



Critical Reflection on Hate Speech in a Criminal Perspective by Nuno Brandão

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Summary

This article seeks to explore and contextualize Nuno Brandão's contribution to the debate on hate speech from a criminal perspective, considering his text "Hate Speech in Penal Perspective" by Nuno Brandão published in 2021. Starting from a critical review of his main arguments, we intend to reflect on possible directions for public policies and legal interventions in this area. In conclusion, Nuno Brandão's text offers a rich and multifaceted analysis of hate speech from a criminal perspective, highlighting the complexities and dilemmas inherent to its criminalization. His critical reflection invites us to think deeply about how best to protect vulnerable individuals and groups without compromising the fundamental values of a democratic society.

Key words:Hate Speech. Criminalization. Nuno Brandão.

Abstract

This article aims to explore and contextualize Nuno Brandão's contribution to the discourse on hate speech from a penal perspective, considering his work "Hate Speech from a Penal Perspective" published in 2021. Through a critical review of his main arguments, the goal is to reflect on potential directions for public policies and legal interventions in this area. In conclusion, Nuno Brandão's text offers a rich and multifaceted analysis of hate speech from a criminal perspective, highlighting the complexities and dilemmas inherent in its criminalization. His critical reflection invites us to deeply consider the best way to protect individuals and vulnerable groups without compromising the fundamental values of a democratic society.

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Introduction

The phenomenon of hate speech has increasingly emerged as a central concern in pluralistic and democratic societies. The dissemination of messages that incite discrimination, violence and prejudice against vulnerable groups has raised urgent questions about the limits of freedom of expression and the legal mechanisms to deal with such demonstrations. In this context, the work of jurist and professor Nuno Brandão emerges as a crucial reference for critical and in-depth reflection on hate speech, especially in the criminal sphere.

The text "Hate Speech in a Criminal Perspective" by Nuno Brandão published in 2021 presents an in-depth and critical analysis of the complexity and challenges of dealing with hate speech within the criminal sphere. Through a detailed examination, Brandão (2021) explores the difficulties of definition and the implications of criminalizing this type of speech, considering the social, legal and ethical repercussions. In this critical reflection, we seek to deepen some of the points raised by Brandão, highlighting the main issues and evaluating their implications.

This article seeks to explore and contextualize Nuno Brandão's contribution to the debate on hate speech from a criminal perspective. Starting from a critical review of its main arguments, we intend to - reflect on possible directions for public policies and legal interventions in this area. By examining Brandão's analyses, we will highlight his contributions to understanding the phenomenon of hate speech and the nuances of his approach to the effectiveness, risks, and broader implications of criminalization.

Through this critical reflection, we seek to enrich the academic and practical dialogue on how to deal with deal fairly and effectively with hate speech in contemporary democratic societies.

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Ambiguity and Definition of Hate Speech

Brandão (2021) begins his text by highlighting the ambiguity inherent in the concept of hate speech, which makes its precise definition difficult and, consequently, the creation of clear limits for its criminalization. This lack of definition can lead to subjective interpretations and variations in the application of the law, compromising predictability and legal certainty. Ambiguity can also be exploited by authoritarian governments

to silence opponents, as pointed out by the author, becoming a tool of repression instead of protection.

Nuno Brandão (2021) conceptualizes hate speech as a form of expression that targets or may target certain groups or individuals based on protected characteristics, such as race, religion, sexual orientation, gender identity, among others. He highlights that hate speech can take different forms, from direct manifestations of hostility and violence to more subtle speeches that perpetuate stereotypes and prejudices.

This range of manifestations makes defining and identifying hate speech a challenge, as it is not always easy to distinguish between legitimate opinions and expressions that incite hatred and discrimination. The ambiguity inherent in the concept of hate speech is one of the main points of discussion in Brandão's text, which highlights the need for a judicious and contextualized approach to dealing with this complex issue.

Brandão (2021) highlights that hate speech transcends geographic and cultural borders, often fueled by political, economic and social trends that promote exclusion and polarization. It examines how different countries have responded to this phenomenon, highlighting different legal and policy approaches adopted at national and international levels.

For example, in Germany and other European countries, specific laws have been implemented that criminalize hate speech, imposing criminal sanctions on those who promote or disseminate it. These laws often clearly define what constitutes hate speech and provide proportionate punishments for violators. In Canada and Australia, approaches more based on self-regulation and promoting public awareness and education about the harms of hate speech have been adopted. This includes implementing awareness campaigns, educational programs and policies to promote diversity and inclusion to preventively combat hate speech.

The United States, for its part, has adopted a combination of legislative, political and social measures to deal with hate speech. This could include creating specialized units within police forces to investigate and monitor incidents of hate speech, as well as cooperating with civil society organizations and international institutions to share information and best practices.

However, even among countries that have specific laws against hate speech, as mentioned previously, there are common challenges related to effectively enforcing these laws, protecting freedom of expression, and ensuring that measures taken do not unduly restrict the rights individual. Therefore, finding the appropriate balance between protecting against hate speech and safeguarding fundamental freedoms remains a challenge for many nations.

Freedom of Expression vs. Protection against Discrimination

One of the central points of the debate is the tension between freedom of expression and the need to protect individuals and groups against discriminatory speech. Brandão (2021) argues that, although it is legitimate to prohibit speeches that incite hatred and violence, criminalization should be treated as a measure of last resort (*ultima ratio*) in criminal law. Freedom of expression is a fundamental right in democratic societies, and any restrictions must be carefully considered to avoid the erosion of civil rights.

Freedom of information is directly related to the search, access, reception and dissemination of ideas or information, regardless of the means used (and regardless of censorship), and each person must be responsible for possible excesses they commit (Silva, 2019). However, on several occasions it is possible to identify a certain confusion of the term "freedom of information" with the terms "freedom of the press" and "social communication".

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This is likely to occur due to the complexity of clearly defining the difference between "value judgment and statement of fact" (Machado, 2002). The idea of considering the right to information with autonomy and independence compared to freedom of expression is, in fact, progress for society. And when referring to the right to information, it covers the right to inform, to be informed and to be informed.

For Ferrari (2000), if democracy is closely related to the ideas of freedom and equality in the enjoyment of rights and opportunities, it is clear that free information is also its essential foundation. In other words, it must be understood that "information" is not just "the act of informing", as can be found in the dictionary, it is a primordial part of the process of developing knowledge, opinions and, thus, the individual's own personality: the part that acts through the subject's interaction with the world

external. "The lack of information blocks the development of personality, making it asphyxiated."

Furthermore, unilateral information, coming from a single source, even if quantitatively rich and qualitatively sophisticated, directs the personality towards pre-established channels, objectively limiting the individual's opportunity for choice and critical capacity, thus harming their participation in democratic processes. The relationship between democracy and information is, therefore, biunivocal, of co-essentiality, in the sense that one cannot exist without the other and the concept of one encompasses the concept of the other (Ferrari, 2000). For Checker (2011), although there are numerous foundations that support freedom of expression, it is possible to divide them into two parts:

- a) the instrumental line, whereby such right is a means to achieve an important end, such as the Democratic Rule of Law, stability, social peace or truth and b) the autonomous or substantial line, according to which freedom of expression is important in itself, as it contributes to individual personal fulfillment and is linked to the person's own dignity (Chequer, 2011, p. 17).

The freedom to inform can be said to coincide, in a certain way, with the freedom to express thoughts, which happens through writing, words or any other means of dissemination. On the other hand, the freedom to be informed is related to the diligent aspect of the collective, which aims to keep individuals and society as a whole increasingly informed, so that they are aware of what is happening, being able to exercise consciously their rights and understand public freedoms (Silva, 2019).

Being free to disclose information to others, and to access the necessary means to obtain this information, are elements that contribute to shaping what is understood as the right to inform. It is at this point that individual people position themselves as true news transmitters (Matos, 2011).

On the other hand, the right to information can be understood as the independent and autonomous way that a person has when seeking to acquire information from the media (Matos, 2011). Such freedom allows people to search for the origin of the data that is transmitted, with the restriction of this right being true democratic nonsense, which would generate unmeasurable harm for society as a whole (Farias, 2004).

One also has the right to be informed, which concerns the possibility of being constantly aware of information. It is related to what they call the receiver's rights in the communicative process. The importance of this right is due to the important role of the media, in providing news, which gives citizens the possibility of being aware of what is happening in the most varied areas of the public sector, thus being able to take a position on matters of great importance. In short, the right to inform consists of the ability to communicate information to others without hindrance. The right to information consists of the right to obtain information without hindrance.

Furthermore, it is important to highlight the relevance, especially in contemporary times, of information pluralism. This, in its political bias, is of paramount importance and relevance for a society that is based on modern democracy. It is through it that the most diverse opinions and positions are recognized and, therefore, much more than protecting an individual's right, it guarantees the public point of view (Rebelo, 1998). It is the plurality of information that allows the individuals who make up a society to have an increasingly active and participatory voice, with the aim of protecting their rights and ensuring that the nation moves towards progress.

This plurality translates into the right to publicly disseminate content through the most abundant means of dissemination that exist, and is also capable of promoting a subjective right for any individual, before the Public Power (Farias, 2004). By focusing on a de facto conceptual formulation of the freedom in question, it can be said that this term leads to a perception of an alternative, combined with the aspect of autonomy. In other words, it can be understood as follows: the individual is free to put into practice and make explicit the things that interest him, with the exception of being limited by the rights of others,

that cannot be harmed, and must also pay attention to what is prohibited by law.

Brandão's (2021) analysis of the role of technology companies in repressing hate speech is particularly relevant. He points out that these companies, which operate far-reaching platforms, assume a quasi-jurisdictional role when regulating online content, which could result in a "privatization" of censorship. This practice raises concerns about transparency, accountability and uniformity in the application of freedom of expression standards, as well as possible abuses of power.

Another point raised by Brandão (2021) is the difficulty of reconciling the criminalization of speech of hatred with the principle of legality, which requires clarity and precision in legal definitions. The vast and variable nature of hate speech requires flexible criminal offenses, but this flexibility can result in dangerous vagueness, allowing for arbitrary prosecutions and unfair persecution. In 2019, Law 13,834 of 2019 was enacted, which amends the Brazilian Electoral Code, which includes a penalty for slanderous reporting for electoral purposes, as follows:

art. 326-A: 326-A: Give rise to the initiation of a police investigation, judicial process, administrative investigation, civil inquiry or administrative improbity action, attributing to someone the commission of a crime or infraction of which they are known to be innocent, with electoral purpose: Penalty - imprisonment, from 2 (two) to 8 (eight) years, and fine. § 1 The penalty is increased by a sixth if the agent uses anonymity or an assumed name. § 2 The penalty is reduced by half if the charge is for committing a misdemeanor. § 3 Anyone who, demonstrably aware of the innocence of the accused and for electoral purposes, discloses or propagates, by any means or form, the act or fact that was falsely attributed to him or her (BRASIL, 2019, p. 1) will incur the same penalties as this article.

And on December 18, 2020, Law no. 14,110, which amended article 339 of the Decree-Law n. 2,848/1940 (Penal Code), which now reads as follows:

Art. 339. Give rise to the initiation of a police investigation, criminal investigative procedure, judicial proceeding, administrative disciplinary proceeding, civil inquiry or administrative improbity action against someone, imputing them to be a crime, ethical-disciplinary infraction or improbable act that he knows he is innocent [...].

The slanderous denunciation contained in art. 339 of the Penal Code or art. 326-A of the Electoral Code, any person who attributes to someone the commission of a crime, infraction or unlawful act of which they know they are innocent will be subject to being penalized. The legislator's objective was to create a brake mechanism on the spread of untruths (*fake news*), initially in the electoral sphere and subsequently inserted into the Penal Code. Having made this brief digression regarding proportionality, we can return to the theme of this work, which consists of clarifying the fact that the so-called "Fake News" was not "criminalized" with the overturning of the Executive's veto by the National Congress.

To truly criminalize "Fake News" it would be necessary to have a rule that would incriminate the dissemination of any type of false news, even in a strictly electoral context. Well, that's not what happened. § 3. Now in force, it only incriminates the conduct of someone who, upon being aware that someone else has committed a slanderous accusation, proceeds to propagate or publicize the same accusation for which he or she is aware that it is unfounded.

Now, it is not possible for the author of this conduct to act, for example, autonomously. He needs, first, that someone else has perpetrated a slanderous denunciation. Then, knowing this and the falseness of the imputation, he starts to publish it anyway for electoral purposes. This is, at most, a very particular and linked kind of "fake new". The conduct is linked, as it cannot exist independently of the main offense described in the "caput" of article 326 - A of the Electoral Code.

Therefore, when someone, whether through the "mainstream media", whether on social networks or in any other way disseminates simply false and/or offensive news against others, with or without electoral intent, it will never fall within article 326 - A, § 3rd, of the Electoral Code, which is reduced to a very specific situation and, as already said, linked or conditioned. It is not possible to offend people with impunity, much less spread untruths about them in large-scale media, social networks or in any other way imaginable, even under the supposed mantle of freedom of expression. But for that there are crimes of slander,

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Defamation and Injury, provided for in both the Penal Code and the Electoral Code. In the civil area, there is Right of Reply (Law 13.188/15 c/c article 5º., V, CF) and compensation for material and/or moral damage (article 186 c/c 927, of the Civil Code).

It is counterproductive, because it makes it appear that until then the dissemination of fake news or even Offenses against people, with or without electoral purposes, by the mainstream media or not, were permitted conduct in Brazil, without criminal restraint, perhaps only civil and constitutional. In short, there is only criminal liability in the propagation or dissemination of a slanderous accusation, for electoral purposes and with the author being aware of the falseness of the accusation. Not even the propagation or dissemination of slanderous accusations provided for in the Penal Code has a legal provision.

As already seen, the case must be resolved in the civil area and with the use of criminal offenses against honor, except, in a single, very specific case, now provided for in the Electoral Code. Furthermore, in the case of propagating or disseminating the Electoral Slanderous Complaint, it will be necessary to prove the specific intent of the agent, both in the sense of having an electoral purpose, and in terms of being absolutely certain that the imputation made is false (direct intent).

Neither this type of crime nor others that can be considered, such as crimes against honor, will be considered if the action takes place with "*animus jocand'*" (in a humorous or visible joking tone) or even with the "*animus informand'*" or "*narrand'*" (i.e., just reporting a fact that has occurred), such as when a newspaper or any other person simply reports that someone is responding to a criminal case, for example, and that person really is, regardless of whether they are, in the end, acquitted or convicted, whether or not she was the victim of a slanderous accusation.

Manifestations of hatred and intolerance directed at minority groups, motivated by ethnic, religious, gender, sexual orientation or physical or mental disability prejudices, are not limited to constitutional aspects, generally resolved through weighing of interests or proportionality criteria. The core of this problem is criminal in nature, either because it directly involves crimes of verbal action, or because they are often responded to with coercive criminal penalties from the State, which do not repair or administratively suspend an ongoing harmful process (Zilio, 2017).

The cases mentioned include the Ellwanger case, analyzed by the STF in HC 82.424/RS, where the author of an anti-Semitic book was convicted of a crime of racism; the case involving federal deputy Jair Bolsonaro (PSC-RJ), prosecuted for incitement to rape and insult, according to Inquiry 3932 and Petition 5243; and the case related to a computer game in Paraná, in which slaves were whipped, raising discussions about the practice of the crime of racism, registered under the MPPR Investigative Procedure – Pieces of Information n. 0029644-06.2015.8.16.003 (Zilio, 2017). These cases highlight the need to address not only the traditional aspects of freedom of expression, but also fundamental criminal issues, such as prosecution, legal interests and the role of criminal punishment, when dealing with hate speech-related crimes.

The truth is that there are already sufficient instruments in our legal system to curb the abuse of freedom of expression, and the misuse of an open concept such as "Fake News", normally dependent on the most variable interpretations, is quite harmful to the configuration of a Democratic State of Law and Criminal Law that obeys minimum principles limiting an authoritarian tendency. We face increasing interference with freedom of expression, particularly through questionable actions by social media platforms themselves.

Indiscriminate blocking and censorship, often without clear justification to the user, have become frequent due to the fluid and subjective nature of the concepts of "Fake News" and "hate speech". These definitions are susceptible to confusion between expressions of opinion and statements of fact, creating significant obstacles in distinguishing between what is a simple opinion about something and a factual statement about the same issue.

This ambiguity has led to a number of challenges, including the difficulty in differentiating between opinions protected by freedom of expression and speech that legitimately incites violence or discrimination. As a result, we see a scenario where punitive measures can be applied arbitrarily, undermining the democratic principles of freedom of expression and promoting an environment of self-censorship for fear of retaliation. In this context, state interference, with the eventual creation of criminal offenses, is extremely dangerous for the health of democracy.

Nuno Brandão (2021) addresses the issue of the effectiveness and risks of criminalizing hate speech in his text. He argues that while criminalization can be an important tool for combating extreme manifestations of hate speech, it also presents a number of challenges and risks.

Brandão (2021) notes that criminalizing hate speech can have a deterrent effect and send a clear message that this type of behavior will not be tolerated by society. However, he highlights that the effectiveness of criminalization depends on the legal system's ability to adequately identify and punish cases of hate speech, which is not always an easy task. Furthermore, it raises concerns about the risks associated with the criminalization of hate speech, including the possibility of restricting freedom of expression and the potential for it to become a tool of political repression. He argues that it is important to strike a balance between protecting vulnerable groups against hate speech and preserving freedom of expression and pluralism of opinions.

In summary, Brandão (2021) recognizes the importance of criminalizing hate speech as part of a broader effort to promote equality and combat discrimination, but highlights the need to



of careful and balanced approaches that take into account the potential negative impacts of criminalization.

Final considerations

Although Brandão recognizes the legitimacy of banning speech that incites discrimination and violence, he highlights the importance of a balanced and judicious approach. Criminal intervention must be carefully calibrated to avoid the aforementioned risks, and must be accompanied by other measures, such as education and promotion of a culture of respect and tolerance.

In conclusion, Nuno Brandão's text offers a rich and multifaceted analysis of hate speech from a criminal perspective, highlighting the complexities and dilemmas inherent to its criminalization. His critical reflection invites us to think deeply about how best to protect vulnerable individuals and groups without compromising the fundamental values of a democratic society.

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