs. In spite of the small number of cases so far held by judicial and non –judicial bodies, it emerges a consistent jurisprudence which applies a high protection to the artistic freedom of expression by virtue of its inner fictional nature and its vital role in the ongoing process of building up our cultural life.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

From Fragmented Legal Order to Globalised Legal System: Towards a Framework of General Principles for the Consistency of International Law

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ABSTRACT

Fragmentation is out; general principles are in. After years of work on fragmentation, the International Law Commission (ILC) has concluded that international law is a legal system with interconnected norms. The ILC has now shifted its focus to the general principles of law. These principles are a wellspring of rights and obligations, help interpret sources, and guide legal reasoning. This paper focuses on the latter function; it argues that a framework of legal principles can contribute to the consistency of international law as the legal system *par excellence* for a globalised world. This manuscript begins by outlining how fragmentation is a paradox of globalisation and presenting the prevailing systemic view of international law. The paper then presents a reason-based scheme for reasoning with norms. It finishes by advocating for a framework of principles for legal consistency.

Keywords: international law as legal system, fragmentation, general principles of law, legal consistency, reason-based reasoning

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1. Introduction

Fragmentation is out; general principles are in. After years of work on fragmentation, the International Law Commission (ILC) has concluded that international law is a legal system with interconnected norms[1] (2006b, para. 14). This means that instead of being a collection of separate and isolated legal regimes, international law operates as a consistent[2] whole, with various rules and principles working together to create a comprehensive legal framework. Based on these findings, the ILC has shifted its focus to the general principles of law. According to the ILC, these principles are a wellspring of rights and obligations, help interpret sources, and guide legal reasoning (2019, para. 26). They are fundamental to the functioning of the international legal system and act as foundational elements in the "constitutional processes" of international law (Eggett 2019). In this respect, according to the 2023 draft conclusions of the ILC, these principles "contribute to the coherence of the international legal system" (2023, 2).

In this paper, I will focus on how principles guide legal reasoning. I argue that establishing an overarching set of legal principles can enhance the consistency of international law. Consistency is crucial for international law to effectively fulfil its role as the legal system *par excellence* for a globalised world. Specifically, I will concentrate on how principles, such as *lex specialis*, *superior* and *posterior*, provide legal actors with relevant values and standards to resolve international law norm conflicts. I will explain that "*conflict-resolving principles*" offer reasons for the application and non-application of norms; legal actors can use these reasons to determine which

[1] In this paper, I use the term "norm" to refer to the category that includes rules and principles. In this context, the term "normative" refers to things related to norms rather than the strict deontic sense of normativity. See (Hage 2020).

[2] Some authors, such as Andenas et al. (2019), prefer to use the terms "coherence" or "cohesiveness" instead of "consistency." Terminology is not my primary concern; we can interpret "consistency" as "coherence" or any other preferred term. As I will explain in section 3, I use the term "consistency" to refer to either the absence of conflicts or the ability to make sense despite their presence.

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norms apply and do not apply in their cases.[3] In this regard, I argue that the ILC, states, international organisations, legal officials, and other actors of international law should strive to establish an overarching framework of conflict-resolving principles that determine priority relationships among international legal norms. This framework would aid legal actors by giving them reasons to reach unambiguous conclusions on norm application.

This philosophical investigation does not discuss the doctrinal or historical aspects of legal principles. Instead, this paper aims to present a theoretical argument about the foundational role of general principles of law in maintaining the consistency of international law. By moving away from dogmatic research and delving into legal philosophy, we can better understand the complex issues surrounding this topic. Such a philosophical investigation can contribute to current discussions on international law by supplying scholars and lawyers with the theoretical groundwork to discern the role general principles play in legal practice.

Concerning the structure of this paper, section 2 reviews the discussion on the fragmentation of international law and explains how fragmentation is one of the paradoxes of globalisation. Section 3 discusses how the ILC concluded the fragmentation debate by determining that international law is a legal system. It also highlights two defining elements of a legal system: unity and consistency. Section 4 discusses the distinction between rules and principles, adopting a weak differentiation (or an integrated view) between them (4.1). That section then presents a reason-based scheme for reasoning with norms (4.2). Section 4 explains that to maintain consistency in international law, we should establish an overarching framework of conflict-resolving principles to help legal actors deal with norm conflicts (4.3). Section 5 concludes this paper with some final remarks.

[3] When referring to "conflict-resolving principles," I am talking about principles that help us address normative conflicts, not actual armed conflicts. These principles help resolve conflicts between legal norms rather than hostilities between or within nations.

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2. Fragmentation as a Paradox of Globalization

Even before the ILC began discussing the fragmentation of international law, several scholars had already questioned international law's nature as a legal system or even as real law.[4] For instance, Austin stated that international law could never be true law because it concerns the conduct of sovereigns between one another rather than the conduct of a sovereign towards its subjects (1954, 201). Schmitt also expresses scepticism towards international law in his works, particularly in his conclusion that international law is "empty normativism" that cannot be distinguished from politics (2006, chap. 2). He uses the example of the trial of Kaiser Wilhelm II by a special international tribunal to illustrate how political actors use the language of international law to further their own interests, transforming their confrontations into a theatre of good versus evil (Schmitt 2006, 262 f.; see also: Koskenniemi 2002, chap. 6; 2006a, 613).

Hart was not as sceptical about the nature of international law as real law, but he claimed that it did not qualify as a legal system (2012, 213–16). He argued that international law lacks a centralised legislature, courts with compulsory jurisdiction, and centrally organised sanctions. Moreover, according to Hart, international law consists only of primary norms of obligation and lacks secondary norms of change and adjudication. These secondary norms provide for legislature and courts, include a unifying rule of recognition that specifies sources of law, and supply criteria for identifying primary norms. Hart concludes that international law more closely resembles the normative order of primitive social groups than a proper legal system (2012, 232–36). Kelsen would disagree with the assessment that international

[4] Despite the distinction between historical debates on the nature of international law as real law and contemporary fragmentation issues, a connection can be drawn between them as both address the lack of a single, determinative normative source for international law (Koskenniemi 2006a, chap. 6; Koskenniemi and Leino 2002, 556–62). In this context, fragmentation can be viewed as a modern expression of a long-standing debate (Menezes 2013). Recently, there have been differing opinions on whether fragmentation is an actual issue that needs to be addressed or if it is merely an academic concern about the future of international law (Shongwe 2020).

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law is not a legal system. His monistic theory connects domestic and international law, with international law being the superior legal system (Kelsen 1949, chap. 6; 1952, chap. 5). However, due to international law's decentralised nature, Kelsen must concede that international law has characteristics of primitive law. This is because it lacks specialised legislative, judicial, and executive organs and relies on members of the international community to perform these functions (Kelsen 1951, 707; 1952, 22).

Although some may argue that many aspects of these views are no longer relevant,[5] the issues they addressed remain pertinent. The continued relevance of these issues is due to the structural differences between international and domestic law, with the former being far more decentralised than the latter. Contemporary international law still lacks centralised legislative, judiciary and executive bodies. Despite the undeniable importance of institutions such as the United Nations (UN) General Assembly, the Security Council, and the International Court of Justice (ICJ), there is no single central body responsible for overseeing international law-making, deciding cases with compulsory jurisdiction, or enforcing sanctions at a central level.

The decentralised nature of international law has long been a defining characteristic of this legal system (Menezes 2005, 36–38). However, in recent years, this decentralisation has led to increased complexity due to the expansion and diversification of international law. After the UN was formed and especially after the end of the Cold War, there was a period of accelerated growth in the number of international regulations and adjudicative bodies. ICJ Judge Gilbert Guillaume was among the first to draw attention to the proliferation of international courts and tribunals in both scientific publications (1995) and speeches to the UN (2000). He expressed concern about the potential for "forum shopping" by litigants, which could create

[5] For commentary on these views, see (Lefkowitz 2020, chaps. 2–3; Murphy 2013; Payandeh 2010; Waldron 2013).

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uncertainty and increase the risk of conflicting decisions, contradictory interpretations, and incoherent legal precedents.

The concerns expressed by Guillaume were echoed by the ILC, which addressed this emerging issue in its first report on fragmentation (2000). In its report, the Commission examined the causes of fragmentation and noted that international law was undergoing structural changes. These changes were due to an increase in international regulations and growing political polarization, as well as rising regional and global interdependence in areas such as the economy, environment, energy, resources, health, and the proliferation of weapons of mass destruction (2000, p. 143). The ILC pointed out that while the resulting separate international legal microsystems could have a positive effect by enforcing the rule of law in international relations, they would also risk creating frictions and contradictions between legal regulations. This can result in states having to comply with mutually exclusive obligations, leading to inevitable responsibility for liabilities when states cannot fulfil all such obligations (2000, p. 144). Simply put, fragmentation leads to conflicts between different sets of norms of international law.

After the ILC's first report was published, the General Assembly requested further work on fragmentation. This second report was finalised by Koskenniemi (ILC, 2006a). As an international law scholar, Koskenniemi is well-known for his postmodernist reinterpretation of international law's doctrine and intellectual history (Jouannet 2011; Murphy 2013). Koskenniemi sees international law as a realm of rhetorical patterns and structures filled with inescapable contradictions. These contradictions are driven by the tension between formalism and realism, objectivism and subjectivism, and naturalism and positivism (Koskenniemi 2007b). In arguments about applicable international law norms, Koskenniemi sees these contradictions as allowing both sides to advance their positions through equally valid and plausible legal claims (Koskenniemi 2006a, 562 f.).

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In line with Koskenniemi's interdisciplinary approach, the ILC's second report uses the concept of "functional differentiation" from sociology to explain the fragmentation of international law (ILC, 2006a, para. 7 f.). According to Luhmann, functional differentiation is the process by which society becomes more complex and specialised, with different subsystems emerging to perform specific functions for the overall system (Luhmann 2004, 93, 934; Marcos 2021; Pineda 2022; Rogowski 2001). Each subsystem can connect with other subsystems in different ways, leading to more variation within the system and allowing for better responses to the environment and faster evolution. However, when a system (legal or otherwise) undergoes restructuring in response to changing social contexts, it does so through a critical rearrangement of established institutions rather than an organised and planned reformation.

In the report, the ILC explains that functional differentiation is a characteristic of late modernity, occurring both within and between states and is driven and accelerated by globalisation (2006a, paras. 7–8, 481–482). In this context, globalisation refers to the increasing interdependence between states, nations and peoples worldwide. This interdependence spans many areas, including time, space, place, boundaries, diasporas and migrations. It also encompasses social, cultural, economic and legal connections (Berman, 2002, 314–15; 2005, xvii). Functional differentiation is closely related to many aspects of globalisation. The ILC specifically mentions global cooperation networks that are technically specialised in areas such as communication, scientific research, trade, the environment, human rights and transboundary crime prevention. These networks extend beyond national borders and span various spheres of life and expert cooperation. Because of such characteristics, according to the ILC, these frameworks are challenging to regulate through traditional international law (2006a, paras. 481–482).

Due to globalisation, contemporary international law has evolved to include normative microsystems, often called "special regimes" (ILC, 2006a, paras. 123–137, 482–483). Special regimes, such as those for trade,

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environmental and human rights law, can emerge informally. This happens when leading actors adopt standardised solutions and behaviours that create mutual expectations and are replicated by other actors. These regimes often arise through intergovernmental cooperation, particularly with the support of specialised international organisations. This results in the creation of international law regimes based on bilateral or multilateral treaties and customary patterns. Specialised legal regimes have their own microsystems designed to address their specific needs and interests. However, we often witness "regime failure" when these microsystems do not take into account the broader macrosystem, leading to inconsistencies between the two (Koskenniemi 2004, 205; 2006b, 18–21). In this regard, the importance of having a "fallback" option to general international law and its principles lies in the concrete risk of regime failure (Gradoni 2009, chap. 1). This fallback provides a necessary solution when the microsystem's limitations prevent the legal order's objectives from being achieved.

Paradoxically, as globalisation continues to grow stronger, fragmentation also increases (ILC, 2006a, para. 7; Lundestad 2004). According to Zolo (1997; 2004), globalisation is causing social life worldwide to become increasingly uniform. He attributes this to the advancement of new technologies in transportation and communication, the growth of multinational corporations, and the diminishing power of nation-states. These factors have created a vacuum that has been filled by international organisations and other actors, resulting in a global order marked by greater interconnectedness, interdependence, and inequality. While globalisation has led to greater uniformity in our world, it has also given rise to specialised and relatively autonomous spheres of social action and legal structure. This can result in fascinating changes and significant new interconnections in the legal sphere, but it can also lead to a greater risk of contradictions and normative conflicts. The future of globalisation is even more uncertain in light of the continued impact of the recent Covid-19 pandemic, climate change, and the

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rise of political extremism (Andrea Willige 2022; Foroohar 2022; Guerra, Marcos, and Hardman 2020; Menezes and Marcos 2020).

No matter what the future brings, whether it be more multilateral integration or nationalistic isolation, many aspects of our world will remain global. However, this does not mean that our world will be uniform. In this respect, with the potential for continued fragmentation and functional differentiation, international law should not aim to impose absolute supranational homogeneity or even predefine solutions to all possible international issues. Instead, it should establish minimum standards[6] via a set of guiding principles that allow for a consistent interpretation of international legal obligations and cooperation between the many actors in the international legal sphere. A framework of general principles could play a critical role in creating an effective legal system for a globalised world. It could do this by providing legal actors with minimum standards for legal consistency. In the next section, we will discuss international law's systemic character, leading us to consider how general principles can contribute to legal consistency in section 4.

3. The Systemic Character of International Law

As pointed out in section 1, the ILC concluded its work on fragmentation by declaring that international law is a legal system (2006b, para. 14). In other words, despite any complications brought about by international law's decentralised character, its functional differentiation, globalisation and ongoing regulatory expansion, international law is still a legal system. Even Koskenniemi, who is known for advocating the idea that international law is fragmented, has revised his stance and now acknowledges that it is a system. In his words: "[l]aw is a whole […] You cannot just remove one of its fingers and pretend it is alive. For the finger to work, the whole body must come

[6] This notion of minimum standards is inspired by Zolo's ideas of minimum supranational standards (1997; 2010).

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along" (2007a, 10). In this connection, many authors have presented different views on what it means for international law to be a system. Dupuy (2002; 2020) speaks of systematicity resulting from the joint operation of international law's formal and material unity. Benvenisti (2008) and Menezes (2017) refer to a logical order that keeps international law coherent. Delmas-Marty (2009) sees contemporary international law as a pluralistic legal order that overcomes contradictions.

Despite the variety of perspectives on the systemic nature of international law,[7] most authors who view it as a legal system agree on two key elements: unity and consistency.[8] That is to say, international law is a legal system insofar as it is a unified and consistent set of norms. This idea is reflected in Losano's definition of internal systems as opposed to external systems (2002, sec. I). An external system is an outward organisation imposed on certain elements, such as organising wine bottles based on their vintage. The vintage does not reveal any inherent relationship between the wines but rather a categorisation based on the year the grapes were harvested. In contrast, an internal system comprises interconnected components that work consistently together towards a particular end. A good example of this is the nervous system in vertebrates. The nervous system comprises the brain, spinal cord, and nerves. These components work together to receive, process and send information throughout the body.

When discussing the systemic character of international law, we focus on its nature as an internal system of unified and consistent elements. While some authors, such as Kelsen (1949, 147), argue that completeness is another necessary element of a system, others, like Carrió (1986, 88–89), maintain that legal systems are inherently incomplete. Bulygin (2015a; 2015b) suggests that this debate arises from not considering the relational nature of

[7] For an overview, see (Prost 2012).
[8] In previous work (Marcos 2023; Forthcoming), I have explained that consistency results from the internal logic of a normative system. Although there is a difference between these two concepts (internal logic and consistency), we can disregard this distinction in this paper, thus focusing only on consistency.

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completeness and viewing legal orders as encompassing all legal norms rather than examining each microsystem individually. Although there is much to be said about the completeness or incompleteness of legal systems in general and international law specifically, we do not need to delve into this discussion in this paper. Instead, we can focus on the widely accepted elements of unity and consistency.

A legal system, such as international law, is unified if we can conceptually understand it as a single entity. That is, international law is unified as it exists as a distinct entity to which we refer as international law. This does not preclude the existence of microsystems, such as special regimes within international law. International law is an overarching macrosystem comprising several microsystems (special regimes). These microsystems are still part of the international law system, and their special norms are still norms of international law. Norms that are part of international law but do not belong to special regimes are considered norms of general international law. The ILC agrees with this perspective, acknowledging that the designation of a special regime has no inherent value because no international legal regime exists in isolation from general international law (2006a, paras. 21, 193, 254).

Consistency can be understood in at least two ways (Marcos 2023; Forthcoming).[9] One way is to consider a set of elements consistent if there is no conflict between them. Another way is to consider a set consistent even if there are conflicts between its elements, as long as these conflicts can be resolved through the system's underlying rationality. For instance, the set of descriptions "Rome is the capital of Italy," "Rome is in Europe," and "Rome is a beautiful city" is consistent because there is no conflict between these descriptions. Contrarywise, the set "Rome is the capital of Italy" and "Rome is not the capital of Italy" is inconsistent because Rome cannot simultaneously be and not be the capital of Italy.

[9] In previous work (Marcos 2023; Forthcoming), I have differentiated between "statement-consistency" and "rule-consistency." This terminology will be ignored for present purposes as we will focus only on the consistency of normative systems.

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Norms offer more flexibility than descriptions; a normative system is consistent even if there are conflicts between its norms as long as these conflicts can be resolved. Let us define a normative conflict as a situation where at least two norms are applicable to a case, but their application would result in incompatible legal consequences. To clarify this definition, consider a simple microsystem with only two norms: N1 (acts of force are prohibited) and N2 (acts of force in self-defence are permitted). Now, imagine a case where Ukraine responds to an unwarranted military attack by Russia. Let us call it the "Ukraine v Russia case."[10] Under N2, Ukraine's act of force would be permitted because it is in self-defence. However, under N1, that act would be prohibited because it is an act of force.

According to the logical standard of non-contradiction, an action cannot be permitted and prohibited simultaneously (Hansson 2013; Von Wright 1963, 86 f.). This is because a prohibition to φ is equivalent to an obligation to not φ, while permission to φ is equivalent to a non-obligation to not φ.[11] But legal practitioners know that when there is a conflict between two norms like N1 and N2, only N2 should apply. This is due to the legal principle of *lex specialis,* which prioritises the more specific norm over the less specific one. In this case, N2 is more specific than N1 because N2 only pertains to acts of force in self-defence, while N1 pertains to all acts of force. Therefore, even though N1 and N2 are conflicting, their microsystem can still be considered consistent if seen under the light of the principle of *lex specialis*. This example illustrates the importance of conflict-resolving principles like *lex specialis* in maintaining the consistency of a normative system. We will explore these principles in greater detail in the following section.

[10] The recent Russian attacks on Ukrainian territory inspire this case. See (Sayapin 2022)
[11] In this paper, the symbol "φ" represents an action or an act. So, φ is a variable that can be replaced with any specific act or action, such as making a claim, deciding on a course of action, using force and so on. This allows for general discussions and arguments about acts and actions without specifying a particular act or action in each instance.

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4. Principles of International Law

Arbitral decisions concerning international disputes have referenced the general principles of law long before the adoption of the Permanent Court of International Justice's (PCIJ) Statute.[12] For example, in the *Antoine Fabiani* case, the award explicitly mentioned the application of the "general principles of the law of nations."[13] In the *Gentini* case, the Italian-Venezuelan Commission stated that while rules are practical and mandatory, principles express a "more general truth" that guides our actions and serves as a theoretical foundation for norm application.[14] This notion that rules are more concrete or specific while principles are more abstract or general is still widely accepted in international law, finding echoes in both the ILC's fragmentation report (2006a, para. 28) and its current studies on general principles (2019, para. 67).[15]

The significant role of general principles of law in international adjudication was explicitly clarified by Article 38 of the PCIJ Statute. The Article posits that "[t]he Court shall apply […] the general principles of law recognized by civilized nations." Article 38 (1) (c) of the ICJ Statute uses similar language to the PCIJ Statute, but with a key difference. It posits that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply […] the general principles of law recognized by civilized nations." This subtle change clarifies that general principles of law are indeed principles of international law (Tunkin 1971). Nonetheless, the ICJ's case law often refers to principles that have their origins in domestic law. For example, the ICJ has cited procedural principles

[12] The ICJ Statute is based on the PCIJ Statute. For an overview of the drafting of the provisions of the PCIJ and ICJ Statutes on general principles, see (Gaja 2020).
[13] *Antoine Fabiani Case* [1905] 10 Reports of International Arbitral Awards 83, pp. 115-117.
[14] *Gentini Case* [1903] 10 Reports of International Arbitral Awards 551, p. 556.
[15] In subsection 4.1, we will delve deeper into the supposed distinction between rules and principles.

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from domestic law regarding the burden of proof,[16] *res judicata,*[17] and pleas of error.[18]

In 2017, the ILC began discussing general principles as a continuation of its previous work on the fragmentation of international law and the sources of international law identified in Article 38 of the ICJ Statute. National delegations agreed that the Commission could provide authoritative clarification on the nature, scope, and function of general principles of law, as well as the criteria and methods for their identification. In his first report on general principles, Special Rapporteur Vázquez-Bermúdez explained that the ILC aimed to clarify various aspects of general principles of law based on current law and practice (ILC, 2019, 4–5). The Commission's goal is to provide pragmatic guidance to states, international organisations, courts, officials, lawyers, and other legal actors dealing with the general principles of international law.

In his first report, the Rapporteur outlined a list of issues and questions the ILC should address in its work (ILC, 2019, 5–9). These included the legal nature of general principles of law as a source of international law, their origins, functions, and relationship with other sources of international law, and the identification of general principles. In addition to serving as a direct source of rights and obligations, the Commission declared that these principles serve as a means to interpret other norms of international law and a tool for legal reasoning (ILC, 2019, pp. 7–8). In truth, the purposes of general principles had already been discussed during the *travaux préparatoires* to the PCIJ Statute (Advisory Committee of Jurists 1920, 306 f.). The ILC also referenced these purposes in its report on the law of

[16] *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Reports 4.
[17] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Reports 100.
[18] *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Reports 6.
In *Chorzow* the PCIJ had already clarified the principle that a party cannot take advantage of its own wrong. See *Factory at Chorzow (Germany v Poland)* (Merits) [1927] PCIJ Reports, Series A, No 9, 31.

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treaties (1966, 187 f.), and the preamble of the Vienna Convention on the Law of Treaties mentions several roles played by principles, including helping resolve legal disputes.

As mentioned in section 1, this paper focuses on how principles function as tools for legal reasoning, particularly on how (conflict-resolving) principles can help legal actors deal with norm conflicts in international law. Nevertheless, the general principles of law serve a variety of other essential functions not directly related to dealing with normative conflicts.[19] For example, some principles establish the rights and obligations of states, such as sovereignty, non-intervention, and self-determination. Additionally, some principles govern the conduct of international relations, such as good faith, *pacta sunt servanda*, and the peaceful settlement of disputes. While these principles serve critical functions in the international legal system and may indirectly play a role in resolving normative conflicts, they are not directly related to conflict resolution. As such, these principles fall outside the scope of this investigation, but the findings brought by this paper can still be helpful to practitioners dealing with such principles. In the following subsections, we will continue discussing general principles. I will first explain the difference (or lack thereof) between rules and principles (4.1). Then I shall present a reason-based scheme for reasoning with norms (4.2). And finally, I will argue for the relevance of establishing an overarching framework of conflict-resolving principles (4.3).

4.1 Between Rules and Principles

Much has been written about the distinction between rules and principles.[20] Alexy (2000; 2016), for instance, offers a well-known distinction between the two, drawing on Dworkin's views (1978a; 1978b) that rules are conclusive reasons that apply in an all-or-nothing fashion, while principles have a dimension of weight and importance and provide *prima facie* reasons for a

[19] For a general discussion on general principles, see (Andenas et al. 2019; Cheng 2006; Eggett 2021; Shao 2021).
[20] For an overview, see (Feteris, 2017).

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specific conclusion. However, Alexy disagrees with Dworkin, claiming that both rules and principles provide *prima facie* reasons and are always overridable. Alexy also believes there is a difference in the defeasible nature of rules and principles. According to Alexy, rules are definitive commands that either apply or do not apply, with no middle ground. In contrast, principles are optimisation commands that require something to be accomplished to the greatest extent possible (Duarte 2017).

I do not intend to argue extensively against Alexy's interpretation of Dworkin's work. Instead, I will state that while there is a difference between rules and principles, there is no complete segregation between them. Alexy's interpretation stems from his attempt to create an absolute separation between rules and principles. However, this separation disappears when rules and principles are considered in isolation. Thus, any distinction between them is a matter of comparison rather than a categorical difference (Sartor 1994; Soeteman 1991; Streck 2011, chap. 10; Verheij, Hage, and Van Den Herik 1998). Both rules and principles consist of conditions of applicability that lead to legal consequences. Their differences arise from their varying relationships with other rules and principles. The only distinction is that the connection between conditions and legal consequences appears stronger for a rule than for a principle—principles seem "more defeasible" than rules. When considered in isolation, if their conditions are met, the legal consequences of both rules and principles follow. Thus, their differences only exist when contrasted; when considered individually, the distinction vanishes.

I believe Dworkin would agree that rules and principles are not absolutely separate, even though he may have played a role in Alexy's efforts to distinguish between them. In *The Model of Rules I* (1978a, 24), Dworkin states that the "difference between legal principles and legal rules is a logical distinction." However, in *Model of Rules II* (1978b, 76), he clarifies his position by stating that:

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> My point was not that 'the law' contains a fixed number of standards, some of which are rules and others principles. Indeed, I want to oppose the idea that 'the law' is a fixed set of standards of any sort. My point was rather that an accurate summary of the considerations lawyers must take into account, in deciding a particular issue of legal rights and duties, would include propositions having the form and force of principles, and that judges and lawyers themselves, when justifying their conclusions, often use propositions which must be understood in that way. Nothing in this, I believe, commits me to a legal ontology that assumes any particular theory of individuation.

In this paper, I will adopt an integrationist view of the relationship between rules and principles. While there is a difference between them, it is more a matter of degree than of distinct logical categories. This view is supported by the notion that norms of any category (whether rules or principles) lead to *prima facie* conclusions in the sense that they offer defeasible reasons for a particular conclusion that may be overridden by reasons supporting a contrary conclusion (Hage 1997; Marcos 2021; Sartor 1994). The discussion of whether the connection between conditions and legal consequences is stronger for rules than principles is intriguing, but it can be set aside in this paper. In the next subsection, I will present a reason-based scheme of reasoning with norms (rules and principles) that considers the defeasible nature of legal reasoning.

4.2 A Reason-Based Scheme for Legal Reasoning

My reason-based scheme[21] is based on the idea that reasons are facts that support a conclusion. In this context, I define facts as states of affairs that obtain, whether natural, such as the Sun being larger than the Earth, or social, such as Paris being the capital of France, the Euro being the currency in that country, or Nicolas de Rivière being the French ambassador to the UN. It is

[21] For an in-depth explanation of this scheme, including a logical framework and a list of axioms for legal reasoning, see (Marcos 2023). See (Hage 1997; 2005; Hage and Verheij 1994) for earlier iterations of this scheme.

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essential to stress that my definition of facts includes social facts because lawyers have specific expectations about what qualifies as factual. For instance, Hart argues that rights and corporations do not have factual counterparts (1983, 23) because he defines facts in a way that excludes social facts. However, we can speak of social facts because humans can collectively adopt relevant social attitudes through mutual commitment to what they believe to be true (Lagerspetz 2001; Searle 1995; 2010; Tuomela 2003). This collective commitment allows a piece of land to be considered a city and a capital of a country, a piece of paper to be money, and a person to be an ambassador.

A reason is a fact, whether social or not, that supports a conclusion. Some reasons may argue against a conclusion, but this is the same as supporting a contrary conclusion. Therefore, I will refer to reasons as either pro or con reasons, depending on whether they support a conclusion to φ or to not-φ. According to Alvarez (2009; 2010, chap. 2), there are three types of reasons: justifying reasons, motivating reasons, and explanatory reasons. Justifying reasons have deontic force and provide guidance and evaluation. They inform an agent about what they ought to do or what ought to be the case. As such, justifying reasons make φ-ing justified in the sense that φ is proper, adequate, or suitable in a particular situation. A motivating reason is a fact that motivated an agent to φ. It is the fact that an agent considered when deciding to φ. An explanatory reason explains why an agent φ-ed by making their φ-ing understandable.

Justifying, motivating, and explanatory reasons play distinct roles in an agent's actions, but it can be challenging to distinguish between them in practice. As Alvarez explains, a motivating reason is a reason that an agent acts upon and serves as the premise of their reasoning about acting. Meanwhile, an explanatory reason tries to make sense of an agent's actions (2010, 35–36). But a reason that explains why someone φ-ed is often the same reason that motivated them to φ. Moreover, a reason that justifies φ-ing can also explain why someone φ-ed and reveal their motivations to φ. For

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example, a reason that justifies an ambassador's decision not to sign a treaty can also explain their actions and reveal what motivated them to oppose signing the treaty (Marcos 2023, 35).

All three reasons — justifying, motivating, and explanatory — are relevant in legal reasoning. For instance, if we want to understand what motivated a lawyer to file a petition in a certain way or why a judge ruled in favour of one party over another, we would be dealing with motivating reasons. At the same time, we use explanatory reasons to understand actions and scenarios within the legal framework of (international) law. But, most importantly, in legal practice, we often seek justifying reasons to support our positions. This could include lawyers searching for grounds to support their claims or decision-makers needing to justify their verdicts. This is because the law finds itself within the realm of social practices that determine what we ought to do and what ought to be the case. As Postema (1982, 165) explains, the law is a type of practical reasoning that, like morality and prudence, establishes a general framework for making decisions. The law provides reasons for legal action to the members of the legal community, including both lawmakers and those subject to the law.

Reasons for legal action are reasons that attempt to justify legal positions. When evaluating the appropriateness of legal decision-making, we consider reasons that justify why a legal agent acted in a certain way and reasons that show that a legal agent's actions may have been (un)justified. So, in legal practice, we often deal with reasons that plead for or against the conclusion that one's actions are justified. One's actions are justified if they acted in the way they ought to have and unjustified if they ought not to have acted in that way. It is important to note that my terminology differs from Raz's. While Raz equates the statement "one ought to φ" with "one has a reason for φ-ing" (2002, 28 f.), I would argue that a reason for φ-ing supports the conclusion that φ-ing is justified and that one ought to φ. But this reason for φ-ing can be outweighed by stronger reasons against φ-ing. Therefore, having a reason to φ does not necessarily mean that one is justified in φ-ing or ought to φ.

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The justification of φ-ing depends on carefully balancing the reasons that support and oppose φ-ing. We can only conclude that one ought to φ or φ ought to be the case after carefully weighing all the reasons for and against φ. This involves assessing which set of reasons (pro or con) carries more weight and, based on this evaluation, determining whether φ-ing is justified or unjustified. For instance, in the Ukraine v Russia case above, the fact that Ukraine used force against Russia provides a reason to conclude that, according to the law, such use of force is prohibited (under N1). However, this reason may need to be weighed against stronger opposing reasons that support the conclusion that Ukraine's use of force was justified as it was carried out in self-defence (N2). In other words, the justification for Ukraine's actions depends on weighing reasons for and against its use of force.

A structured way to provide clarity when reasoning with norms is to consider the role that reasons play in the shift from the applicability of a norm to a case to its application to that case (Marcos 2023, 30 f.). A norm N is *applicable* to a case C if N's conditions are met by C. In contrast, *application* refers to whether a norm N applies to a case C. When talking about norm application, we could focus on adjudicators (such as a court or a judge) and talk about whether they ought to (or ought not to) apply a specific norm to a case. But our focus on justifying reasons allows us to sidestep adjudicators to say that a norm applies (or does not apply) to a case.

Determining whether a norm applies (or ought to be applied) to a case is based on the justifying reasons that support its application. So, a norm N applies to a case C if and only if the reasons for N to apply to C outweigh the reasons against it. If N applies to C, then N's legal consequences are imposed on C. For example, in the Ukraine v Russia case, while both norms N1 and N2 are applicable, only N2 applies, while N1 does not. We could say that an adjudicator ought to apply N2 and not apply N1 to this case. Still, we can also say that N1 does not apply, and N2 does apply to this case because the reasons for N1 to apply did not outweigh the reasons for it not to apply, while the opposite is true for N2.

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In legal reasoning, reasons plead for or against applying a norm to a specific case. A common reason for a norm to apply to a case is its applicability to that case. However, as previously mentioned, pro reasons for norm application can be outweighed by con reasons. For example, while norm N1 is applicable to the Ukraine v Russia case, the fact that N1 is less specific than N2 is a reason against applying N1. By balancing these reasons, we can conclude that the applicability of N1 to this case does not outweigh the fact that N2, which is also applicable, is more specific than N1. It is important to note that the reason for prioritising N2 over N1 comes from a conflict-resolving principle, *lex specialis.* In this regard, these principles help us resolve conflicts by providing reasons for (and against) the application of norms. In the following subsection, I will explain how conflict-resolving principles function within the reason-based framework of norm application presented in this paper.

4.3 A Framework of Principles to Safekeep Legal Consistency

The way *lex specialis* works to help us resolve the conflict between N1 and N2 in the Ukraine v Russia case is straightforward. Both norms N1 and N2 are applicable to this case and have pro reasons for their application (their applicability), which we can call R1 and R2, respectively. However, their application would result in incompatible legal consequences because the same act would be prohibited under N1 and permitted under N2. As explained above (section 3), these legal consequences are incompatible under the logical standard of non-contradiction. To resolve this conflict, *lex specialis* prioritises the more specific norm (N2) over the less specific one (N1). We can interpret this as *lex specialis* providing a third reason (R3) that the reason for N2's applicability (R2) outweighs the reason for N1's applicability (R1).

Assuming there are no more reasons to consider, we can balance R1 against R2. Due to R3 given by *lex specialis*, we can conclude that R2 outweighs R1 and, therefore, N2 applies while N1 does not. So, despite the

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conflict between N1 and N2, the microsystem composed of these two norms and *lex specialis* is still consistent.

Notice that the reason provided by *lex specialis* is a second-order reason (or a meta-reason) that affects how we should treat or respond to first-order reasons. Second-order reasons are reasons for (or against) φ-ing on account of a first-order reason in favour (or against) φ-ing (Adams 2021; Moreso 2023; Raz 2021). To put it another way, while first-order reasons are reasons to perform a specific action, second-order reasons guide how we should respond to those first-order reasons. R3, as provided by the principle of *lex specialis*, is a second-order reason because it affects how we should treat or respond to other reasons (R1 and R2) rather than directly affecting the application of norms (N1 and N2).

Similar to *lex specialis*, other legal principles provide different pro and con reasons for norm application. These principles include *lex superior* and *lex posterior*. *Lex superior* prioritises norms found in more fundamental provisions over those found in lesser provisions. For example, according to Article 103 of the UN Charter, norms derived from the UN Charter have priority over norms derived from other documents. This means that *lex superior* provides reasons for the applicability of a more fundamental norm to outweigh the reasons for the applicability of a less fundamental one. *Lex posterior* prioritises norms from newer provisions over those from older ones. For instance, in the admissibility decision of *Slivenko and Slivenko v Latvia*, the European Court of Human Rights (ECtHR) held that norms from the European Convention on Human Rights have priority over norms from a prior bilateral treaty between Latvia and Russia.[22] This means that, according to the ECtHR, *lex posterior* provides reasons for the applicability of a newer norm to outweigh the reasons for the applicability of an older norm.

Many other principles also function as conflict-resolving principles, even if resolving conflicts is not their primordial role. For example, we can speak

[22] *T Slivenko and Others v Latvia* (Admissibility Decision) [2002] (App no 48321/99) ECtHR Reports.

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of *pro persona* and the precautionary principle. The *pro persona* (or *pro homine*) principle can assist us in dealing with conflicts by prioritising the norm that promotes a more favourable outcome for individuals' rights.[23] The Inter-American Court of Human Rights (IACtHR) has consistently used the *pro persona* principle in its decisions.[24] This is evident in cases where the IACtHR has carefully considered the individual rights of detainees, including fair trials, judicial protection for detainees and their families, and the right not to be detained. In these situations, the IACtHR has shown a presumption in favour of applying human rights norms against non-human rights norms when all other factors are equal.

The precautionary principle, in turn, is a (controversial) principle in international environmental law that aims to prevent harm to the environment before it happens rather than addressing it after the fact.[25] This principle encourages caution in decision-making when there is a potential risk of environmental harm and places the burden of proof on ensuring environmental safety. In essence, the precautionary principle prioritises the application of norms that provide greater protection to the environment from harm over those norms that provide less protection or do not protect the environment at all. The European Commission (2000) has acknowledged that the principle is integrated into the high level of protection chosen by the European Union, and the European Court of Justice has applied it in specific cases.[26] However, both the World Trade Organisation Appellate Body in *EC-*

[23] For a general discussion of the *pro persona* principle, see (Lixinski 2019).
[24] For example, *Barreto Leiva v Venezuela* (Merits, Reparations, and Costs) [2009] IACtHR Reports 1, para. 122; *Case of Gomes Lund et al. ('Guerrilha do Araguaia') v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) [2010] IACtHR Reports 1, para. 178; *Mendoza et al. v Argentina* (Preliminary Objections, Merits and Reparations) [2013], IACtHR Reports 1, para. 165.
[25] For an overview of the precautionary principle, see (Schröder 2014).
[26] See, for example, *United Kingdom v Commission (Case C-180/96)* [1998] ECR I-2265 and *Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri (Case C-236/01)* [2003] ECR I-8105.

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Hormones[27] and the ICJ in *Gabčíkovo-Nagymaros*[28] have expressed doubts about whether the precautionary principle has truly evolved into a norm in international environmental protection, declining to assert that it could override applicable norms in these cases.

We can quickly solve the conflict between N1 and N2 by using the *lex specialis* principle, but it is possible to face a scenario where different principles provide reasons pleading for opposite conclusions. Let us consider an example mentioned by the ILC in its second fragmentation report (2006a, para. 273; Marcos 2023, 70 f.) where we face two norms concerning the lawfulness of commercialising some genetically modified microorganisms. One norm, let us call it N3, stems from the 2000's Cartagena Protocol on Biosafety. N3 permits the commercialisation of this microorganism. The second norm, let us call it N4, stems from 1972's Biological Weapons Convention. N4 prohibits trading this microorganism because it is considered a biological weapon. N3 and N4 are conflicting as they are both applicable to this case, but if applied, they would lead to incompatible legal consequences: trading this microorganism would be permitted under N3 and prohibited under N4.

The conflict between N3 and N4 is complicated because the two different principles providing opposing reasons for prioritising these norms. The *lex posterior* principle prioritises N3 over N4 because the Cartagena Protocol from the 2000s is more recent than the Biological Weapons Convention from 1972. However, the *lex specialis* principle prioritises N4 over N3 because it is more specific in scope, dealing only with microorganisms that can be considered biological weapons, while N3 deals with all microorganisms. As a result, there are two reasons for the application of N3 and N4 (their applicability to this case, reasons R4 and R5, respectively) and two reasons for their prioritisation: one in favour of N3 over N4 (R6 given by *lex*

[27] *EC-Measures Concerning Meat and Meat Products (EC-Hormones)* [1998], Appellate Body Report (16 January 1998), WT/DS26/AB/R and WT/DS48/AB/R.
[28] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Reports 7.

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posterior, prioritising R4 over R5) and another in favour of N4 over N3 (R7 given by *lex specialis*, prioritising R5 over R4).

Although this scenario is more complex than the previous one, the reason-based scheme developed in this paper can still help us resolve the conflict between N3 and N4. We need a meta-conflict-resolving principle, that is, a conflict-resolving principle that operates on the level of other principles.[29] Let us consider the *generalia specialibus non derogant* principle, which states that the general norm does not detract from the specific one (Pauwelyn 2003, 405). This principle was referred to in the *Beagle Channel* case[30] and can be interpreted as supporting a reason R8 that the reasons given by *lex specialis* outweigh those given by *lex posterior*. This provides a "third-order reason" (or a "meta-meta-reason"). R8 is a reason the second-order reason provided by *lex specialis* (R7) outweighs the second-order reason provided by *lex posterior* (R6). Assuming there are no more reasons to consider, R8 allows us to conclude that R7 outweighs R6, and so, R5 outweighs R4. Consequently, N4 outweighs N3, and N4 applies, while N3 does not. In conclusion, states would be prohibited from trading that microorganism.

A framework of such conflict-resolving principles and meta-conflict-resolving principles can help guide legal reasoning and norm application in international law. Notice that despite the complexity of dealing with the conflict between N3 and N4, the microsystem composed of these two norms, alongside the conflict-resolving principles of *lex specialis* and *lex posterior*, and the meta-conflict resolving principle of *generalia specialibus non derogant*, is still legally consistent. Regardless of the conflict between N4 and N3, we could still make sense of their microsystem. With the potential for continued fragmentation and functional differentiation (explained in section 2), we should not expect international law to become a supranational homogeneous legal system any time soon. Instead, if we aim to develop an

[29] In previous work, I have referred to these principles as "adages" or "meta-meta-rules" that provide for "meta-meta-reasons." See (Marcos 2023, 73)
[30] *Dispute between Argentina and Chile Concerning the Beagle Channel* [1977], 21 Reports of International Arbitral Awards 53, para. 39.

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effective globalised legal order that provides a minimum level of consistency in interpreting legal obligations and cooperation between states, we should work towards establishing a framework of principles and meta-principles to help resolve normative conflicts.

This framework would not provide predefined solutions to every possible conflict of norms within the international law macrosystem. Instead, it would offer determinative principles and meta-principles to help legal actors understand international law. This framework would aid them in reaching conclusions on norm application in cases of rule conflicts, particularly when different principles provide reasons pleading for contradictory conclusions. In theory, we could face scenarios where meta-principles themselves also support contradictory conclusions. In such cases, we would need even more abstract "meta-meta-principles," potentially leading to an infinite regress. However, in practice, our balancing of reasons would likely end at the meta-principle level, as international law would run out of relevant norms for us to consider. Thus, this framework could serve as a foundational structure for legal reasoning and argumentation, equipping lawyers with the tools to discuss relevant reasons, weigh their importance, and construct a consistent interpretation of international law.

5. Final Remarks

In this paper, I have argued for the importance of establishing a set of conflict-resolving principles (and meta-conflict-resolving principles) to enhance the consistency of international law. These principles provide legal actors with values and standards in the form of first-, second- or even "third-" order reasons relevant for resolving norm conflicts in international law. By establishing an overarching framework of such principles that provide priority relationships among international legal norms, legal actors could reach more evident conclusions on norm application. As a basis for legal reasoning and argumentation, this framework would equip lawyers with the

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necessary tools to evaluate pertinent reasons and construct a consistent understanding of international law. In conclusion, this framework of principles can assist international law in fulfilling its function as *the* legal system for our globalised world.

In future research, it would be valuable to apply the reason-based scheme developed in this paper to current discussions on exclusionary reasons (Moreso 2022) and the role of rebutting and undercutting defeaters (Moreso 2020). Additionally, it would be important to further explore the topic of general principles in light of current discussions on the existence of a "second category" of general principles of international law. These second-category principles may be formed within the international legal system as opposed to those derived from national legal systems (ILC, 2023, 1). It would also be interesting to consider the existence of specific second-category principles, like the principle of freedom of maritime navigation, as "principles that are not of a general character" and how these principles interplay with current discussions on military exercises and manoeuvres in geopolitically sensitive regions of the oceans (Askary 2023; Marcos and Mello Filho 2023).

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