



SANT'ANNA LEGAL STUDIES

STALS / PANOPTICA BOOK REVIEW

Elettra Stradella

La libertà di espressione politico-simbolica e i suoi limiti: tra teorie e “prassi”

Giappichelli, Torino, 2008

reviewed by G. Martinico

Sant'Anna School of Advanced Studies
Department of Law
<http://stals.sssup.it>

Panóptica - Revista Eletrônica Acadêmica de Direito
<http://www.panoptica.org>

E.Stradella, *La libertà di espressione politico-simbolica e i suoi limiti: tra teorie e “prassi”*, Giappichelli, Torino, 2008, pag. 428, 45 euros.

By *Giuseppe Martinico*¹

Overview of the research and structure of the work

The book is the outcome of a long research conducted by the author during the three-year PhD programme in Public Law and Economics that she attended at the University of Pisa, and its contents have been partially anticipated in some papers and articles published during these years in Italian and international journals.

The work is organized into five chapters: the first chapter is devoted to the identification of the analysed subject (namely, the “political speech”).

This chapter is paramount for understanding the vocabulary used in the author’s pages (i.e. the notions of symbol and speech) and it can be seen as a sort of methodological and terminological introduction of the work (quite exhaustive indeed).

In the second chapter Stradella introduces the role of political (and symbolic) speech in the dynamics of democracy “protection”, which is the true issue of her analysis.

The third chapter dwells on the interconnections between the freedom of political and symbolic speech and the political power’s “self-conservation”.

I would like to stress the importance of these two chapters to the economy of the book since (in my opinion) they represent the *fil rouge* of the author’s argumentations.

The last two chapters are devoted to a comparative analysis of the limits in the European symbolic political speech (with a particular focus on the Italian vs. the American case-studies).

These cases indirectly confirm what has been supported by Stradella in the previous 200 pages.

¹Lecturer, University of Pisa, PhD Sant’Anna School of Advanced Studies, Stals (Sant’Anna Legal Studies) Senior Assistant Editor (www.stals.sssup.it/site/).

Symbol and political speech

After having explained her definition of “symbolic political speech”, the author tries to map out the chosen fields of analysis by distinguishing those dynamics connected to the manifestation of the political thought seen either from the perspective of the symbol’s objective nature or under the expressivity’s subjective profile (pag. 69-71).

Three categories of “symbolic” have been identified by Stradella with regard to symbolical speech:

- 1) The expression that *utilizes* a symbol which is precedent to the expression itself is the *stricto sensu* conceived political speech; some examples of this phenomenon can be found in practices such as the cross burning and the flag burning.
- 2) The speech *through* the symbol, in which the symbol is *forma ad substantiam* of the speech itself or, in the author’s words, “the symbol and the speech are in a relationship of identity and indistinguishability; this is the case of contempt of the flag (“vilipendio alla bandiera”).
- 3) The third category is represented by the *meta-symbolic* dimension: in this case “*the symbol is necessarily abstract (i.e. non-perceptible) and the content... of the speech prevails on the speech itself*” (pag.71). Here the symbol is the whole of words recalling messages that come beyond the speech and its context (pag. 78), clearly the vaguest category identified by the author who, in order to overcome possible ambiguities, provides the reader with examples of those conducts expressive of instigation and apology according to the criminal law’s provisions.

Given this tripartition, Stradella’s attempt to insert the symbolic political speech in the democracy protection’s framework confirms the significance of such an issue to the economy of the book.

Stradella² pictures three models representing different protection levels for the constitutional boundaries.

- “**Protectionist democracy**”: it is the strongest form of the system’s protection; it is represented by those democracies that introduce in their own system of repression some mechanisms by which purely expressive conduct is punished, such as content-based restrictions.

² For a different tripartition see: A. Di Giovine, “La protezione della democrazia tra libertà e sicurezza”, in A.Di Giovine (ed.), *Democrazie protette e protezione della democrazia*, Giappichelli, Torino, 2005, 1-12.

- **“Democracies which protect themselves”** by contingent enemies without having as constitutive *telos* the self-preservation.
- **“Protective democracies”**, i.e. those systems that protect their founding values (fundamental rights, equality principles) in order to ensure minorities or other disadvantaged people. In this case the self-protection of system is just a consequence of the protection of those subjects’ rights.

Each model corresponds to a certain degree of freedom of speech granted to the members of the constitutional legal order it represents.

The “true subject” of the work

As previously mentioned - and despite the title (which I would translate as: *“The freedom of symbolic political speech and its limits: between theory and “praxis”*)- the true subject of the volume is the issue of the Constitutional State’s self-conservation, that is the Constitutional State and its limits: how much is the Constitutional State entitled to claim from its citizens - in terms of loyalty and adhesion to its basic values- without breaching one of its fundamental principles that is the freedom of speech?

The very famous paradox of the tolerance (involuntarily) devised by John Locke³ is recalled in the first pages of the book. According to Locke, tolerance is a universal value except for the intolerant:

“These, therefore, and the like, who attribute unto the faithful, religious, and orthodox, that is, in plain terms, unto themselves, any peculiar privilege or power above other mortals, in civil concernments; or who upon pretence of religion do challenge any manner of authority over such as are not associated with them in their ecclesiastical communion, I say these have no right to be tolerated by the magistrate; as neither those that will not own and teach the duty of tolerating all men in matters of mere religion”.

Similarly we can talk about democracy’s founding values : according to Gustavo Zagrebelsky democracy is the *“regime of the doubt”* and not of the *certitudes*⁴; this allows citizens to contribute to the life of the State with their thoughts and ideas.

³ J.Locke, *A Letter Concerning Toleration*, 1689.

⁴ G.Zagrebelsky, *Il “Crucifige!” e la democrazia*, Einaudi, Torino, 1995.

Actually a strong contradiction, labelled “the paradox of democracy” by Norberto Bobbio⁵, is inherent in such a vision: this pluralistic openness to all forms of contribution is strongly limited by the fact that only those actors who share the principle of pluralities’ mutual respect can be legitimated to have a role in the pluralistic life of democracies.

Quoting Rosenfeld⁶ there is no room or chance in the post modern society to take part in the constitutional interpretation for those actors who do not accept the interpretation’s (i.e. the opinions’) equal dignity principle.

The apparent openness of democracies thus reveals its contradictory nature: it is only open to those actors who share its axiological core. Therefore the issue of democracy’s self preservation and that of the community members’ loyalty to the axiological core of the community itself are two sides of the same coin.

According to the premise of Stradella’s reasoning the “*very essence of a democratic regime is the effective openness to every thought, even the most shocking (as the American case shows), which is considered useful and necessary in order to guarantee the maximum of debate inside the political and institutional arena*”⁷.

In Stradella’s perspective the legal order’s self-preservation is connected with the demands of loyalty the former can rightfully claim from its members.

The ambit of freedom of speech, in fact, is a privileged perspective which permits Stradella to extend her analysis to some well known issues for a constitutional law scholar: this is namely the case of the pages devoted to the relationship between constituent power and loyalty to the founding values of the constitutional community (what the constitutional law scholars call the “*Form of State*”).

By “*Form of State*”, the most important Italian constitutional law scholar, Costantino Mortati⁸, meant both the relationship between the State classical elements (sovereignty, territory and people) and its mission. In this sense the notion of Form of State is connected to the concept of fundamental high policy goals (i.e. “*indirizzo politico*”). Under the formula “*Form of State*” Mortati grouped classifications related both to the vertical separation of powers (e.g. unitary versus decentred State with regard to the relationship between territorial entities; Liberal State versus Welfare State with regard to the relationship between State and market) as well as to the horizontal separation of powers (e.g. democratic versus authoritarian State).

⁵ N.Bobbio, *Le ragioni della tolleranza*, in *L’età dei diritti*, Einaudi, 1990, 235 ff.

⁶ M.Rosenfeld, *Just Interpretations. Law between Ethics and Politics*, Berkley, University of California Press, 1998, it. transl. *Interpretazioni. Il diritto fra etica e politica*, Il Mulino Bologna, 2000, 440 ff.

⁷ E.Stradella, “Hate speech in the Background of the Security Dilemma”, *German Law Journal*, 59-88, 81.

⁸ C.Mortati, *Le forme di governo*, Cedam, Padova, 1973, 1 ff.

As Mortati himself pointed out the notion of form of State represents the form of government's teleological moment (that is the whole of relationships between sovereign powers⁹).

The notion of the Form of State is also known out of Italy: as confirmed in the comparative investigation by Palermo¹⁰, it is possible to find similarities between this notion and other formulas like *Staatform*¹¹ in Austria, *forma del poder*¹², *sistema* or *régimen político*, *forma de Estado* in Spain, *rule of law* in UK.

All these concepts recall the idea of a nucleus of constitutional principles which represent the essence of such regimes.

Sometimes the possibility to amend such principles is expressly ruled out by the constitutions themselves, other times the prohibition has been inferred by the constitutional adjudicators.

The idea of an absolute constituent power invested with the full powers of creating constitutional entities vanishes with its outcome, the Constitution which, disciplining the constitutional amendment's form and content, thus governs its rules: in this context there is no room for a "real" constituent power and both the popular sovereignty itself and the power to amend the fundamental text of a political community become "constituted" (i.e. they imply a constitutional text as well as being governed by it).

The first case recalls the German experience of art. 21 *Grundgesetz* which states the following:

"(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

(3) Details shall be regulated by federal laws".

This is a case of limitation to the freedom of political speech, which is functional to the preservation of the shared core of principles acknowledged by the national constitution as the peculiar and unamendable heart of the "Form of State".

⁹Definitively it concerns the different "options/techniques" offered in order to guarantee the separation of powers (e.g. parliamentary regimes versus presidential regimes).

¹⁰F.Palermo, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale*, Cedam, Padova, 41 ff.

¹¹P.Pernthaler, *Allgemeine Staatslehre und Verfassungslehre*, Wien-New York, 1986, 188 ff.

¹²F.Rubio Llorente, *La forma del poder. Estudios sobre la Constitucion*, Madrid, 1997.

Sometimes the limits to the freedom of speech are associated with the constitutional revision process, other times this parallelism seems to disappear: in the Spanish case, for example, all the provisions of the *Constitución* are amendable but the *Batasuna* case¹³ shows the existence of a certain degree of intolerance of the constitutional regime towards different values from those constitutionalized.

The author then tries to investigate the possible existence of regimes supported by non-militant loyalty and, more in general, to understand if the “loyalty clause” is an essential element to the system’s self-preservation.

In the US federal Constitution, for instance, the absence of any imposition of loyalty “*the idea aiming to deny any limitation of free speech (with “obvious” exceptions, punctually designed by the Supreme Court) has been accompanied by a very strict judicial review on content-based restriction... This could reveal the existence “of 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*”¹⁴”.

This conclusion confirms the emphasis laid by the author on the comparative case-law and strengthen the above mentioned scholarly tripartition regarding democracy protection.

The conclusion reached in the last pages focuses on the different models (the European and the American one) coming from the comparison.

The American one presents itself as the most open constitution thanks to the absolute protection of the freedom of speech (guaranteed by the first amendment) while the European model (although the existence of a sole true “European” model is a questionable matter because of the varieties of constitutional experiences) does not grant protection to every form of ideological anti-conformism. Nevertheless, the history of the US shows that the possible occurrence of threats to democracy allows a temporary limitation to freedom of speech.

The distinction between temporary and permanent enemies enables us to understand the current situation of stress undergone by the freedom of speech in the US, due to the terrorist threat although the author prefers avoiding the issue.

The absence of a deep analysis of the current situation confirms the fact that this book’s true focus, rather than being the limitation of political and symbolical speech, can be identified in the analysis

¹³ See the judgement 48/2003 of the *Tribunal Constitucional* on www.tribunalconstitucional.es L. Alvarez, “Lealtad constitucional, defensa de la Constitución y partidos políticos”, http://www.uclm.es/area_constitucional/ace/leonardo_alvarez.Pdf;

¹⁴ E.Stradella, “Hate speech cit”, 66-67.

of the democracy's paradox through an overview of the possible limitations to those rights which should be granted by democratic constitutional orders.

The antidote to the self-conservation of the power is found in the adoption of a moderate ideological relativism (*à la* Kelsen) according to which: *“Tolerance, minority rights, freedom of speech, and freedom of thought, so characteristic of democracy, have no place within a political system based on the belief in absolute values. This belief irresistibly leads-and has always led-to a situation in which the one who assumes to possess the secret of the absolute good claims to have the right to impose his opinion as well as his will upon the others who are in error”¹⁵*.

In conclusion: the need to overcome the concept of the associates' loyalty to the values of the political community lies in the cultural pluralism which characterizes the current post modern communities.

Although this neutrality seems to exalt the idea of constitutional *dialogue*, in my opinion it cannot escape- behind its apparent neutral procedural- the paradox of democracies, the dialogue being only open to those subjects who accept the equal dignity of the starting opinions.

¹⁵ H.Kelsen, “Absolutism and Relativism in Philosophy and Politics”, in *The American Political Science Review*, Vol. 42, No. 5 (Oct., 1948), 906-914, 913.