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## Populism and freedom of expression, irreconcilable differences

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# POPULISM AND FREEDOM OF EXPRESSION, IRRECONCILABLE DIFFERENCES

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## Introduction

Freedom of expression in a broad sense is sometimes described as a *cluster right*<sup>1</sup> comprising a wide range of communicative freedoms, such as freedom of opinion, press, broadcasting media, audio-visual programming, telecommunications, social networks, journalists' rights, artistic license, academic freedom and edition of books and films<sup>2</sup>. With such a comprehensive reach, freedom of expression is a cornerstone of free, open, plural and democratic societies. It is understandable, therefore, that all political, religious and ideological groups will want to have access to the media so that they can disseminate their ideas and

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<sup>1</sup> Thomson, Judith Jarvis, *The Realm of Rights*, Cambridge: Harvard University Press, 1990, 55f.

<sup>2</sup> Benjamin, Stuart M, 'Transmitting, editing, and communicating: determining what "the freedom of speech" encompasses', in: *Duke Law Journal*, 60 (8), 2011, 1673f.

thus influence the course of life in society. This is a legitimate aspiration that a free and democratic constitutional order must recognise and safeguard.

Democratic constitutions often contain provisions intended to ensure freedom of expression for various sectors of society, a reasonable degree of equal communication opportunities and access to the media. However, for political, ideological or religious groups with a more identitarian, centralised and authoritarian vocation, freedom of speech is represented as an annoying obstacle to be removed as soon as possible, an instrument of interference of foreign political and economic interests and, in some cases, a factor in promoting relativism, indifferentism and cultural and moral decay. In fact, what is, in many cases, intended is the removal of scrutiny, transparency and exposure that a wide freedom of expression and information provides. It is for these reasons that paying attention to the importance of freedom of expression in a democratic society and to the challenges that it has been facing with the development of populist movement is necessary. This is what we attempt in this article, fully aware the reader understands that reality is far more complex than what we can demonstrate in these few pages.

## **Content and Purposes Freedom of Expression**

Freedom of speech as we know it today began to assert itself in Western Europe and the United States primarily as a by-product of the Protestant Reformation, the Enlightenment and liberal revolutions.<sup>3</sup> This doesn't mean that prior to that there was no freedom of expression at all or that there are no more grounds for its limitation subsequently. But it

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<sup>3</sup> Zippelius, Reinhold, 'Die Entstehung des demokratischen Rechtsstaates aus dem Geiste der Aufklärung', in: *Juristen Zeitung* (23), 1999, 1126f; Bullinger, Martin, 'Multimediale Kommunikation in Wirtschaft und Gesellschaft', in: *Zeitschrift für Urheber- und Medienrecht* 40, 1996, 750f.

is in the aftermath of the Second World War and the Holocaust that freedom of expression became strongly rooted in contemporary constitutionalism, as a conscious and deliberate reaction against national socialist, fascist and communist authoritarianism. It was enshrined in the Universal Declaration of Human Rights and the European Convention on Human Rights, and it also achieved consecration in the democratic constitutions of European states and in the Charter of Fundamental Rights of the European Union. Since then, there has been a symbiotic link and mutual strengthening between freedom of expression and democracy. An open society is a *free marketplace of ideas*<sup>4</sup> built upon principles of individual autonomy and decentralisation of authority. Freedom of speech 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.'<sup>5</sup>

This does not mean that freedom of expression should be protected without restrictions. Even the most ardent defenders of this right recognise that it does not protect those who, without reason, shout "Fire!" in a crowded theatre.<sup>6</sup> The current problems related to the

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<sup>4</sup> *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Oliver Wendell Holmes, dissenting opinion); Kerr, Robert, 'From Holmes to Zuckerberg: Keeping Marketplace-of-Ideas Theory Viable in the Age of Algorithms', in: *Communication Law and Policy* 24 (4), 2019, 477f.; Blasi, Vicent, 'Holmes and the marketplace of ideas', in: *The Supreme Court Review*, 2004, 1f.

<sup>5</sup> ECHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A No. 24, §49

<sup>6</sup> This point was famously made by Oliver Wendell Holmes, in *Schenck v. United States*, 249 U.S. 47 (1919), 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. (...) The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger

protection of personal and private data, the regulation of violent TV programs or videogames, pornography, or the fight against hate speech, the creation of alternative facts, the spread of conspiracy theories or fake news, just to give a few examples, show that there are still strong reasons to restrict freedom of expression, even in a free and democratic society.<sup>7</sup> The national courts and the European Court of Human Rights in Strasbourg have a key role to play in weighing up freedom of expression with other rights and interests that are legally protected in the event of a collision between them. There may be scope for intervention by the Court of Justice of the European Union, in Luxembourg, with regard to freedom of expression in the event of a violation of the Charter of Fundamental Rights by the European Union or by a Member State acting under European Union law.

Freedom of expression serves several functions. First of all, it allows for the expression of individual subjectivity, allowing people to manifest their authentic, genuine feelings, thoughts and opinions.<sup>8</sup> In this sense, it pays tribute to the dignity and moral, emotional and rational autonomy of human beings, as unique producers of meaning. Without this possibility, individuals could not be themselves, know themselves or make themselves known to others. Human interaction would be incomplete and imperfect.

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that they will bring about the substantive evils that Congress has a right to prevent.’ Larson, Carlton F.W., ‘Shouting “Fire” in a Theater’: The Life and Times of Constitutional Law’s Most Enduring Analogy, in: *William & Mary Bill Rights Journal* 24 (1), 2015, 181f.

<sup>7</sup> Strong, S.I., ‘Alternative facts and the post-truth society: meeting the challenge’, in: *University of Pennsylvania Law Review Online* 165 (1), 2017, 137f.

<sup>8</sup> Murchison, Brian C., ‘Speech and the Self-Realization Value’, in: *Harvard Civil Rights-Civil Liberties Law Review* 33 (2), 1998, 443f.

Another important function of freedom of expression is the search for truth and knowledge.<sup>9</sup> Despised by Pilate in his cynicism, who doubted its existence, truth has recently been called into question by some so-called postmodern thinking, saying (albeit in a self-refuting way) that there is no such thing as absolute truth but only social constructs and linguistic conventions.<sup>10</sup> But truth remains important in politics, law, economics, society, religion, science, education, sport, or, as we have recently seen, in guaranteeing global public health.<sup>11</sup> Jesus's words "You will know the truth and the truth will set you free"<sup>12</sup> remain entirely correct and pertinent in our day and age. Freedom of expression must protect the intellectual, cognitive, and methodical tools that enable individuals and communities to seek and know the truth. Basically, freedom of expression protects the possibility that all propositions will be tested through confrontation with contrary propositions, in a kind of permanent and open discursive process of *disputatio* or 'cross-examination'. Deliberate lies, alternative facts, and fake news are not particularly welcome in the sphere of public discourse.<sup>13</sup>

Democracy and the rule of law require freedom of expression and information. Citizens need to know and understand the problems facing the political community so that they can choose the political programs

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<sup>9</sup> Schauer, Frederick, "Free speech, the search for truth, and the problem of collective knowledge", in: *SMU Law Review* 70 (2), 2017, 231f

<sup>10</sup> Dennett, Daniel C., "Postmodernism and truth", in: Daniel Dahlstrom (ed.), *The Proceedings of the Twentieth World Congress of Philosophy, vol. 8*, OH: Philosophy Documentation Center, 2000, 93f.; MacKinnon, Catherine A., "Points against postmodernism", in: *Chicago-Kent Law Review* 75 (3), 2000, 687f.

<sup>11</sup> Larsen, Allison Orr, "Constitutional Law on an Age of Alternative Facts", in: *New York University Law Review* 93(2), 2018, 175f.

<sup>12</sup> John 8: 32.

<sup>13</sup> Timmer, Joel, "Fighting falsity: fake news, Facebook, and the First Amendment", in: *Cardozo Arts & Entertainment Law Journal* 35 (3), 2017, 669f.

and the people who can best guarantee their resolution. Citizenship is only feasible when it is possible to know the real functioning of public institutions and the social and economic effects of their conduct. Freedom of expression allows the necessary scrutiny of public office holders, the assessment of public resource management practices, and the detection and repression of the pathologies of power, such as illegality of the conduct of public authorities, abuse of power, incompetence, inefficiency, clientelism or corruption. Democracy and the rule of law depend on the possibility of citizens to participate, directly or through their elected representatives, in the discussion, negotiation and deliberation on matters relevant to the whole political community.

Elections are legitimate only insofar as citizens are free to form, express and revise their opinions on the most varied themes and to express those opinions in universal, free, equal, direct, anonymous, and periodic elections. For that, it is necessary for them to be exposed to different perspectives. In the words of the US Supreme Court, “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”.<sup>14</sup> Many social problems, such as hunger, poverty, corruption or economic, financial or health crises can be avoided if wide freedom of expression is guaranteed, which is why the protection of whistle-blowers is essential. Democracy requires a permanent critical commitment that only a broad form of freedom of expression and a polycentric media structure can guarantee. And this requires a regulatory framework, at national, supranational and international levels, that ensures the diversity of perspectives, the freedom and independence of journalists, the protection of investigative journalism, the protection of the confidentiality of information sources, the autonomy and confidentiality of the newsroom, public debate on all political, economic and social

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<sup>14</sup> *Associated Press v. U. S.*, 326 U.S. 1, 20 (1945).

issues of public interest and the transparency of media ownership up to the level of the beneficial owner.<sup>15</sup>

Freedom of expression is important for society in general. In all areas of our personal and political life, it is vital to hear various opinions. The Bible says that ‘For lack of guidance a nation falls, but victory is won through many advisers.’<sup>16</sup> Freedom of expression combats systemic pressures towards conformity and protects the diversity of the gene pool of ideas. In this way, freedom of expression allows knowledge and learning, the emergence of new ideas, the refutation and abandonment of old ideas, and the peaceful transformation of society. Freedom of speech rests on the notion, as history teaches us, that things are not always as they seem: what appears true is not always true, just as what seems false is indeed not always false. In this sense, freedom of expression is based on a positive valuation of diversity and pluralism, and on the acceptance of dialectical tension. It underlines the importance of ensuring protection from dissident and innovative views, because this depends on the existence of more possibilities and alternatives for society and more freedom of choice for individuals. Thus, freedom of expression prevents normative stagnation and gregarious conformism, favouring mutual knowledge, inter-comprehension and approximation between antagonistic social groups. It also protects the possibility of agreeing to disagree, until a new fact or idea restarts the debate.

## **Then Along Comes Populism**

The main objectives of populism's media strategy are to use communication and propaganda to manipulate public opinion, influence

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<sup>15</sup> Recommendation CM/Rec (2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies).

<sup>16</sup> Proverbs 11:14.

electoral processes, destabilise democratic systems and promote liberal and anti-democratic ideologies with a democratic appearance.<sup>17</sup> There may be also a geo-strategic dimension of the struggle for power between States, and of dispute for the hegemony in the world. Populists seek to take advantage of the various deficits in the fields of democratic participation, civic and political education and media culture. They know that many citizens are uninformed and have no interest in the core issues that underpin the democratic rule of law. In some cases, populists use pathologies installed in the democratic system (e.g. corruption, incompetence, instrumentalisation of public causes for private purposes, crisis of confidence in democracy) to present themselves as undisputed saviours. They resort to polarising and extremist discourse, dividing the world into friends and foe, which may be particularly desirable to some media outlets more interested in entertainment and audiences than in promoting democratic and inclusive debate around topics of general interest.<sup>18</sup>

Populist politicians do not hesitate to resort to insults, threats, fallacies and falsehoods to achieve their goals, all the while attempting to silence critical voices, identifying and stigmatising individual journalists who dare to ask uncomfortable questions, and presenting some mainstream media outlets as obstacles to executive action or even as enemies of the people.<sup>19</sup> In some cases, they actively promote the

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<sup>17</sup> Gaughan, Anthony J., “Illiberal democracy: the toxic mix of fake news, hyperpolarization, and partisan election administration”, in: *Duke Journal of Constitutional Law & Public Policy* 12 (3), 2017, 57f.

<sup>18</sup> Hundley, Annie C, “Fake news and the First Amendment: how false political speech kills the marketplace of ideas”, in: *Tulane Law Review* 92 (2), 2017, 497f.

<sup>19</sup> Day, Terri R./ Weatherby, Danielle, ‘Shackled Speech: How President Trump’s Treatment of the Press and the Citizen-Critic Undermines the Central Meaning of the First Amendment’, in: *Lewis & Clark Law Review* 23 (1), 2018,

production and dissemination of fake news or take advantage of those who engage in this activity. Politicians who, in a narcissistic way, want to present themselves as representatives of the totality of the people, in demagogic and identitarian terms, will try to make sure that all critical discourse is labelled as seditious and unpatriotic. They will try to maximise the communicative opportunities currently available to them. Both Donald Trump and the Brexiteers procured the services of Cambridge Analytica, a British company which utilises Facebook users' personal information data, harvested without their consent, to help build psychological profiles in view of targeting them with Trump and Brexit political campaigns. From the beginning of his Presidency, Trump used Twitter to spread his many short, incisive, and manipulative messages. The falsehoods were such that the Twitter company went so far as to insert a fact-checking warning into those messages.<sup>20</sup> Trump threatened to retaliate.<sup>21</sup>

In the United Kingdom, Boris Johnson's team 'is keen to ensure that they control the premier's message on digital media, replicating successes of the Tory election campaign'.<sup>22</sup> What's more, 'in side-lining the mainstream media, the British leader is following a pattern set by populists around the world'.<sup>23</sup> In Brazil, President Bolsonaro's son was investigated on suspicion of being a leader of the group that creates and

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311f; Rusomanno, Joseph, "Falsehood and Fallacies": Brandeis, Free Speech and Trumpism', in: *Communication Law and Policy* 22 (1), 2017, 155f.

<sup>20</sup> 'Twitter tags Trump tweet with fact-checking warning', BBC News, May 27 2020 <https://www.bbc.com/news/technology-52815552> (accessed 27 May 2020)

<sup>21</sup> Trump threatens to shut down social media companies', BBC News, 27 May 2020, <https://www.bbc.com/news/technology-52821304> (accessed 28 May 2020).

<sup>22</sup> Ross, Tiss, 'Boris Johnson Copies Trump in War on U.K.'s Mainstream Media', Bloomberg, 11 Feb. 2020 <https://www.bloomberg.com/news/articles/2020-02-11/boris-johnson-copies-trump-in-war-on-u-k-s-mainstream-media> (accessed 27 May 2020).

<sup>23</sup> Ross, *op. cit.*

disseminates fake news to intimidate and threaten judges and other public authorities on the internet.<sup>24</sup> Some of the owners of media outlets (e.g. tabloid press and talk radio) are actively involved in promoting populism, since they know that they may benefit from the regulatory initiatives of populist leaders, especially if they shut down or severely weaken the competition. When Recep Tayyip Erdogan made significant efforts to extend his control over the Turkish media, he shut down many media outlets, captured public media, and made sure that private media would be controlled by his political friends. Some point out that many newspapers in Turkey have identical headlines.<sup>25</sup> This populist drift has resulted in more hatred, more division, more radicalisation, more racism, and more xenophobia. The journalists' mission has become increasingly treacherous.

Available time and space do not allow for the further development of this point, but it is already possible to understand that the dangers to human rights, democracy and the rule of law are evident.

## **What Should Christians Do About It?**

Populism should be fought against by exposing falsehood and fallacies with more speech, with a strong emphasis on 'education, civic awareness and confronting the danger of an inert people'.<sup>26</sup> This is where the church can and should play an important role. The church, in

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<sup>24</sup> 'Polícia identifica filho de Bolsonaro como líder de esquema de "fake news"', *Diário de Notícias*, 25-4-2020, <https://www.dn.pt/mundo/policia-identifica-filho-de-bolsonaro-como-lider-de-esquema-de-fake-news-12117873.html> (accessed 27 May 2020).

<sup>25</sup> 'Turkish government's biased media pool helps opposition', *Ahval*, Mar 28 2019 09:38 Gmt+3 Last Updated On: Mar 30 2019 10:55 <https://ahvalnews.com/turkey-local-elections/turkish-governments-biased-media-pool-helps-opposition> (accessed 27 May 2020).

<sup>26</sup> Rusomanno, *op. cit.*, 155f.

its Catholic, Orthodox, Protestant and Evangelical manifestations, can make an important contribution in this context, placing itself alongside the different functions of freedom of expression. To do this, the church must be aware that it cannot present itself as an unassailable example in this matter. If it is true that the church is the result of intense theological, hermeneutical, moral, and political debate over two millennia, focusing on the truth of the first and last questions of existence, it is also true that this debate has often generated animosities, antagonisms, divisions and conflicts.

It is an indisputable fact that permanent theological discussion has allowed the removal of ideas considered unorthodox to stabilise creeds, canons, doctrines and dogmas. But it also generated *odium theologicum* and the stigmatisation and persecution of so-called heretics, apostates, schismatics and infidels. This debate has not always obeyed the rules of Christian fraternity by telling the truth in love, being often dominated by the spirit of animosity, division and faction. Many Christians paid the price of expressing their opinions with their freedom and their lives. The Church must be aware that for too long it has sought to rely on arguments of formal authority and to silence debate and dissent on various grounds, and under various pretexts.

Still, despite its structural vulnerabilities, the Church can still play important cards in a democratic society. Based on the absolute *Logos*, it has an existential and irrepressible commitment to truth and knowledge. Its conviction that human beings are rational, moral and communicative beings, having been created in the image of God, underlies an uncompromising respect for the inherent dignity and uniqueness of each person. Likewise, the Church's realistic view of the fallen and corrupted nature of human beings can make it a relentless ally in the fight against falsehood, manipulation, demagoguery, corruption and evil. On the other hand, being inherently plural and diverse, even within the large existing confessional families, and thanks to its experience resulting

from a history of pain and suffering, the Church can show the world that there is no viable alternative to the permanent, peaceful and respectful exchange of information and ideas, through civilised and uncoerced dialogue. The mutual knowledge thus generated can allow for the peaceful coexistence of different points of view, or, who knows, may enable the approximation of formerly distant and incompatible positions and the healing of old wounds.

With this awareness and attitude, the church must strive for the integrity of the sphere of public discourse and the promotion of media literacy among its members, facilitating the respectful exchange of ideas between individuals with different opinions. The Church must unite in the struggle for the right to the truth regarding the politically and socially relevant facts, underlining the importance of truth in the formation of public opinion and political will, defending freedom in the dissemination of true facts on the exercise of power by its holders, and upholding the right to listen to different perspectives and alternatives before making a decision. Christians must be active in the defence of the truth in all spheres of life and denounce those who make a political career by disseminating alternative facts and fake news. Christians must stand alongside freedom and the transparency of the media, investigative journalism, and a regulatory framework that protects the channels of true information and promotes the repression and accountability of agents and platforms that disseminate falsehoods.

## **Conclusion**

Democracy and populism are substantially and structurally incompatible. Democracy needs integrity and truth. Populism builds on lies and deception. Christians must be on the side of truth because it is a requirement of human dignity, equality and justice. Truth liberates. The Church must be part of the solution and not part of the problem. It can and must play an important pedagogical role in preparing Christians for

active, responsible and critical citizenship inspired by their faith commitments. For them, freedom of expression must serve the search for truth and knowledge and the democratic self-government of the people in an atmosphere of integrity and fraternity. The Church, by definition, can never indulge a post-truth society