

## Hate Speech in the Background of the Security Dilemma

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### A. Premises

In this paper I will analyze the relation between the limitations on freedom of speech and the increasingly intense defense of “security” intended as a psychosomatic and material condition of well-being. I will consider, in particular, the evolution of the legal limitations on the freedom of speech, moving from the apparently new dilemma of the protection of self-preservation contrasting with the guarantee of individual liberties. I will describe the transition from an internal foundation of this kind of limitation, caused by the will to destroy the potential enemies of State power, to a new form of “thought control” existing in the international construction of general paradigms of “well-thinking”, in addition to those of a “well-doing.”

The aim of this paper is to look at the present situation of the hate speech field, in light of the general protection of free speech (and specifically of radical political speech). The deep necessity to analyze the limits on such form of expression derives from the contentious relationship between racial, religious, sex, and other forms of discrimination and the attempts to curtail such discrimination by another form of discrimination which is concretized by criminalization or prohibition of hate speech. In the shadow of the security dilemma, limitations on expressions of hatred, which are exactly like past (or present) limitations on subversive political speech, could become instruments in the hands of public power to contain or repress minorities and anti-conformist values.

I will approach this topic as a matter of comparative law, looking at Italian, German and North-American experiences. In fact, *only* a comparative analysis enables an evaluation of the different models by which free speech is guaranteed, and a study of the historical changes in State attitudes towards self-preservation, described both as the traditional conservative defense and as the new individualization of universal rules for the preservation of the human being and his/her own “complex” safety.

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## B. Hate Speech: Definition and International Blame as an Answer to Discrimination

The definition of *hate speech* may certainly be found in the various international documents which characterize a very high level of protection for some values. I am referring to the values that are supposed to be intrinsically connected to the democratic attitude of the “international order” itself.

This definition can exist only because some punitive provisions were already contained within different national legal systems; these concerned a kind of behavior characterized as a manifestation of thought that is able to inculcate particularly strong, even material, effects, on the audience, and to solicit harmful reactions against other people.

Actually, the main difference between *hate speech* in its stricter sense and other forms of a “call to hatred” is that it is not the punishable expression, which is limited, but the very object of the expression that is not allowed. International hate speech differs from other ways of restricting freedom of expression because of the well-characterized aims of restriction, recognizable in some guiding values, generally regarded as inalienable.

The *International Covenant on Civil and Political Rights*, adopted in 1966, in its Art. 20(2) establishes that every kind of propaganda for national, racial or religious hatred, which constitutes incitement to discrimination, hostility, or violence must be prohibited by law. Meanwhile, it is important that the *International Convention on the Elimination of all Forms of Racial Discrimination*, adopted in 1965 (the so called Convention of New York), ratified by Italy in 1976, and in particular the provision of Art. 4, establishes that the contracting Nations must engage in criminalizing, by law, even the mere diffusion of ideas based on racial superiority or hatred, and every incitement to racial hatred.

With regard to the *International Covenant on Civil and Political Rights*, the *Human Rights Committee* declared that Art. 20(2) is consistent with Art. 19, which concerns the freedom of speech.<sup>1</sup> Moreover, the *International Convention on the Elimination of all Form of Racial Discrimination* contains no provisions establishing the freedom of speech, but it establishes that the measures adopted with regard to Art. 4 must comply with the principles of the *Universal Declaration of Human Rights*, including the free speech clause.

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<sup>1</sup> Office of the High Commissioner for Human Rights, General Comment 11: *Prohibition of propaganda for war and inciting national, racial or religious hatred*, art. 20 (29 July 1983), available at <http://www.ohchr.org>.

The *Universal Declaration of Human Rights* has been interpreted to allow national systems to ban hateful expressions, although the Declaration does not explicitly refer to instigation or propaganda for the diffusion of hateful feelings.

The legal framework for the banning of expressions of hate can be found - and it is clearly characterized on the level of interpretation of international law<sup>2</sup> - in: Art. 1, "All human beings are born free and equal in dignity and rights;" Art. 2, which establishes that the equal entitlement to the rights and freedoms set forth in the Declaration is "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;" and Art. 7, specifically regarding the aim of contrasting discrimination and all forms of incitement to it, in which "All are equal before the law and are entitled without any discrimination to equal protection of the law," and "All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Art. 29 establishes that some limitations on the protected rights can be considered necessary and lawful in order to guarantee "recognition and respect for the rights and freedoms of others." This represents a "taster" for the *abuse of right* (Art. 30) clause. The *abuse of right* clause is among the pillars, at least formally, of every democracy protecting its background of values.<sup>3</sup>

Both the Statute of the *International Criminal Tribunal for the former Yugoslavia* (ICTY) (Resolution of the UN Security Council 827(1993), May 25 1993), and the Statute of the *International Criminal Tribunal for Rwanda* (ICTR) (Resolution of the UN Security Council 955(1994), November 8 1994, Art. 2), verbatim use the provisions contained in Arts. 2 and 3 of the *Convention on the Prevention and Punishment of the Crime of*

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<sup>2</sup> Office of the High Commissioner for Human Rights, *Incitement to Racial and Religious Hatred and the Promotion of Tolerance*; *Report of the High Commissioner for Human Rights*, § 13 (20 September 2006), available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=86](http://ap.ohchr.org/documents/dpage_e.aspx?m=86). Regarding the interpretation of international treaties, it must be remembered that the rules for interpretation are presented by the *Vienna Convention on the Law of Treaties*, art. 31-33, 115 U.N.T.S. 331 (1969).

<sup>3</sup> Also, Art. 17 of the European Convention of Human Rights and Freedoms, and Art. of the Charter of Nizza, contain some protection clauses like these, which some literature considers the true foundation of militant democracies. See S. Van Drooghenbroek & F. Tulkens, *La Constitution de la Belgique et la incitation à la haine*, in *PROCEEDINGS FROM THE CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW* (2002), available at <http://www.ddp.unipi.it>. Concerning the small role of these types of clauses, especially regarding Art. 17 of ECHR, see Cesare Pinelli, *Art. 17*, in *COMMENTARIO ALLA CONVENZIONE EUROPEA PER LA TUTELA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI* 455 (SERGIO BARTOLE, BENEDETTO CONFORTI & GIUSEPPE RAIMONDI eds., 2001); Michela Manetti, *L'incitamento all'odio razziale tra realizzazione dell'eguaglianza e difesa dello Stato*, in *STUDI IN ONORE DI GIANNI FERRARA* 116 (Giappichelli ed., 2005). ECHR case law on Art. 17 identifies well the legitimization for content-based restrictions on freedom of speech.

*Genocide*. Furthermore, the Statute of the International Criminal Court (ICC) (adopted in Rome, July 17 1998, and entered into force July 1, 2002; Art. 25) “using” the Art. 3 of the *Convention on Genocide*, establishes that the “direct and public incitement to commit genocide” is punishable.

There are also some regional sources concerning freedom of speech and its possible limitations. Art. 9(2) and Art. 10(2) of the *European Convention of Human Rights and Freedoms*<sup>4</sup> concern the limits to the rights accepted,

in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others ... and ... formalities, conditions, restrictions or penalties as are 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 *African Charter on Human and Peoples' Rights* (adopted by the Assembly of the African Union, June 27 1981)<sup>5</sup> does not contain provisions about racial and religious hatred. But it includes some limitations on the right of receiving and spreading information, and the duty to exercise one's own rights with regard to those of other people (Art. 27), within the framework constituted by the promotion of respect and tolerance (Art. 28). This kind of provision obviously could justify the banning of hate speech.

The *American Convention on Human Rights* (adopted in San José, Costa Rica, November 22 1969) in Art. 13(5)<sup>6</sup> bans *hate speech*, establishing that:

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<sup>4</sup> Available at <http://www.conventions.coe.int>

<sup>5</sup> Available at <http://www.achpr.org>

<sup>6</sup> Available at <http://www.hrcr.org>

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.

The engagement in hate speech stigmatization and punishment also seems very strong at the European level, even though quite often the normative instruments are not able to determine direct effect on the juridical and subjective situations against or in favor of which they were imagined and implemented. I refer to the *Recommendation of the Committee of Ministers of the Council of Europe*, n. 20 adopted in 1997 specifically on hate speech,<sup>7</sup> and to the preparatory work for the adoption of the *Decision on Racism and Xenophobia by the European Council*, renewed after the proposal, COM(2001)664, but not concluded, in spite of the recent effort of the European Parliament, which adopted two Resolutions on 25 June 2006, and, most recently, a last one on 21 June 2007.<sup>8</sup>

Finally, the *Decision n. 621* adopted on 29 July 2004 by OCSE, titled *Tolerance and Struggle against Racism, Xenophobia and Discrimination*, proposes that contracting States act to “establish the adoption or the enforcement, when possible, of a legislation banning discrimination and instigation to hate crimes based on race, colour, sex, language, religion, politics or other views, national or social origin, economic condition, born status or every other condition.”<sup>9</sup>

### **C. The Alternative Solutions: Believing in a Modern Free Marketplace of Ideas and the Creation of an Affirmative Intervention to Promote Factual Integration**

The punitive system mentioned above can be intended for two fundamental outlines. The first one is connected to the struggle against discrimination, in which the configuration of hate speech represents the will to stigmatize someone because of his or her “innate” characteristics, or to express a project of marginalization. The other one is deeply correlated to public protection of state self-conservation through the protection of democracy.

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<sup>7</sup> Available at <http://www.coe.int>

<sup>8</sup> Available at <http://www.consilium.europa.eu>

<sup>9</sup> Available at [http://www.oecd.org/home/0,3305,en\\_2649\\_201185\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/home/0,3305,en_2649_201185_1_1_1_1_1,00.html)

What one immediately notices is that there exists a plain difference between these two conditions for the criminalization of hate speech. The first one seems to be unquestionably “correct” because the imperative not to discriminate among human beings is now generally perceived as irreproachable. But the second one does not appear to be so simple because a democracy protecting itself from opposition, from every anti-democratic idea or “value” actually could itself become something other than a democracy.

In fact, the very essence of a democratic regime is the effective openness to every thought, even the most shocking, which is considered useful and necessary in order to guarantee the maximum of debate inside the political and institutional arena.<sup>10</sup>

The struggle against hate speech has a double attitude. A “negative” one, when public power intervenes in an “abstensionistic” manner, in order to prevent people from determining or favoring discriminatory behaviours. And a “positive” one, because public power is used to impose a characterized table of values in protecting a democracy from its enemies.

In turn, if the goal is to hinder the use of hatred messages through some other means than legal punishment, one must consider that fighting against discrimination is an inalienable mission of every democracy, but it is not the same with regard to the self-conservation of the system, which is pursued through the axiological fixation of an incontestable paradigm. So, it seems a priority to characterize why limitations of expressions (like punitive hate speech) should be avoided in combating hate speech, and how it could be possible to go beyond them without giving up the commitment to ending discrimination.

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<sup>10</sup> Moreover, this fact determines what has been called the paradox of the constitutional democracy, and the tolerance of it (in its “actively pluralistic” meaning). On the public side, it implies the restraint of democratic power inside constitutional limits. On the relational side, it leads to acknowledging exceptions to ideological freedom, based on the nature of expressed ideas. This means that only tolerant ideas could participate in the democratic debate. See NORBERTO BOBBIO, *L'età dei diritti* (Einaudi ed., 1990), who refers to John Locke to demonstrate examples of those “prudential” theses. See also MICHAEL WALZER, *ON TOLERATION* (1997), who posits that this leads to the reciprocity of tolerance, then to the refusal of it with regard to all who do not believe in the admissibility of the ideas of others. See additionally KARL POPPER, *Congetture e confutazioni* 604 (Il Mulino ed., 1985) and KARL POPPER, *La società aperta e i suoi nemici* 265 (Armando ed., 1973-2002). Karl Popper proposes to resolve the “paradox of tolerance” by the limitation of the application of tolerance only to the tolerants. This concept is discussed as absurd and described as creating an “undefended democracy” that cannot protect itself without betraying its fundamental values, in HANS KELSEN, *La democrazia* 35 (Il Mulino ed., 1981). This interesting concept of democracy, similar to “tolerance for the disorder,” is also mentioned in FRANK I. MICHELMAN, *La democrazia e il potere giudiziario. Il dilemma costituzionale e il giudice Brennan* 144 (Dedalo ed., 2004), concerning the deep formulation by Justice Brennan.

Believing in a modern *marketplace of ideas* could become an alternative solution. We should think about the Meiklejohnian imperative of freedom<sup>11</sup>, renewable in the present era through a more conscious and pragmatic evaluation of the dangers connected with limitations on speech, and contemporarily through a serious reflection about the costs and the benefits of curtailing speech in order to fight discrimination.

#### **D. The Relationship between Punitive Reactions to Hate Speech and Public Restraint for Protection**

Studying the relationship between, on the one hand, punitive reactions to hate speech and, on the other hand, public restraint for protection, requires trying to identify some of the existing models for the protection of democracy.

It seems very useful to consider a recently authoritatively designed repartition.<sup>12</sup> It imagines the presence of three models for the degree of protection of its (metaphorical) constitutional boundaries in the State legal system. These models would represent also the level of openness in a society to the threats that are able to undermine its foundations. The first model is constituted by the *protected democracy*; the second could be those democracies that introduce in their own system of repression some instances in which purely expressive conduct is punished, including content-based restrictions. The third model is the “emergency model.” It residually comprehends all the normally “disarmed” legal systems that in some particular circumstances – thought as extraordinary – tend to produce radical limitations on individual liberties.

What are the differences between the two individualized categories? Could we recognize in a teleologically protected democracy possible objective indicators? And could we distinguish this with another in which the punitive repression of

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<sup>11</sup> See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948), in which the author reiterates that the protection to the First Amendment is not equally assured to every kind of expression. It is specially assured to expressions that directly or indirectly affect the generation of public opinion, particularly expression about political and public questions. In a later article, Meiklejohn enlarged his concept of the sphere of ‘political’, determining that many additional issues affected the public interest, and were therefore worthy of absolute protection in order to guarantee a free and open public debate. A. Meiklejohn, *The First Amendment is an Absolute*, in *SUPREME COURT REVIEW* 245 (1961).

<sup>12</sup> Alfonso Di Giovine, *La protezione della democrazia tra libertà e sicurezza*, in *DEMOCRAZIE PROTETTE E PROTEZIONE DELLA DEMOCRAZIA* (Giappichelli ed., 2005) (reviving and completing a reflection developed by the same author in *ALFONSO DI GIOVINE, I CONFINI DELLA LIBERTÀ DI MANIFESTAZIONE DEL PENSIERO. LINEE DI RIFLESSIONE TEORICA E PROFILI DI DIRITTO COMPARATO COME PREMESSE A UNO STUDIO SUI REATI DI OPINIONE* (Giuffrè ed., 1988)).

certain “forms” or “contents” of dissent does not imply the coessentiality of limits with its nature?

It could be useful to guide a clarification by providing an answer concerning the relation between measures of protection and “demand of loyalty” on the citizenry - a loyalty that takes shape not only with regard to the public entity in its material sense, but with regard to its fundamental values.<sup>13</sup> Should we consider the imposition of a *duty to be faithful* - like the one posed in Art. 54 of the Italian Constitution - as a direct effect of the instauration of a kind of “protected” regime?<sup>14</sup> Or perhaps does it exist as an “added value” of loyalty - added but less intense - in comparison with protection, that allows the configuration of a complete set of non-protected systems to protect themselves?

A positive answer to this last question would probably determine that the “declination” of loyalty would become useful as a thermometer of a society’s openness, and to help the analyst to examine the “degree of protection”.

Those legal systems that do not explicate themselves as true protected democracies that feed on the provision of something like a “fiduciary relationship” are the ones interposing some precise obstacles in the free transit across democratic channels. Some of these obstacles are represented by “thought crimes.”

Once established, the (possible) presence of an autonomous whole of state organization characterized by a non-militant loyalty tie eliminates the problem if the loyalty is an indispensable - or at the very least -necessary element to the preservation of the system itself.

The answer seems to be positive if we “empirically” look at the existence of the systems that modify the scope of their openness differently in those cases when exceptional circumstances jeopardize their security or stability.

An example of this situation is provided by the United States. In this case - the absence in the federal Constitution of any imposition of loyalty does not matter - the idea aiming to deny any limitation of free speech (with “obvious” exceptions,

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<sup>13</sup> In this case, the loyalty concretizes itself actively in the civil and military defense of the *lato sensu* intended territory.

<sup>14</sup> Concerning the *duty to be faithful* and Art. 54 of the Italian Constitution, see GIORGIO LOMBARDI, *Fedeltà (diritto costituzionale)*, in ENCICLOPEDIA DEL DIRITTO 165 (Giuffrè ed., 1968), LUIGI VENTURA, *Art. 54*, in COMMENTARIO DELLA COSTITUZIONE (Zanichelli ed., 1985), LUIGI VENTURA, *La fedeltà alla Repubblica* (Giuffrè ed., 1984)..

punctually designed by the Supreme Court)<sup>15</sup> has been accompanied by a very strict judicial review on content-based restriction.<sup>16</sup> We could ask if there exists a residual *loyalty clause* that determines the beginning, in particular situations, of punishments and conditions limiting freedom of expression in the democracies that do not present provisions like Art. 54 of the Italian Constitution, nor a mechanism elaborated to construct some defensive barriers.

Even if not all the democracies are *protected*, it actually seems that in some way all democracies protect themselves,<sup>17</sup> at least exceptionally.<sup>18</sup> Then the problem concerns the instruments and the finalities of the protection, and what they should be.

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<sup>15</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (in which the Supreme Court formulates what has been defined as the “two-class theory” of the exceptions to the First Amendment). See also RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 160 (1992) (expressly excluding from First Amendment protection expressions that are not essential to the explication of every kind of idea, and that have so poor a social value as to render them absolutely insignificant with respect to the general objective of the progression towards truth, limitable on the basis of a compelling social interest). These express exclusions include obscene expressions, outrageous expressions, *fighting words* (expressions which will incite an immediate violent reaction by the receiver) and “those that by their very utterance inflict injury or tend to incite an immediate breach of the peace.”)

<sup>16</sup> Content-based restrictions are limitations of freedom of expression that are directly aimed at intervening with the thought itself. They developed, with a “roller-coaster” course, through periods of militant repression of social-communist opposition. The evolution of content-based restrictions is evidenced through federal and state legislation and Supreme Court case-law after the *Espionage Act* of 1917, through the 1950’s, in decisions like *Dennis v. United States*, 341 U.S. 494 (1951). Further restrictions have developed in the more recently in the war against terrorism. It is significant that the *public choice theory* - in the opinion of some influential authors - presents some reasons to oppose content-based restrictions. A government’s restriction on the “quantity of expression” is preferable to content-neutral limitations. In fact, the content-based restrictions limit the interval of choice, and because of this consumers with a high demand of expression (limited because of their content) cannot be exposed to the opinions that they would listen to and know. At the same time, consumers with a high demand of free opinions (the ones not restricted) can find them available. See Daniel Farber, *Free speech without romance: public choice and the First Amendment*, in 105 HARVARD LAW REVIEW 554 (1991). On the combination of *market of ideas*, *market of goods*, and the role of a public intervention in the former because of the need for regulation to produce more efficiency and equity concerning channels of communication, see MORTON J. HORWITZ, *Foreward: the Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARVARD LAW REVIEW 30 (1993); JACK M. BALKIN, *Free speech and hostile environments*, 99 COLUMBIA LAW REVIEW 2295 (1999); C.f. RONALD H. COASE, *The Economics of the First Amendment: the Market for Goods and the Market for Ideas*, 64 AMERICAN LAW AND ECONOMICS REVIEW 384 (1974), and RICHARD A. POSNER, *The Constitution as an Economic Document*, 56 GEORGE WASHINGTON LAW REVIEW 4 (1987) (stating that public intervention, negative in the field of economic relations, is more detrimental to the market of ideas).

<sup>17</sup> Gaetano Azzariti, *Libertà di manifestazione del pensiero e ordinamento democratico. Appunti*, in LIBERTÀ DI MANIFESTAZIONE DEL PENSIERO E GIURISPRUDENZA COSTITUZIONALE (Giuffrè ed., 2005).

<sup>18</sup> On the meaning of the loyalty in Art. 54 of Italian Constitution as “limited” to exceptional circumstances, see CARLO ESPOSITO, *LA LIBERTÀ DI MANIFESTAZIONE DEL PENSIERO NELL’ORDINAMENTO ITALIANO* (Giuffrè ed., 1958).

Reflecting on the comparison between the Italian, German, and North-American systems, it could be helpful to delineate a graduation of intensity of the loyalty tie that these systems try to create with their associates. This would be useful to understand if an “apparatus” of protection not contrasting with free speech could exist, and how it should be. Still some uncertainty remains, because it could be said that the only system that does not restrict expression, or expressive conduct,<sup>19</sup> is the one that is not protecting it at all. In fact, in some situations considered as causes of an emergency, the defense of public safety could be considered inseparable from the repression of fitting expressions to increase the factors determining eventual risk to the security and the integrity of the system because of their strength to advocate or persuade.

If we accept this perspective, the question would concentrate on a *deontical* level, that is, on the possible existence of democratic legal systems that definitively renounce the establishment of guarantees for their own conservation.

The analysis of the “being” is nowadays more complex. In fact, the catastrophe does not manifest itself exclusively within the national dimension, but in an eventual disequilibrium among constitutional provisions, or in the dialectic among Constitution, legislator and interpreter. It appears also from the international perspective because both freedom of expression and its limitations - based on the recall to a democratic system of values - can be found in various and numerous international documents (see in B). It seems to create an “international ideal public order,” based on principles, like equality, peace, and human dignity, which will become the preferred and essential content of the democratic system.<sup>20</sup> These principles actually construct a synthetic parameter in producing limitations on freedom of speech.

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<sup>19</sup> On the determination of expressive conduct, *ex multiis*, see LEE BOLLINGER, THE TOLERANT SOCIETY 198 (1986).

<sup>20</sup> On this new and pervading limit to free speech, ALESSANDRO PACE & MICHELA MANETTI, LA LIBERTÀ DI MANIFESTAZIONE DEL PROPRIO PENSIERO (Zanichelli ed., 2006). It is interesting to note, with regard to the “ideal public order” itself, the reflection of Alessandro Pace, who thinks that the existence of non-amendable constitutional provisions (added to provisions like Art. XII of the Transitory and Final Disposition in the Italian Constitution, determining the exclusion from democratic processes some ideas or “boxes” of ideas), *rectius*, would be relevant for the observation of the presence of an “ideal public order.” Alessandro Pace, *Ordine pubblico, ordine pubblico costituzionale, ordine pubblico secondo la Corte costituzionale*, in GIURISPRUDENZA COSTITUZIONALE 1780, note 16 (1971). C.f. Paolo Barile, *La salutare scomparsa del potere prefettizio di scioglimento delle associazioni*, in GIURISPRUDENZA COSTITUZIONALE 1252 (1967).

*I. The Relations between the Italian and the German Model: Brief Notes*

In this section, I try to map the similarities and the differences that could allow us to find a distinguishable line marking the first and the second “loyalty models” well represented by the German and the Italian systems. The fundamental elements to be considered in this evaluation are the content of ideological limitations and the “chronological” placing of speech restriction on the hypothetical distance splitting the instant of expression from the production of some material effects.

With regard to the first element, it would be useful to understand the relation between the Italian Constitution - which exceptionally considers fascism as the only ideological limit to freedom of association, and not as a limit to freedom of speech<sup>21</sup> - and the German *Grundgesetz* (GG - Basic Law/Constitution).

As regards the level of prevention and anticipation of the protection, we must look at the legal framework that could be considered as differentiating Germany from

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<sup>21</sup> Art. XII of the Transitory and Final Dispositions forbids the “reorganization, in every form, of the dissolved fascist party.” This was carried out by the “Scelba” law n. 645/1952, modified by the law n. 152/1975.

The Scelba law accomplished the extension of the ambit created by the constitutional rule, introducing two incriminating cases signed by an exclusively ideological peculiarity (on this point, see Paolo Barile & Ugo De Siervo, *Fascismo (sanzioni contro il)*, in DIGESTO DELLE DISCIPLINE PUBBLICISTICHE 137 (Utet ed., 1987) (the *apologia* of fascism and the fascist manifestations). The Constitutional Court subordinated their validity to the instrumentality with the reorganization of the fascist party (sent. n. 1/1957 and sent. n. 74/1958). But the same Court would have saved that validity by elaborating a “renewal”, at least doubtful, of the *apologia* of fascism read as an indirect instigation to the reconstitution of the fascist party. Successively, the statute n. 152/1975 - whose adoption is collocated in a particular context signed by opposite tensions also determined by neo-fascist ideological elements - introduced some modifications. They were essentially represented by the enlargement of the qualification to consider the possibility of reorganization of the fascist party to every “movement or group of people not lower to five;” by the remaking of the cases of *apologia* and fascist manifestations (the latter were enlarged to the utilization of the symbols of “Nazi organizations”); by the charge of punishments and the provision of an autonomous crime of “propaganda to the construction of a neo-fascist association, movement or group.”

The diversity between the letter of the constitutional provision and the work of legislator is evident.

Art. XII certainly posed a restriction to the freedom of association ulterior to the provision of Art. 18 of the Constitution. The expression “in every form” was imposed in order not to limit the provision to the National Fascist Party, as “immortalized” at the moment of its origin and defined through its development till its configuration as the sole party of the regime. A limitation like this would have deprived the constitutional disposition of its normative content, making it paradoxical.

However, Art. XII did not plainly imply the beginnings of a limit to the freedom of expression. In fact, the constitutional level of protection of democracy embodied in this provision did not specifically concern freedom of expression. It was the legislative implementation of the Penal Code of 1930 that introduced new “thought crimes.”

other countries, if they had not committed to certain international acts contributing to a globalization of the protection of values believed inherent to democracy.

In particular, the German Constitution establishes, at Art. 18, that “whoever abuses of freedom of expression [...] to struggle against the fundamental liberal-democratic order, departs from these fundamental rights”, with regard to the rights above mentioned - among them the right to the personal honor as an expressed limit to freedom of speech (Art. 5(2)). Art. 21(2), establishes that “parties that because of their objectives or the behavior of their adherents aim to prejudice or overturn the fundamental liberal-democratic order or to endanger the existence of the Federal Republic of Germany are unconstitutional.” At a level of ordinary legislation, the German Penal Code contains some provisions (Art. 185 and ff. and Art. 130) that partially carry into effect the Convention of New York; and partially - for example Art. 130(3), about the “simple Holocaust denial” - manifest the evidence of a choice that seems to concern the international struggle against racism and xenophobia accomplished through an ideal obligation to legitimate “good” limitations to individual speech. This choice requires looking at a particular opinion, whose connatural fearfulness *ex se* determines the duty of total removal.

It is worth having a different treatment for the expression concerning Holocaust denial, different from other forms of hate speech, i.e. forms of instigation of a kind of hate that is not anti-Semitic.

The crime of Holocaust denial is articulated, differentiated within the general case: “simple Holocaust denial” consists of the act of affirming that there was no genocide during the Third Reich and, if some Jewish were killed, it was not the number usually said and by the ways normally quoted. This terrible lie becomes “qualified” when it is supported by something like “preceptive” expressions, or by active propaganda to commit some actions, for instance the author not only denies the Holocaust but says that Jews have consciously and in bad faith elaborated historical falsifications with the aim of growing rich by blackmailing Germany; or if the perpetrator incites, consequent to the “affirmed denial”, the sharing of Nazi ideology.<sup>22</sup>

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<sup>22</sup> Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law*, 4 GERMAN LAW JOURNAL (no. 1) January 1, 2003; Alessandro Pizzorusso, *La disciplina costituzionale dell'istigazione all'odio*, in THE CONSTITUTIONAL TREATMENT OF HATE SPEECH, PROCEEDINGS FROM THE CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW (2002) available at <http://www.ddp.unipi.it>; Alessandro Pizzorusso, *Limiti alla libertà di manifestazione del pensiero derivanti da incompatibilità del pensiero espresso con principi costituzionali*, in DIRITTI, NUOVE TECNOLOGIE, TRASFORMAZIONI SOCIALI in SCRITTI IN MEMORIA DI PAOLO BARILE 651 (Cedam ed., 2003).

Also case-law excludes Holocaust denial from the protection of freedom of speech because it would lack the expressive value that a message should possess to be protected. It seems that this form of speech does not have a “dignity” sufficient to admit its “location” inside free speech, eventually subjected to the limitations differently characterized.<sup>23</sup> The reason for this is that it likely would lack “programmatically” content, and, therefore, expressive content.<sup>24</sup>

The German option is original, above all, with regard to the generalized global struggle against different forms of *hate speech*. This also because – although in reception of the guidelines coming from superior levels of protection and limitation of rights – it keeps a transparent objectivistic approach. This approach characterizes the protection of free speech: it is directed to ideas intended as more or less critical, always personal, reproduction of facts, circumstances, events or, in any case, objects addressed by thought, but it is not directed to the mere enunciations of facts, if not true.<sup>25</sup>

Then, with regard to the defense of the system from hateful and hatred expressions, the German model seems, in its origin, “methodologically” similar to the Italian one; and it is similarly “harmonized” in the setting of the correspondent cases at the point of criminalization. However there is a fundamental difference from a

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<sup>23</sup> Relevant to this is the well-known decision, Bundesverfassungsgericht, BVerfGE 90, 128 – 131 (1991), in which it was affirmed that the protection of freedom of expression does not comprehend “the denial of the truth of facts that the individual asking to protect his speech knows to be true, or that are demonstrated to be true, while concerns eventual expressions evaluating facts historically proved”. However, in a more recent case, Bundesgerichtshof, 12 Dec. 2000, Strafkammer AZ/S R 184 (2000), the German Court condemned the actions of a German citizen, promoter of an institute whose studies and researches were clearly aimed to the diffusion of ideas concerning Holocaust, because his website publicized opinions denying the existence of the Holocaust, in violation of Section 130 of the German Criminal Code. The most interesting element of the decision was that regarding the analysis of the means of communication used in the transmission of the message. The court stated that it was absolutely able to determine that such form of diffusion resulted in a high possibility that the message would be received, read or downloaded in Germany. The Court then introduced two important statements: the first referring to the total exclusion of the opinion of denial from protection established by Art. 5 GG, it means from “speech,” and the second tending to neutralize the role of space in penal law when the crime regards the horror of Holocaust. See also *Bundesgerichtshof*, 15 March 1994, no. 179/1993 e BVerfGE, 6 Sept. 2000, no. 1056/1995. On this question, see *Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred*, 2 GERMAN LAW JOURNAL (no. 8) (May 1, 2001).

<sup>24</sup> But an interpretation like this would fail to consider the Holocaust denial as symbolic speech, reading its eventual symbolic sphere in the distinction between the literal expression and the deeper meaning of the same. In this case, Holocaust denial would become necessary and always qualified, because of the programmatic nature coessential in the symbolic speech.

<sup>25</sup> Michela Manetti, *Libertà di pensiero e negazionismo*, in MICHELE AINIS, *INFORMAZIONE, POTERE E LIBERTÀ* 48 (Giappichelli ed., 2005).

“qualitative” point of view. This difference remains in the particular evaluation of an expression, and only of this kind of expression, considered the worst possibility.

Certainly this last interpretation is against the idea that the base of the prohibition of the Holocaust denial lies in the protection of the historical truth, because in this case the discrimination that would have been determined among facts it would not be justifiable, that is among the denial of different historical events. It would also not be very easy to univocally define which facts must be considered as historical truth and which must not be; and even, considering that this definition often happens - logically in the case of the recognition of historical events, generally tragic, that would have involved a lot of people - on the bases of a legislative provision, it is evident the risk of the creation of “official truths” actually recalling the ones elaborated in Orwell’s 1984.

Therefore it seems an absolutely preferable radical choice to introduce only one significant auto-justifying exception to the freedom of speech, more so than to look for a foundation for the limit of “a simple lie” in some interests, like dignity and honour, that may subsidiarily intervene.<sup>26</sup>

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<sup>26</sup> On the contrary, a much more important role of these interests in ECHR case-law can be found by looking, for instance, at some cases like the one decided on 23 September 1998, concerning the publication of an article about the marshal Pétain and the case *Chauvy and Others v. France*, on 29 June 2004. *Chauvy and Others* (64915/01), (June 29, 2004), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=France&sessionid=3028425&skin=hudoc-en>. In the first situation, in fact, the Court remarks on the absolutely fictitious nature of the publication, and on Pétain as a very positive character, but remembers that Art. 10 also protects the manner in which ideas are expressed, as well as the substance of the expressed ideas and information (see also *De Haes and Gijssels v. Belgium*, (19983/92), (Feb. 24, 1997), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Belgium&sessionid=3046369&skin=hudoc-en>.) On the premise that all other speech directed against the values under the Convention would not be allowable (the Court quotes the famous *Jersild v. Denmark*), the justification of pro-Nazi politics would not be protected under Art. 10. The Court affirms that, in spite of the silence maintained about some strong facts concerning the notorious and important involvement of Pétain, the protection of Art. 10 must be extended to this kind of expression because the claimants “simply praise a man”. *Jersild v. Denmark*, (15890/89), (Sept. 23, 1994), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Jersild%20%7C%20v.%20%7C%20Denmark&sessionid=3046369&skin=hudoc-en>. In the second similar case, the decision of the Court was the opposite because the relationship did not merely regard free speech and historical truth; rather it is triadic, including also the right to honor. Similarly, in the well-known case *Faurisson* (1996), it was said that the so called Gayssot law (the French statute that, in the Art. 24-bis, defines the crime of the contestation of the existence of Nazi misdeeds) was legitimate with regard to the provisions of the International Covenant on Civil and Political Rights because the condemnation of Faurisson, based on the real violation of rights and reputation of other individuals, did not contrast with his right to express and sustain an opinion.

We may compare the “normal loyalty model” designed by the GG, in relation to the Italian system, and, in particular, with the protection set up by the provisions of Art. 18, Art. 21 and Art. XII of the Final Dispositions, and see the difference between a system in which the extremism is immediately interpreted as a potential *vulnus*, as an enemy to control, and sometimes to eliminate, a system in which the characterization of the danger is immediate but also contingent. And it is contingent because it concerns only an identified ideology, concretely locatable in a historical phase near the moment of its recognition, as contrasting with a democratic system.

In any case, rather than reading differences among models of “loyalty,” it would be better to underline the peculiarity of a choice that could have found and could still find a positive reply in other legal systems. The reason would be the uniqueness of the Holocaust phenomenon, and the characterization of anti-Semitism as the historically most sensitive and, at the same time, more strongly resistant to every condemnation.

As already discussed, Art. XII introduces an ulterior limit to the right of association, and it takes nothing away from the proclamation of freedom of speech. Certainly this begins with legislative provisions that implemented Art. XII, and it was considered as the foundation of other provisions limiting free speech in contexts only indirectly connected with the exclusion of fascism from the political and institutional dialectic. But undeniably the general picture of the Italian system describes a banishment of fascist ideology when: *a*) “organized” to lead to the formation of a group able to re-propose the pursuing of a model (or models) that died with the birth of the Italian democratic Republic; or *b*) because expressing a thought to determine the concrete danger of the emergence of someone willing to reconstruct the banned fascist party.

In Germany the picture of an “anti-extremist” model has prevailed: the declaration of unconstitutionality applying to an anti-system political parties regards all “extreme” political movements, characterized by very different – even antithetical – ideas and objectives, but “joined” by the same subversive nature.<sup>27</sup>

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<sup>27</sup> Those which have been declared unconstitutional, requested by German Federal Government in 1951, are as follows: the *Sozialistische Reichspartei* (SPD) and the *Kommunistische Partei Deutschlands* (KPD). In 2003, the German government, together with *Bundestag* and *Bundesrat*, asked for the banning of the *Nationaldemokratische Partei Deutschlands* (NPD), a party that had evidently been inspired by Nazi ideology. This was not considered unconstitutional by the BVerfGE because the party had published some information about its composition that had been made prevalently known by German secret agents. In September of 2006, NPD had an important electoral consent in Pomerania. Moreover, the Federal Administrative Court (Urteile vom 27. November 2002 - BVerwG 6 A 1.02, 6 A 3.02, 6 A 4.02 und 6 A 9.02) has affirmed the decision (8 December 2001) of the Federal Secretariat of Internal Affairs that established the banning of the Islamic fundamentalistic association, a group that had among its

From another perspective, the evolution of the model necessary for a progressive tendency to “manage” Nazi ideology as the principal element of potential destabilization of the system - disclosed also by the utilization of the provision of Art. 21(2) of the GG - leads some interpreters to bring the German model nearer the Italian one in the definition of a “negative republicanism.” In “negative republicanism” the identification of the enemy essentially happens by the recognition in him of a specific historical and political identity, or of his psychological and/or material affinity with the authors of a past tragedy, or with the protagonists of a system against which the democracy is born.<sup>28</sup>

In any case the constitutional provisions do not seem to be negligible, nor to be the true origin of the model, that would eventually allow a revival of the starting approach in the protection of democracy.

## II. The U.S. Model: Brief Notes

The model of the United States regarding free speech regulation could be studied before and after the “new security dilemma,” represented by the growth of international Islamic terrorism. But it seems more momentous to evaluate the “normal phases” in treatment of expression because of the unsolvable doubt about the existence of democracies that are not used to protecting themselves.

In fact (see also E.) only if we do not want to analyze the relationships between exceptional circumstances and “conservation” in defending freedom (of expression), can we then think of the United States as the best representation of a totally open model in free speech guarantees.

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substantive aims the institution of a Caliphate inside the State, on the basis of the interpretation, already supported by doctrine, that the anti-extremism instruments in the *Grundgesetz* were absolutely valid to combat a group trying to undermine the democratic order because of religious and cultural more than political reasons. (See Palomar, n. 12, 2003, available at [http://www.unisi.it/ricerca/dip/dir\\_eco/palomar/012\\_2003.html#germania2](http://www.unisi.it/ricerca/dip/dir_eco/palomar/012_2003.html#germania2)).

<sup>28</sup> An interesting classification was made in Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties – Part I e Part II*, Vol. 3, No.7 GERMAN LAW Journal (2002). The author individuates a third and new model of democracy protection from its enemies and contrasting expressions, defined as the *civil society*. The model of *civil society* determines a passage from *protected democracies* (that struggle against the extremist and subversive tendencies, ideas, political movements) to *protective democracies* (that limit liberties (like freedom of speech) in order to shield minorities and generally the “very human values.”) This is a democracy that would protect the weakest individuals using, above all, the weapon of the recognition of the other as an equal subject, and intercommunication. On this last point, see also JURGEN HABERMAS, *L’INCLUSIONE DELL’ALTRO* (Feltrinelli ed., 1998).

The American legal system does not reject some kind of very strong “intolerant” protecting behaviors, also penalizing freedom of speech when the liberty is supposed to endanger what (in the specific political and institutional context) is perceived as fair security and social well-being. But some restrictions to free speech, according to the “enlightening” First Amendment, are “normally” unaccepted by the constitutional jurisprudence (engaged in the delineation of the boundaries to the fundamental constitutional freedom), differently from the other Occidental Countries.

With regard to hate speech, at the level of legislative-positive intervention, it seems significant to mention that the United States did not ratify the provisions of the *International Covenant on Civil and Political Rights*, adopted in 1966, in which (Art. 20(2)) it was established that every kind of propaganda to national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence must be prohibited by law. This choice was motivated “because of the strength of the First Amendment’s protection of freedom of speech” including the condition determining that “opinions and speech are protected categorically, without regard to content.” The US Report under the *International Covenant on Civil and Political Rights* (July 1994) clearly explains the point of America’s rejection of thought control, regardless of its content or how disgusting it might appear.<sup>29</sup> The difference between the treatment of hate speech and what concerns hate crimes is strong; supplemental criminal penalties seem to be well-allowed in the American current legal context only in the second case, when the object is a crime motivated by racial, ethnic, religious or generally xenophobic intentions.<sup>30</sup> This is also connected with the principles deriving from the equal protection clause of the XIV Amendment.<sup>31</sup>

There are many reflections of the XIV Amendment on the First Amendment free speech clause: certainly it is not possible to consider racial identity during the drafting of a law, save that it is used in order to operate (not stigmatize) legal classification or to promote positive actions.<sup>32</sup> Moreover, there seems to exist a

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<sup>29</sup> See, among others, Dominic McGoldrick & Thérèse O'Donnell, *Hate-speech laws: consistency with national and international human rights law*, in 18 *Legal Studies* 453 (1998).

<sup>30</sup> A significant example can be found in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), in which the distinction between punishing someone because of their opinions versus punishing someone for using prejudice as a motive for their behavior is confirmed. In *Wisconsin*, the law incriminated behavior, not opinions, because of the determination that crimes motivated by prejudice and hate resulted in bigger personal and social injuries than crimes committed for other reasons.

<sup>31</sup> RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 158 (1992)

<sup>32</sup> It seems quite unnecessary to refer to the Supreme Court statements in *Brown v. Board of Education*, 347 U.S. 483 (1954), where the *separate but equal* doctrine was destroyed because of its intrinsic discriminatory nature deriving directly from the message included in segregation, or to *Anderson v. Martin*, 375 U.S. 399

constitutional duty for the Government not to engage in xenophobic (actually racist above all) speech: this could be quite controversial if we pose the reflection about the particular growth of limitations on freedom of speech with regard to “public subjects,” that is, people who exercise public functions as representatives of a community. These limitations would derive from the role, and the consequent responsibilities, that “belong to” this kind of people performing the “didactic” function of speech. But contemporarily they could determine the same effects of a *psychosomatic faithfulness*: this means a prior restraint for some ideas considered intolerable in order to keep them from entering inside the democratic debate and then to succeed in obtaining some consent, most probably in the future.<sup>33</sup>

Certainly, the recognition of this last position with regard to public institutions points out the dichotomy between Government duties and private rights, highlighting individual liberty as an inalienable atom of general participation in collective life.

A classical example of the American attitude towards hate speech is recognizable in the episode of Skokie.<sup>34</sup>

Skokie is a suburb of Chicago where a large Jewish population lived, among them many survivors of the Nazi concentration camps. It was just there that the neo-Nazi group, lead by Frank Collins, sought to organize an obviously provocative “parade” during which they would have expressed, also in some symbolic ways, their political projects and ideals, by using many emblems belonging to the Third Reich tradition and “mystical baggage.”

This event arrived at the Supreme Court after some statements by the administration against the demonstration. The Supreme Court actually did not affirm the existence of a constitutional right guaranteeing the neo-Nazis to make

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(1964), in which the Supreme Court struck down a state law provision requiring indication of the race of political candidates.

<sup>33</sup> Eric Heinze, *Viewpoint absolutism and hate speech*, 69 MODERN LAW REVIEW 4 (2006), and JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* (1999) - recently commented on in Kyu H. Youm, *First Amendment law: hate speech, equality, and freedom of expression*, 51 JOURNAL OF COMMUNICATION 2 (2001) - affirm that the regulation of hate speech unavoidably concerns the content of the message. Also, Andrew Altman, *Liberalism and Campus hate speech: a philosophical examination*, 103 ETHICS 2 (1993), affirms that rules against hate speech cannot be *viewpoint-neutral*, even if they can be justified with regard to the limitation of some kind of harm for the victims. This is the most important point concerning the reflection about the relation between the I and the XIV Amendments.

<sup>34</sup> On this case, *see*, in particular, LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986).

the procession in Skokie. But it declared that Nazis have a constitutional right not to be subjected to *prior restraints* and admitted the manifestation (even from a “theoretical” point of view, because of the fact that the parade was not carried out and the group was seen as using the parade to stir up the dispute about its rights).

This fact would appear shocking if read with respect to the psychologically harmful effect of a clear expression of hate against a determinable group of people, directly connected with Nazi crimes because of their personal involvement in the Holocaust tragedy. But it is the necessary corollary of the distressing defense of racist speech, necessary in a legal system that is conscious of the intrinsic value of political speech itself in order to guarantee the maximum degree of protection to the representation of every idea.

Consenting to a content-based restriction of speech, even if the limited content is considered to hurt human dignity and the essential principles of the system, would mean to found the possibility of allowing limitations of liberty against anything in the future that could be perceived as despicable or dangerous. It is true that American abstention from a punitive invasion of hate speech actually does not prevent the US, today, from imposing particularly strict boundaries on the freedom of speech, as to other liberties. It must be underlined - however - that in this case the evident contradiction between the normal attitudes of the system and what happens with regard to emergencies can be subjected to criticism and faulted for incoherence. On the contrary, usually “protective” legal systems more “naturally” pass from an imposition of democratic values to an imposition of “majority values”, with the risk of an “heterogenesis” in the aims leading to the paradoxical transformation from victims to “affirmed prosecutor” of people having very few channels of communication and very few instruments to express “high profile” messages.<sup>35</sup>

In short we must say that, also in the US system, protection of hate speech is not an absolute.

The main example is the one referring to the *fighting words* doctrine, which the Supreme Court expressed in *Virginia v. Black* (538 U. S. 343 (2003)).

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<sup>35</sup> The “heterogenesis” in the aims could, on the one hand, criminalize people belonging to minorities and marginalized groups; on the other hand (and in the short term) it could turn the perception of the criminals in victims. See SERGIO MOCCIA, *La perenne emergenza. Tendenze autoritarie nel sistema penale* 99 (Jovene ed., 1997).

This case, the most recent one and a very important case about hate speech in the US, well describes the American attitude towards hateful symbolic conduct (rather than speech), putting the attention on the circumscribed exceptions to the free speech protection.

Barry Black was convicted because of his violation of Virginia's statute banning *cross-burning*. In particular, where it provided that:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. [...] Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

In its opinion the Court starts with the premise of the qualified nature of the protection provided by the First Amendment, and the existence of restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>36</sup>

The Supreme Court recalls the three categories of "non-speech" restrictions that are consistent with the constitution. The first one concerns those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>37</sup> That is, the *fighting words*, "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction,"<sup>38</sup> and then a *breach of peace*. The second one - more directly connected with the strict scrutiny used in the evaluation of restriction to radical expressions - implies that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>39</sup> Finally, it is consistent with the U.S. Constitution banning "true threats."<sup>40</sup> "True threats" encompass "those statements where the speaker means to

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<sup>36</sup> *Virginia v. Black*, 538 U. S. 344 (2003).

<sup>37</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>38</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>39</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*).

<sup>40</sup> See, in particular, *Watts v. United States*, 394 U.S. 705, 708 (1969) (*per curiam*), and *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992).

communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>41</sup>

The Court underlines that “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>42</sup>

In order to understand the possibilities in restriction of hate speech another relevant point concerns the relation between *content* and *non content based regulations*.<sup>43</sup> Because of this *Virginia v. Black* quotes *R.A.V. v. City of St. Paul*, which totally bans all forms of *content-based discrimination*, but suggests that some cases of *content discrimination* do not conflict with the First Amendment, in particular

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.<sup>44</sup>

Something more could be said about the nature of the restrictions, not only with regard to its content-neutrality (leading to a direct protection of safety of people and property<sup>45</sup>) but also to its *viewpoint based* character. In fact, a content-based law having as its principal aim the limit of speech because of the message that it tries to transmit, could be constitutionally admitted too. This would be on the condition that its inspiration was not found in the willingness to condemn and censor a particular and defined political thought or idea (viewpoint neutral law).<sup>46</sup> *De facto*, a distinction between viewpoint based and viewpoint neutral provisions as a

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<sup>41</sup> *Virginia v. Black*, 538 U. S. 343, 344 (2003). See Michela Manetti, *L'incitamento all'odio razziale tra realizzazione dell'eguaglianza e difesa dello Stato*, in SCRITTI IN ONORE DI GIANNI FERRARA, and Giuseppe Franco Ferrari, *La giurisprudenza della Corte Suprema americana nel biennio 2002-2003*, in GIURISPRUDENZA COSTITUZIONALE (2003).

<sup>42</sup> *Virginia v. Black*, 538 U.S. at 344.

<sup>43</sup> George R. Stone, *Content regulation and the First amendment*, 25 WILLIAM AND MARY LAW REVIEW 189 (1983); George R. Stone, *Content-neutral restrictions*, 54 UNIVERSITY OF CHICAGO LAW REVIEW 46 (1987).

<sup>44</sup> *Id.*

<sup>45</sup> See, for instance, *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>46</sup> CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1995). See, for instance, the Supreme Court position in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

parameter for evaluating the fairness of a speech restriction could be plainly interpreted as the tentative method for finding the setting of every case of hate speech in a hypothetical *taxonomy* of dangers. This means that only a viewpoint neutral restriction of freedom of speech could respect what is generally considered as a “danger test”<sup>47</sup> and allow a real evaluation of the effective risks of an expression in its harmful range.

### **E. The Conflict between Freedom of Expression and “Freedom from Fear” in the Age of the Security Dilemma**

Legal and political systems protecting their own existence – or, at the preliminary phase, protecting the fundamental values clearly characterizing their nature and socio-institutional mission – typically react to “exceptional circumstances” conserving their nature, and enforcing legal instruments tending to the restriction of free speech. On the contrary, the “open” systems seem not to maintain their “stoical” resistance to illiberal temptations when emergencies, or supposed emergencies, appear to legitimate a repressive intervention. Therefore, the traditional models of militant democracies<sup>48</sup> (like the German one) and of democracies that protect themselves from some enemies (like the Italian one), which have already changed and redefined by the “graft” of an *international ideal order*, do not appear really perverted when they introduce, in case of emergency, some measures to narrow the gap slightly; instead this “residual” condition of protection is considered in order to determine the absurdity of hypothesizing on a legal system that definitively gives up protection.

It is because of this fact that we are not surprised if the Italian government, in the context of legal reactions to the threat of Islamic terrorism cruelly appearing after 11 September 2001, has introduced further cases in point of penalizing some speech.

In fact, the “pacchetto Pisanu” (meaning the group of Italian legislative provisions passed in order to oppose international terrorism, from the name of the Minister of Interior proposing: d.l.144/2005, as converted into l.155/2005, *Urgent measures of opposition to international terrorism*) among other provisions contained an integration of the Art. 414 of Penal Code (*Instigation and apologia of crime*) was introduced in

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<sup>47</sup> On the individuation of a “danger test,” specifically with regard to a material and liberal definition of the restriction to freedom of speech, see *Abrams v. United States*, 250 U. S. 616 (1919), (Holmes, J., dissenting); *Gitlow v. New York*, 268 U. S. 652 (1925) (Holmes, J., dissenting); and *Hess v. Indiana*, 414 U. S. 105 (1973). In literature, see RODNEY .A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (1992) and SUNSTEIN, *supra* note 46.

<sup>48</sup> On the original notion of militant democracy, see K. Loewenstein, *Militant Democracy and Fundamental Rights*, *I e II*, 31, 3 THE AMERICAN POLITICAL SCIENCE REVIEW 417 (1937)

order to establish an aggravating circumstance of the crime, existing in the case that the instigated or exalted behavior consists in a *crime of terrorism* or in *crimes against humanity*.<sup>49</sup>

It is evident that this provision is part of the complex of rules directly punitive speech because of its racist objective, or the ostentation of a symbol because of its xenophobic meaning, but these rules were born and imposed during an ordinary moment in the life of the system, instead of the most recently.

Currently, the relation between the production of the rule and its contextualization implies the recognition for it to have a more symbolic value, limited, for one reason, by a wish of temporariness, but reinforced for another by the proclaimed necessity of it. Generally you can distinguish the exceptional rule from the ordinarily protecting one also by its vagueness. In fact, the first one paradoxically tends to enlarge its scope of intervention due to the perception of a truer legitimation, and then to create evanescent objects, as in the Italian case. The instigation or the apologia of a crime of terrorism result is unavoidably “overwhelmed” by the vagueness of the notion of terrorism itself.

The present phase is not the only one that Italy is passing through. This is not the first time in which the Italian legal system has reacted by a stiffening of the provisions concerning a repression of “unfaithful expressions”. We may consider about the laws made during the Seventies. The law that ratified the ICERD (the law 654/1975, so called “Legge Reale”), and the law on public order in 1977, both took their place in the period of political assassinations: after the stake in Primavalle and the banning of “Ordine Nuovo,”<sup>50</sup> while the public prosecutor in Milan, Luigi

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<sup>49</sup> The textual provision of Art. 414 C.p.:

Instigation to commit a crime: Whoever in public instigates to commit one or more crimes is punished, because of the instigation itself: 1) with the reclusion from one to five years, if the instigation is to commit crimes 2) with the reclusion up to one year, or with the fine [...] if the instigation is to commit offences. If the instigation is to commit one or more crimes and one or more offences, it is applied the punishment established in n. 1. The punishment established in n. 1 regards also whoever in public makes apologia of one or more crimes.

In particular, this article is integrated with the present proposition: “Excepted the cases in Art. 302, if instigation or *apologia* enumerated above concern crimes of terrorism or crimes against humanity the punishment is augmented of an half.”

<sup>50</sup> What happened in this poor quarter in the suburb of Rome has only recently become clear. This episode is mentioned because of its cruel significance in the memory of those years signed by a violent contrast between opposite extremes, during which also very young and innocent people lost their lives. With regard to the banning of the Ordine Nuovo, this can be seen in the events of 1974. This movement, with no representation in the Italian Parliament, was an extremist group promoting some ideas and forms of activity consistent with a fascist regime.

Bianchi d'Espinosa, proceeded against Giorgio Almirante, secretary of the Movimento Sociale Italiano, in regard to the crime of the reconstitution of the dissolved Fascist Party.

But these legislative actions did not plainly derive from, and could uncertainly be put in relation with the "emergency" model. In fact, their nature and objectives were strictly connected with the picture of protecting democracy designed *in primis* by the Italian Constitution<sup>51</sup> and then "remade" by the conservation of punitive pre-democratic provisions, renovated because of the individuation of new specific public enemies.

What constitutes the difference between today and during this period is the emergence of an enemy characterized at the international level. In this context the dimension of protection drastically crosses towards a higher level, becoming more similar to the "active emergency" considered by the international documents promoting measures against racism and xenophobia, in which the substantial aim is to guarantee a cosmopolitical agreement to those essentially democratic values. And moving from this level, the legitimation of the "rules of emergency" looks as if it goes round in circles through different legal systems, in search of the roots to its surviving, deeply linked to human nature.

The problem does not only concern the relationship between self-protection and protection of individual liberties, and among these last ones the freedom of expression, which used to support the *enemies* who are responsible for the throwing of the system out of balance. Finally this relation is the exponential re-proposing of the conflict being below every democratic organization, maybe in the exceptional circumstance worked out by the intervention on the space-temporal variables in defining the causality nexus. Instead the true question regards a moment before, and a methodological profile. It concerns the qualification of emergency itself, and the distribution of powers when they have to front it, so that (even partially) necessary limitations of freedom do not determine later and indirect limitations originated from an "internally" less democratic management of an emergency.<sup>52</sup>

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<sup>51</sup> It is fundamental to remember that the constitutional document did not pose any expressed limitation to freedom of *political speech* residing in the content of the ideology.

<sup>52</sup> On the organization in and of exceptional circumstances in relation to the Italian constitutional order, see GIUSEPPE DE VERGOTTINI, GUERRA E COSTITUZIONE. NUOVI CONFLITTI E SFIDE ALLA DEMOCRAZIA (2005); Giuseppe De Vergottini, *La difficile convivenza tra libertà e sicurezza. La risposta della democrazie al terrorismo*, in RASSEGNA PARLAMENTARE 427 (2004) with a complete review of the various anti-terrorism legislations.

The analysis could be conducted by paying particular attention in those systems considered too be the more open ones. In fact, the eventual rising of phenomenons of liberty restrictions, normally thought to be incompatible with democracy, derives from the definition of the notion of emergency.

This model is incorporated by the United States choice.

It seems to find its beginning during the Secessionist War, when the Supreme Court had to judge about a Presidential provision, in 1862, extremely harmful with respect to fundamental rights, the content of which was also related to the extension of martial law around the territory of the United States. On that occasion, the Supreme Court very strictly interpreted the provisions with regard to the constitutional regulation of the suspensions of *habeas corpus*. The Court defined a concrete and present threat to public security as essential to legitimately restrict individual rights in such an intense way.<sup>53</sup>

Subsequent legislatures presented a different attitude, not really "liberal" like the one of the Court from the Civil War era. The following situation of verifying exceptional circumstances (the First World War) would have determined the approval of the *Espionage Act* first (1917), and then of the *Sedition Act* (1918). These acts introduced measures clearly finalized to the repression of anti-system political opinions. These opinions were essentially represented by the ones expressed by the Socialist Party, and provided for the punishment of the unfaithful, profane, scurrilous or abusive expressions about the American form of government and Constitution; and of every speech intended to despise, to scorn, to discredit or to sneer at the American form of government. Furthermore, these choices progressively *contaminated* state legislation, which punished *criminal syndicalism* and introduced the *red flag laws* since 1917 till 1920, moving from the States of New York and California to concerning the absolute majority of State Assemblies.<sup>54</sup>

From then to now is a remarkable passage, and means passing through decades of case-law signified by a medium level of protection of free speech – although coming from a rather "schizophrenic" background. The American level of protection could and has been considered as the highest all around the world, because of an interpretation of the free speech fundamental right as symbolic itself,

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<sup>53</sup> ANTONIO REPOSO, LA DISCIPLINA DELL'OPPOSIZIONE ANTICOSTITUZIONALE NEGLI STATI UNITI D'AMERICA 88 (1977). The author considers that the *Milligan* case represents the real precedent of the *clear and present danger test* elaborated by Justice Holmes in relation to the *Espionage Act* of 1917.

<sup>54</sup> *Id.*, at 91. See also the wide reconstruction by THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

like an *antonomasia of liberties*. But now the emergency seems to shake the *marketplace of ideas* again; it imposes a “guided” selection among expressions, in order to freeze (or worse eradicate) those considered as “unfaithful.”

In the present situation the main difference from the “protective” measures adopted in past periods of conflict is the strengthened recognition of a new right, as a mirror image of the other fundamental rights. A new right that is able to legitimate a repressive and suppressive intervention against the other rights, due to something like a balancing, the principal endeavour of which is to pose the conflict between freedom and security on a subjectivist plan. This “individualization” determines the growing of the right “not to be afraid,” that is the right not to experience oneself as potentially threatened with physical safety, but also not to be obliged to change one’s life habits because of the risk.

The right “not to be afraid” is not a “discovery” coming with emergency: *freedom from fear* has already been outlined in the *Convention of Civil and Political Rights*, 1966, and in the Resolution adopted by the General Assembly of United Nations on Human Rights and Terrorism (2000).<sup>55</sup> After the facts of 2001, this has been taken up again with much more intensity.

The Report of the General Secretariat of the United Nations (*In larger freedom: towards development, security and human rights for all*) adopted in 2005<sup>56</sup> plainly reveals the setting down of an individual and collective right, with an autonomous dignity not only on the ethical-political side, but also on the juridical one. It would seem to suppose a large adjudication for individuals and qualified groups in relation to the violations of this right.

We should reflect about its manifestly temporary nature, by focusing our attention on the paradoxical prospect of a concretization of an injury against the discussed right: the “object of defense” which also lacks truly defined contours, resembling a potential container of subjective absolutely heterogeneous perceptions.<sup>57</sup>

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<sup>55</sup> <http://www.un.org>.

<sup>56</sup> <http://www.un.org/largerfreedom/>.

<sup>57</sup> Concerning relations between emergency/security and the protection of fundamental rights, particularly with regard to the controversial definition of a new right to security, see ALESSANDRA BENAZZO, *L'EMERGENZA NEL CONFLITTO TRA LIBERTÀ E SICUREZZA* (2004); PAOLO BONETTI, *TERRORISMO, EMERGENZA E COSTITUZIONI DEMOCRATICHE* (2006); D. Colarossi, *La difficile convivenza tra regimi emergenziali e diritto di espressione: le ultime misure predisposte dal Governo di Tony Blair contro la minaccia del terrorismo*, in *Diritto pubblico comparato ed europeo, Rassegne* 11 (2006); DAVID D. COLE & J.X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* (2002), Giuseppe De Vergottini, *La difficile convivenza tra libertà e sicurezza. La risposta della democrazie al terrorismo*, in *Rassegna parlamentare* (2004); GIUSEPPE DE VERGOTTINI, *GUERRA E COSTITUZIONE. NUOVI CONFLITTI E SFIDE ALLA DEMOCRAZIA* (2005), ALFONSO DI

The beginning of a duty for the public powers, meaning something different than a mere protection of communitarian security seems to be founded in the right/duty binomial, a continuative “preventive legitimate defense.”

In exercising this activity, the eventual restriction of fundamental liberties is justified by the aforementioned duty to pursue the protection of a right that is read as a presupposition to the consequent protection of all others, in fact as a right to survival.

Thus the *Patriot Act*, adopted on 24 October 2001, just after the tragedy, “also expands ideological exclusion, authorizing the government to deny entry for pure speech.” It excludes aliens who “endorse or espouse terrorist activity,” or who “persuade others to support terrorist activity or a terrorist organization,” if the Secretary of State determines that such speech undermines U.S. efforts to combat terrorism.<sup>58</sup>

Perhaps the deeper difference between the reaction to an emergency of a system like the Italian - already made juridically “heavy” by its provisions, formal or substantial, left over from an illiberal approach to the dissent - and the effects of exceptionality on a system like the American one do not really concern the merits of the choices. This would concern the presentation of the choices themselves until the flowing of the basic question about their unavoidability.

Even the very recent case-law presented either the problem of the conservation, during the emergency, of a qualitative balance in protecting rights, or the problem of the distribution of power in the managing of emergency. The inseparable link between balance among the institutional powers of a Nation and the safeguard of individual liberties appear not only with regard to the limitation of personal freedom in its stricter sense - we can consider the case of Guantanamo - but also to the role of freedom of speech.

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GIOVINE, *La protezione della democrazia tra libertà e sicurezza*, in *Democrazie protette e protezione della democrazia* (Giappichelli ed., 2005); TANIA GROPPI, *DEMOCRAZIA E TERRORISMO* (2006); Gaetano Insolera, *Terrorismo internazionale tra delitto politico e delitto penale del nemico*, in *DIRITTO PENALE E PROCESSO* 7 (2006); Marco Pelissero, *Terrorismo internazionale e diritto penale*, in 11 *STUDIUM IURIS* 1279 (2005); John A. E. Vervaele, *La legislazione anti-terrorismo negli Stati Uniti: inter arma silent leges?*, in 2 *RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE* 739 (2005); Jean-Claude Paye, *Il Patriot Act Reauthorization: uno stato di emergenza permanente*, in 2 *DEMOCRAZIA E DIRITTO* 181, 189 (2006).

<sup>58</sup> COLE & DEMPSEY, *supra* note 57 at 158.

We can also reflect upon some of the case-law regarding the *Patriot Act*, and in particular Section 215, that was declared to conflict with the First Amendment (*Muslim Community Association of Ann Arbor v. Ashcroft*).

Section 215 allowed the *Federal Bureau of Investigation* (FBI) to “make an application for an order requiring the production of any tangible things for an investigation to obtain foreign intelligence information ... providing that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.”

Moreover, the fact that it provides for judicial oversight of all FBI requests for such information was not plainly interpreted because the language was ambiguous.

A provision like this, although not imposing direct limitations to the freedom of speech, actually results in deterring the individual wishes of expression. People who realize themselves as different than the “good” and “inoffensive” paradigm could be penalized. Because only these persons will be afraid to borrow a book in a library, or to visit a web site. They will be conscious that the ideological content of that book, or of that web site, conflicts with the dominant ideology of the system in which they live, or it is well connected with group or associations that are diffusing some ideas radically clashing with the good order of human, social and political relationships, that are regulating the universal being.

After *Muslim Community Association of Ann Arbor v. Ashcroft*, the Congress modified the *Patriot Act* (March 2006), partially amending Section 215. In fact, today people asked for such records may disclose the request to “an attorney to obtain legal advice or assistance with respect to the production of things in response to the order,” and the FBI must include in its request “a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation.”

Another provision clearly contrasting with freedom of expression, and – although apparently indirectly – connected with hate speech regulation, is found in Section 805 (a) (B).

It provides people who provide “material support or resources” to terrorist organizations, but also “*expert assistance or advice*” shall be incriminated. This last definition of the contribution that a person cannot offer inside an association is quite vague, and it is circumscribed to a solely “thought activity.” This definition can introduce an immaterial, aprioristic and prejudicial connection between the expression and a coming, indeterminate and indeterminable terrorist action. This element is set forth in 2004 by U.S. District Judge Audrey B. Collins in *Humanitarian*

*Law Project v. Ashcroft* (No. CV 03-6107 (ABC)), where it is written that the “expert advice or assistance” plaintiffs seek to offer includes advocacy and associational activities protected by the First Amendment, which Defendants concede are not prohibited under the USA Patriot Act, and “[d]espite this, the USA Patriot Act places no limitation on the type of expert advice and assistance which is prohibited, and instead bars the provision of all expert advice and assistance regardless of its nature.” However the judge declined to apply the overbreadth of the provision: “The Court therefore declines to apply the ‘strong medicine’ of the overbreadth doctrine, finding instead that as-applied litigation will provide a sufficient safeguard for any potential First Amendment violation.”

These few examples tend to demonstrate that actually, the most compelling danger could regard the creation of the chronic of a state of emergency, a shifty transformation from exceptionality to “normality.”

The reasons for the danger are set in the nature of emergency itself, that is, in the absence of objective indicators of its occurrence, and in the concern of the subjects having political power also in singling out its existence.

Then, there is a “vicious loop” that may transform the longing for repression of the opposition of constituted power in an (apparently) legitimate declaration of emergency. The “loop” is such that it allows the repression, strongly sustained by the consensus deriving from the demand for security. And, moreover, the repression occurs also by an imposition of loyalty in order to orient the individual manifestation of thought.

The inevitable “informative asymmetries” among institutions and citizens could conceal some attempts like this, introducing silent mechanisms of systematic removal of “unfaithful expressions,” maybe also by marginalizing and sending away the individuals looking “unfaithful” on the bases of absolute presumptions – hardly controvertible – of ideological diversity, often originating from ethnical/cultural features.

Finally, it is very important to underline that this is the mechanism that revolves around the protection of victims of *hate speech*. The transformation of the injured minority in a potentially dangerous nucleus of difference to be neutralized is inherent in the creation itself of some form of restriction of “rebel speech.”

A problem immediately posed, deeply and variously analyzed, probably irresolvable – or that may be faced only in a case by case evaluation aware of the real meanings of the emergency in the specific time and place – regards whether the emergency necessarily requires the public and “diffusely” private duty to

determine an imposition, and a respect, of a psychosomatic loyalty to the system, not only a material *id est*, but a moral *lato sensu*.

The final dilemma presents itself on a subjective level, and concerns the research as to whom should have the power, the authority and the wisdom to decide eventual limitations to expression: a generally immaterial instrument, but potentially very cutting, and, contemporaneously, so much ingrained in the human essence that it must be the object of a uniquely strict protection.

The subjective profile is so important also in relation to the mentioned risks hanging over speech, also in its more "protective" feature, and in its aspect of guarantee of an essential instrument to safeguard the personal dignity for people belonging to minority and discriminated groups. In fact the struggle against hate speech seems to forget that precisely these marginalized people, people with small education and culture, different than the majority, staying at the boundaries of society, may generally tend to express its own identity by a violent register of communication, because of the feelings of impotence characterizing this condition.

It is also because of this fact that "loyalty" to democratic values - including tolerance, respect of diversity, introduction of dialectic manners in every human and institutional field - suddenly become liable to be confused with "loyalty" to public power itself, to the "majority opinion", in order to a blind conservation, also in the words and expressed ideas, of the existing legal system.

A "content-based" protection seems, as already and frequently written, worse than any other, because of its evidently direct aim to restrict one kind, and only one kind, of message. Finally, in this particular way to restrict free speech becomes much more dangerous when (really in something like an heterogenesis of the aims?) the supposed victims of a hateful message risk being transformed into the addressees of the punishment, because of their original incapacity to differently express themselves and perhaps because of the arising of an emergency context in which minorities are feared.