
Political Correctness and the Law

Barbara Sgorbati

Bar Association of Piacenza

ORCID 0000-0001-6177-5756

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ABSTRACT

This paper aims at calling attention to some of the ways in which “political correctness” can impact the legal field, from relationships in the workplace to language guidelines, from teaching in law school to the evolution of legal definitions, suggesting further space for study and research.

KEYWORDS

political correctness; workplace; language; law school, legal definitions

Introduction

“At any given moment there is an orthodoxy, a body of ideas which is assumed that all right-thinking people will accept without question. It is not exactly forbidden to say this, that or the other, but it is ‘not done’ to say it, just as in mid-Victorian times it was ‘not done’ to mention trousers in the presence of a lady”, George Orwell once wrote, in what he meant to be a preface to “Animal Farm” (Popova 2013): each and every era, of course, has its own “political correctness”, its own sensitive topics, its own forbidden words.

The phrase “political correctness”, in fact, first appeared in Marxist-Leninist vocabulary following the Russian Revolution of 1917; in the 1930-40s, it referred to the adherence to the teaching of one’s political party. It then came to be used (in the 1970-80s and 1990s) – mostly by conservatives – to refer to (and criticize) some left-wing issues and teaching methods (Roper 2020).

Some commentators, nowadays, feel there is an “overdose” of political correctness, transforming our society into an overly sensitive one, where people are afraid to voice their opinions (Marques 2009), while others believe that the lamented “dictatorship of political correctness” is in fact a myth (Dupuis-Deri 2001; Poltier 2006).

Some authors (Moller 2016) recognize the legitimate ends at which “political correctness” is aimed, but argue that we should pay greater attention to the possible conflict with other values we hold dear; others highlight the fact that, when we penalise offensive speech, we have to determine not only what is offensive, but also who decides what is offensive, and that these boundaries are likely to be determined by the beliefs and values of those in power (Reynolds 2009).

Weber (2016, 113-114) suggests forgoing the expression “politically correct” and using “culturally respectful/acceptable”, instead.

Whatever our opinion on these matters might be, it is undeniable that we are seeing a surge of attention in how we speak and what we say, the kind of words we use, the things “it won’t do” to say.

This increased attention is of great importance in journalism and the media in general; it is also extremely significant in the legal field: words shape the way we debate social issues, which will influence the direction our legislation follows in the future.

Even more than that, laws are – in fact – essentially *made of* words: using one word or the other can completely change the rules that shape our society, and the personal fate of given individuals at crucial times in their existence. The legal implications of language, and especially of “politically correct” language and mentality, are therefore immense.

How do we balance the right of employees to be protected from discrimination with the right of other workers to freely express their opinions and beliefs?

How do we keep legal definitions up-to-date with the latest progress in inclusive language?

How do we approach difficult topics in law school while guaranteeing that our students feel safe?

How do we make sure minorities are protected from violence while keeping clarity in legal definitions, especially when it comes to criminal law?

This paper will attempt to briefly touch on just a few of these topics, with no pretence of giving definite solutions, in the sole hope of suggesting further study and reflection.

1. Political correctness in the workplace

Anti-discrimination laws' main concern is the relationship between employer and employees; but an increasingly diverse society means that co-workers share an ever greater portion of their daily lives with people with different backgrounds and sensitivities, which can lead to conflict.

American courts (ICAEW 2019) recently ruled that opposition to political correctness is not a "belief" protected by anti-discrimination law, as an employee's "beliefs" include only religious or philosophical beliefs (or lack thereof) that govern or affect how the employee lives their life.

But while "opposition to political correctness" is not a belief in itself, it may happen that a person's beliefs come to clash with what is perceived to be "politically correct" in the work environment.

It might also happen that employees' ways of speaking and behaving offend their colleagues and make them feel less welcome in the workplace.

How do we deal with such situations?

Some experts (Ely et al. 2006) believe that "political correctness" with its "unspoken canons of propriety" can be a "double-edged sword" and pose barriers to constructive and engaged relationships in the work environment. Employees belonging to minorities can often be reluctant to raise concerns about inappropriate behaviour they experience, worrying about being seen as too sensitive or over-complaining; if harsh sanctions are established, they can also keep silent for fear of "causing trouble" for co-workers. (How many of us, even if hurt or offended, would actually want our insensitive colleague to lose their job and income?). Other employees can feel exposed to excessive scrutiny and judged too harshly for what they perceive as well-meaning remarks or attitudes. All of this can lead to a tense and non-productive workplace, while open communication could improve relationship and work performance.

Some legal theorists (Simpson 2018) even argue that the regulation of offence can actually increase the incidence of offence, by nurturing and reinforcing offence-taking sensibilities, and others (writing on the subject of workplace sexual harassment) have highlighted how excessively broadening the range of prohibited speech "would not only undermine the central guarantee of free speech, but it also would fail to serve the avowed purpose of advancing gender equality" (Strossen 1992), undermining equal and full participation of certain groups (such as female workers) by depicting them as needing special protection.

To successfully strike a balance between different principles and goals, a thing to keep in mind is intent.

A recent opinion piece (Yoffe 2020) has remarked that, when it comes to hate crime and discrimination, we increasingly tend to overlook whether or not the person *meant* to be hurtful: the hurt is real and must be punished, regardless of intent. But this attitude (aside from being incompatible with a criminal justice system worthy of the name) can lead to a double feeling of injustice: one person feels unjustly offended or discriminated against, while the other feels unjustly disciplined as they did not mean anything bad by their words or gestures.

Of course, it can be said that a workplace (or university) code of conduct does not need to meet the strict requirements of *mens rea* that need to be met in criminal law, but – when compiling hate speech regulations – much can be done to make rules narrower or broader and more or less dependent on intent.

Altman (1993), for example, compares different University regulations in the 1990s, highlighting that while some (e.g. Stanford) sanctioned the speakers who “intended” to “insult or stigmatize” others on the basis of race, gender or sexual orientation by using “epithets or terms that ... convey ‘visceral hate or contempt’”, others (e.g. the University of Connecticut) included “inconsiderate jokes” and “stereotyping the experiences, background, and skills of individuals”.

Are we sure all of these behaviours can be considered equally reprehensible?

Or can we say that the aim of hate speech regulations should not be to “prohibit speech that has undesirable psychological effects on individuals” (Altman 1993, 315), but only to reprimand the use of language and behaviour that deliberately degrades others?

For simply inconsiderate/ignorant behaviour, communication and education could arguably be more effective both in recognising and repairing offence and, in the long run, in building a more inclusive and respectful work environment.

2. Political correctness and the evolution of language

From a linguistics point of view, “political correctness” aims to eliminate exclusion of various identity groups through language evolution: language shapes our reality and how we think about it, as well as revealing and pro-

moting our biases; therefore, it is argued, sexist and racist language promotes sexism and racism (Roper 2020).

With that in mind, attempts have been made in many countries to achieve more inclusive language in administrative and legal documents, with special attention paid to sexist patterns of speech.

In some languages (such as Spanish and Italian), for example, the masculine is the non-marked gender (e.g. in Italian the male plural “bambini” includes both male and female children, while the female plural “bambine” means only little girls) and this gives less visibility to women, especially when speaking of categories such as scientists, teachers or politicians. To avoid this – now undesired – “sexist” effect, the suggestion (see Maldonado García 2015) has been to use splits (“profesores y profesoras”), neutral expressions (“personas”, “profesionales”, “ser humano”) or feminine words for professions (“ministra”). English-speaking countries, too, are abandoning words like “policeman” in favour of more gender-neutral solutions, such as “police officer”.

These guidelines and suggestions can be implemented easily enough in legislation: since most laws apply to individuals regardless of sex or gender identity, legal language often uses neutral expressions already (the use of terms such as “individual”, “person”, “human being” is already common in texts such as international conventions or national laws) and, when it doesn’t, it can be adapted without too much effort.

How effective is it to police every-day language through legislation or official guidelines, though?

As some scholars have noted (Maldonado García 2015; Agudo 2012), what works for the press, the administration, in public speeches or official documents, often doesn’t work for the spoken language, which doesn’t accept artificial changes and needs to be practical more than it likes to be inclusive.

The question, here, is: should we promote change through our use of language, or wait for language evolution to naturally follow social change?

When forbidding certain language (aside from the obvious racist, ableist or sexist slurs) in legislation or codes of conduct, where do we draw the line? Can a worker or a student be sanctioned for using a common expression, not yet felt as “wrong” in his social circle, but already frowned upon by the inclusivity advisers of the corporation or the faculty?

“Politically correct” language can sometimes seem excessively careful, and too-quickly changing to be actually used by people in everyday life

(Crisafulli 2004, 40-41): “*person with special needs*”, which was considered not long ago an acceptable substitute for the more problematic “*handicapped*” (which had earlier replaced words now universally seen as offensive, such as “*cripple*”), is already being abandoned in favour of “*person with disabilities*”; some disabled rights activists, however, reject it, preferring to refer to themselves as “*disabled*”.

In half a century, black people in America “have traveled almost full circle in the name of PC: from ‘colored people’, to ‘negroes’ to ‘blacks’ to ‘Afro-Americans’ to ‘African-Americans’ and, most currently, to people of color” (Lasson 1996, 693).

How can a person make sure they do not offend? When designing guidelines and legislation (especially those that provide heavy consequences for transgressions) we should remember that most people have no specific knowledge of linguistic changes. Aside from obvious slurs and insults, we should keep intent in mind and be open to educate more than to punish, trying to foster a universally respectful attitude more than to sanction specific violations.

This becomes even more critical when the (actual or perceived) offence does not pertain to “material” characteristics, such as colour or disability, but to more “immaterial” ones, like cultural identity or religious beliefs.

Some scholars, such as Letsas (2012), dispute the claim – endorsed by the European Court of Human Rights and many courts in Europe – that there is a right not to be insulted in one’s religious beliefs “by the public expression of the views of others: we should distinguish between ‘the claim that something is the right thing to do’” (not insulting others’ beliefs) from “the claim that others have a right that you do it, in the sense that they have a right that collective force be used against you if you don’t”. And if there is no such right, there is no need to “balance” it with the right to freedom of expression.

Others, however, argue that western commentators’ objections to blasphemy laws are “fuelled by a failure to understand the significance for the religiously devout of their religious beliefs as their primary point of self-identification” (Cox 2014), thus making offence to religious beliefs not much different from offence based on race or gender.

Interestingly, Edgar (2006) argues that, far from having a *right not to be offended*, we all have a *right to be offended*: that is, a right to have our ideas and beliefs challenged, for “defence of free speech is not primarily a matter of the rights of the speaker but the rights of the listener”.

3. Political correctness in law school

Freedom of expression is even more vital in universities than it is in workplaces: for this reason, it has been said that speech regulation should be less restrictive on campus than in other settings (Altman 1993, 308).

In the USA, academic freedom (even though there is some debate on what exactly it is: is it a right in itself? and if so, who possesses it: institutions, professors or students? and against whom can it be invoked?) seems closely tied with the more general right to free speech, as protected by the First Amendment (Smolla 2018). The Italian Constitution, like many other European fundamental laws, explicitly protects both free expression of thought (art. 21) and freedom of art and sciences, which may be freely taught (art. 33).

The practical application of these principles, however, is not always easy, and researchers have spoken of “today’s growing confusion of what is permissible in academia”.

Let’s consider this example: recently, there has been some debate in Italy over a text adopted by a University professor for her bioethics course: the text, written by a well-known bioethics scholar (who happened to also be a Cardinal in the Catholic Church), expressed some views about procreation and homosexuality that were considered unacceptable by some commentators (Bernadini de Pace 2020). However, not only had the text in question been influential in the bioethics debate for years, but also the University was privately owned by a religious congregation and the views expressed by the author were consistent with the Catholic magisterium, so that criticism led to worries about religious freedom (Vitale 2020). The question here is: can a professor, or an academic institution, teach according to a certain philosophical, ethical or religious worldview, even if their opinions are considered outdated and even offensive by some? Would the answer be the same, if the ideas of - say - a more “progressive” professor clashed with those of a more “conservative” institution or public, or vice-versa?

In the last few years, we have often seen universities and other institutions revoke invitations and engagements with speakers after protests over controversial statements: even such a reputed philosopher as Peter Singer has had speaking events cancelled over some of his stances on disability (Zhou 2020).

It seems, as “de-platforming” becomes more common, that some ideas are not even worthy of discussion any more: this, however, doesn’t seem very productive for academic progress, and especially so in law school.

Studying law inevitably means dealing with harsh realities and difficult topics, charged with ethical significance and cultural influences. Students' backgrounds can lead them to find some topics (for example, domestic or sexual violence) hard to discuss; students and professors can hold different political and religious beliefs that might make discussions particularly heated.

What happens, then, when professors are intolerant of political opinions different from their own, or students feel they cannot share their ideas with their classmates? When certain topics or viewpoints become too politically or emotionally charged to be discussed in the classroom?

Students grow wary of expressing their opinions (Bahls 1991), and professors are afraid to ask their student to explore certain topics; some may even suggest that subjects such as rape law should not be taught because of their potential to cause distress (Gersen 2014).

Many instructors (especially male professors), in fact, feel anxious about teaching rape law: students who have been victims of rape might find it traumatic to discuss the topic; discussions could become emotionally charged; issues of identity and gender are involved [there may be the feeling that "All women are potential victims. All men are potential defendants" (Tomkovicz 2012, 498)].

Lasson reports that "in 1993, a group of female law students threatened Professor Alan Dershowitz with formal charges of sexual harassment for having created a hostile atmosphere during two days of classroom discussion about men falsely accused of rape. According to Dershowitz, many professors avoid teaching classes where issues of race, gender, or sexual preference might arise" (1996, 705).

Professors either do not teach these topics at all, or they teach these classes in a very different manner from the way they normally teach criminal law subjects (Denbow 2014).

This is especially problematic for law students, because "the law school classroom is one place where future legal professionals, many of whom will have substantial power, form their ideas" (Denbow 2014, 29; Bahls 1991).

Law students (more than students in other fields of education) need to understand how different values and political objectives influence the law; they need to be able to test their own views, as well as to discuss difficult topics and learn how to defend even (one could say especially) unpopular opinions.

During their career, a lawyer or a judge might well be called upon to deal with cases of discrimination, violence, rape: how will they be able to do that, if we do not train them properly?

Though some scholars - perhaps rightly - believe it is problematic to urge students (for example, in moot court exercises) to appear to support positions that they find morally repugnant (Tushnet 1992), we should nevertheless encourage students to discuss them, as, once they become legal professionals, they might well be called to defend or judge (and, perhaps, even acquit) someone who is accused of the worst crimes.

As others have remarked, “hard cases make better classes” (Estrich 1992): shielding students from controversial topics can seriously undermine their training.

4. Political correctness and legal definitions

Let’s say we have established that some word or expression is perceived to be offensive and hurtful for some people and shouldn’t be used in polite conversation. Could it still be used in legal definitions? Should we update our legislation every few years in order to avoid any possible slight?

For example, some guidelines for the medical field,¹ in relation to transgender patients, suggest avoiding expressions such as “biologically male/female”, “born a man/woman”, or “sex reassignment surgery”. Can a legislator keep using these phrases, if needed for clarity?

Most legislation uses the word “mother” to refer to the parent giving birth, and takes it for granted that it is a woman²: as we now know that transgender men and non-binary people born with female reproductive systems can and sometimes do get pregnant, should we update our legal definitions?

Do we need to stop referring to “women’s reproductive rights” or “the woman’s choice” (often merely an euphemism for “abortion”) in our policies and legislations?

Laws, by their own nature, need to be general and abstract; they also need to be as clear and precise as possible. This is especially true for criminal law.

¹ See the list of *Terms and Phrases to Avoid* compiled by Alberta Health Services (n.d) from the *Guide To Creating Safe and Welcoming Places for Sexual & Gender Diverse (LGBTQ*) People* (2016).

² Italian L. n. 194/1978 on social protection for maternity and voluntary termination of pregnancy, for example, always refers to the pregnant person as “the woman” (https://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=1978-05-22&atto.codiceRedazionale=078U0194&tipoSerie=serie_generale&tipoVigenza=originario).

Exact determination of the offence (closely tied with the principle of legality) is, in fact, one of the basic principles of Italian criminal law:³ nobody can be punished for a criminal offence unless the legislator has told them - beforehand and in clear and precise terms - what they are *not* allowed to do.

When it comes to issues that relate to our main topic (“political correctness”), as we have just seen, terms tend not to be so clear; but while it is natural for language to shift and evolve quickly in society, academia and the media, law (especially criminal law) needs much more stability and certainty.

Just to give one example: Italy is currently updating its legislation against “hate crime” with a bill⁴ that will extend to gender identity and sexual orientation the same protection given to race, ethnicity and religion. It is, of course, a laudable effort, but some legal experts disagree with the wording of the bill.⁵

In fact, considering that many actions that would constitute criminal offences under the proposed new Italian legislation are already punishable in themselves (without consideration of their motives), and that a homophobic motive could already be considered an aggravating circumstance under the provision that allows for an increased sentence when a crime is committed for futile or abject reasons, it has been argued that the choice to specifically criminalize homophobic discriminations would lead (as, to some extent, already happened with provisions targeting racial discriminations) to a mostly “symbolic” piece of legislation, aimed more at cultural change than at actually persecuting well determined, socially offensive behaviours (Riccardi 2013).

Moreover, while it seems easy enough to determine what constitutes an “act of discrimination” - it is less clear what could be seen as “instigating” discrimination (which would be penalized as well in the proposed bill): it has been argued that disagreement on topics such as same-sex marriage (in accordance, for example, to one’s religious beliefs) or access to IVF and surrogacy for same-sex couples could be seen as “discrimination” and lead to a criminal charge (Tettamanti 2020). Even though, at present, surrogacy is illegal in Italy for all kind of couples, the opinion that it should remain so is at times labelled in the public debate as “homophobic”, as it deprives gay couples of a pathway to parenthood that is seen by many as the only option,

³ For a quick overview, see Canestrini (2012).

⁴ The text of the bill is available at <https://www.camera.it/leg18/126?tab=&leg=18&idDocumento=0569>

⁵ For a brief review of the bill and some of its critics, see Di Leo (2020).

as (with few exceptions) only married heterosexual couples can legally adopt in the country.

In fact, worry over the legal protection of children born via surrogacy abroad (and who are legally considered to be children of the biological parent only) has sparked much debate and a strong suggestion from the Constitutional Court towards some sort of recognition: but the practice itself remains illegal.⁶

Could an opinion in accordance to current legislation constitute a criminal offence? It does not seem reasonable, but the terms used are open and vague enough not to completely rule out the possibility.

If “discrimination” becomes a criminal offence (and not, perhaps, simply ground for a tort claim) what constitutes “discrimination” needs to be defined with the utmost precision, and cannot be left to the fluctuating evolution of language guidelines and “politically correct” opinions.

Moller (2016, 8) reports how some Canadian jurisdictions have made it a human rights violation to make any “vexatious comment” known to be “unwelcome by the individual or class” on grounds that include “political belief”: a definition he agrees ‘one might reasonably fear as absurdly overboard’.

Not only that, but criminal offences require - alongside a well-defined behaviour or event causally depending on the offender’s action or inaction - a subjective element: does discrimination or otherwise offensive behaviour need to be wilful/intentional/malicious, or can someone be accused of it on the grounds of negligence?

“Hate crimes” (a term so closely tied to US history and legal system that even translating it into other languages becomes problematic) seem to require a strong psychological participation (legally expressed as *mens rea*), not really compatible with - say - a careless choice of words or the expression of a controversial opinion.

One could argue that some opinions are, indeed, criminal in themselves: there are, after all, laws that punish Holocaust denial.

Such provisions have spread in Europe since the early 1990s and, having been upheld by the courts (which have stated that denying the reality of clearly established historical facts such as the Holocaust constitutes a serious threat to public order and is incompatible with democracy and human rights), now tend to broaden their scope to other genocides and crimes against humanity,

⁶ See Press Office of the Italian Constitutional Court (2021).

potentially expanding “criminal restrictions on freedom of expression in an area – the formation and preservation of a shared memory on a country’s founding past events – that is critical to the contemporaneous demands of identity building” (Lobba 2015).

The *threat to public peace* is also one of the criteria used by the European Court of Human Rights (alongside others such as humorous/satirical intent, context, explicitness of the message, target, reasonable avoidability of exposure to the content, etc.) when regulating matters of freedom of expression and controversial humour (Godioli 2020). By “threat to public peace”, the Court means whether the material is susceptible to increasing sentiments of contempt, rejection, and hate towards a certain religious or ethnic group; however, in the public debate, it is often remarked that some material could create a negative (perhaps even violent) reaction *from* the targeted group (e.g. a religious minority).

That is a much more questionable criteria to follow: it is one thing to ban speech or art because it could encourage violence *against* those who are targeted, it is another thing for some group or the other to *use* the threat of violence in order to be protected from criticism or satire.

It is a dangerous road to go down: respect for victims and concern over inclusiveness, if not correctly balanced, can lead to excessive restrictions on the freedom of speech, research and criticism.

Criminal law, in itself, does not seem to be the right tool to teach people “how to behave” or (even more so) “what to think” in an evolving society: criminal laws (should) reflect an already agreed-upon – even if not always respected – code of behaviour (we punish murder so harshly because we all – more or less intuitively – agree it is a grave wrong) and are not suited to regulate matters in which social attitudes and values still differ and clash. Bad ideas should always be fought, primarily, with other (better) ideas.

Conclusion

Clearly this paper includes more questions than answers, as studying the impact of “political correctness” on legal matters opens vast fields of research.

One thing can be said here: the laudable aim of avoiding discrimination and fostering inclusion can hardly be pursued through prohibition alone. We cannot claim that erasing certain words from speech (if even possible)

will “magically” change the way people think; fear of harsh penalties – such as being fired from work – can lead to external compliance, but also to resentment and division, which could be counterproductive in the long run ... while time, dialogue and education seem potentially more effective.

That being said, criminal law seems a particularly ill-suited tool to foster inclusion; law school, on the other hand, is an excellent setting for discussion and improvement: provided it doesn't shy away from hard, uncomfortable topics and difficult questions.

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