

REFLECTIONS ON FREEDOM OF EXPRESSION IN THE LIGHT OF THE PROTESTS AGAINST ISRAEL: A COMPARATIVE ANALYSIS OF THE AMERICAN AND FRENCH LEGAL EXPERIENCES

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ABSTRACT: *The echo of the Israeli-Palestinian conflict has reached the attention and sensitivity of students from all over the world, causing student demonstrations inside the university that have caused the occupation of university spaces and the boycott of some academic activities. In particular, these effects have been very visible in the United States, while in France the government has managed to avoid the consequences of these demonstrations. In both cases, there was a police intervention to restore the correct administration of academic activities. During demonstrations, students have called for freedom of expression, accusing national governments of preventing the exercise of this right. By this contrast of positions, the following contribution intends to examine how freedom of expression is regulated in the two countries and what are the limits that it encounters when exercised within school/university environments. In particular, the intention is to propose a focus on the balance between the freedom of expression of students and their right to have academic services provided and those of a national system to see maintained respect for public order that we can define special because it is recognized and protected in particular within cultural places such as schools or universities.*

KEYWORDS: *freedom of expression; clash of interests; public order; political balance.*

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1. FROM THE ISRAELI-PALESTINIAN CONFLICT TO PROTESTS IN EUROPE AND AMERICA IN THE NAME OF FREEDOM OF EXPRESSION

University campuses in many countries, particularly in the US and Western Europe, have seen a large number of protests involving many students. These have called on academic institutions to divest from companies that supply arms to Israel to prevent them from being complicit in the military actions conducted by the Jerusalem army, to help students of Palestinian origin through the activation of specific scholarship programmes, or, as in the case of London's Goldsmiths, the renaming of a classroom in honour of the Al-Jazeera journalist, Shireen Abu Akleh, who was killed by an Israeli army unit.

In particular, in the United States, Columbia University registered the first protests and

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the occupation of the campus. From there, a wave was generated that also affected other universities (especially those in the Atlantic belt states) and the reactions of the police led to the arrest of about 800 people (Edmonds, Betts, Hartocollis, 2024). Although the protesters invoked their right to freely express their thoughts, the intervention of the police (both the campus police and the state authority) was necessary in the face of specific charges that had nothing to do with this right, such as trespassing, vandalism and destruction of private property (Gohil, Henley, 2024). In particular, the commission of these conducts triggered the intervention of the campus police, which, according to the parameters established by the *Campus Security Guidelines* of 2009, in cooperation with the 'Bureau of Justice Assistance' of the 'U.S. Department of Justice', has the task of intervening in unlawful acts committed on campus and acts in cooperation with the state police in guaranteeing security. The security set-up within US university facilities echoes the dictate of the so-called *Clery Act* of 1990, which required all colleges and universities participating in federal student financial aid programs to retain and disclose information on crimes committed on or near a campus.

About these incidents, President Biden condemned what happened while recognizing the right to protest. On the other hand, Secretary of State Blinken called the protests a sign of American democracy but accused the students of disregarding the crimes committed by Hamas.

In France, however, the main clashes were concentrated in Paris and Saint-Étienne. Specifically, in the capital, the students of Sciences Po University blocked the entrance to the campus of students (an illegal act according to French law, as we will discuss later). Again, there were encampments set up on campus and university staff were forced to cancel lectures and graduation ceremonies. The police intervened to restore order inside the universities and, almost peacefully, removed the protesting students. Also, for France, the presence and intervention of the police in university spaces respond to precise legislative provisions that are linked, in part, to the powers of the rector and, on the other, to the action of the Parliament that led, in 2016, to the adoption and subsequent implementation of the so-called '*plan Vigipirate*'. The latter, to develop a culture of vigilance and security throughout society and permanently ensure adequate protection of citizens and the territory, also included, at the beginning of the 2016 academic year, the strengthening of student security on campuses in cooperation with national law enforcement agencies.

About these episodes, President Macron 'blessed' the young French students' interest in international political issues while at the same time denouncing the blocking of academic activities and the ban on access to universities that the young protesters reserved for some students because they were Jewish. Much stronger, on the other hand, was the intervention of the Minister of Higher Education, Retailleau, for whom the intervention of police officers was essential given the need to guarantee public order in academic spaces.

In both the United States and France, students defended the manifestation of their ideas by invoking the freedom of opinion and expression enshrined in Article 19 of the 'Universal Declaration of Human Rights'.

Even before going into the details of the legal-legislative protections that individual states recognize for this right, it seems appropriate to refer to the international sources that also affect the United States and France about respecting and guaranteeing this right. The first reference is the 1948 'Universal Declaration of Human Rights'. The adoption of this

document by the UN General Assembly finds its legal basis in Articles 10 and 11 of the UN Charter. In particular, the first of these two provisions envisages the Assembly's power to debate any subject or issue falling within the objectives set out in the aforementioned Charter, while the second provision declares, among the UN's aims, the maintenance of international peace and security, the building of friendly relations between states according to the principle of equality and social, humanitarian, political and economic cooperation between countries.

Returning to the right itself, free expression entails, in general terms, the communication of ideas, opinions, beliefs, and information. Some international legal instruments, such as the 'International Covenant on Civil and Political Rights' (ICCPR), recognize freedom of expression as a right that can be exercised orally, in writing or through the press, in the form of art, or through any other medium. Recognizing freedom of expression means identifying it as both a freedom and a right to claim. It is freedom because it implies the absence of constraints on what an individual is free to express; it is a right of claim because it corresponds to the duty of another to do or refrain from doing something (Gunatilleke, 2020, pp. 93-94).

Moreover, for France, the observance of freedom of expression also derives from the 2000 Nice Charter (otherwise known as the 'Charter of Fundamental Rights of the European Union'), which, after the entry into force of the Lisbon Treaty, assumed the same legal value as the treaties and is binding on the European institutions and member states. Article 11(1) of the Charter states that "everyone has the right to freedom of expression". This right shall include freedom to hold opinions and to receive or impart information or ideas without interference by public authority and regardless of frontiers.

The normative meaning of a right is that, in some way, it is claimable, i.e. the rights holder can claim the exercise of functions (O'Neill, 1996, p. 131). Therefore, freedom of expression entails the right to claim, including the right not to interfere with that freedom.

The reason why we have the recognition of certain claimable rights is often related to the underlying interests that those rights are intended to protect. Raz observed that a person 'has' a right when his interests are a sufficient reason to hold others to a duty (Raz, 1988, p. 166). The importance of the interests underlying freedom of expression indicates why we recognize it as a claimable right. Remembering this is important because the process by which restrictions on freedom of expression are justified depends on the value attached to it.

This freedom is linked to certain fundamental values such as personal autonomy and human dignity. This right, as mentioned by the political representatives of the two states in question, is a precious value for a democracy. Consider, for example, how political participation, the possibility to criticize a government and freedom of the media and communication are related aspects of freedom of expression. In this regard, John Stuart Mill spoke in defense of the latter freedom, stating that there is no intrinsic justification for suppressing the beliefs and opinions of individuals through the use of coercive means. This cannot be the case, even if one believes that those beliefs and convictions are false because they may be true and alternative beliefs and opinions may be untrue. Mill himself argued that truth can only be ascertained in a clearer and more vivid form when it is possible to confront error (Mill, 1859, pp. 19-21).

Presented in this way, freedom of expression should not be restricted unless there is a substantial burden to justify such action. Placing a limit on this freedom means that the

burden of justification falls on those who restrict the recognition and enforcement of this right. This scheme is consistent with the approach of the liberal tradition and aligns perfectly with the fundamental liberal principle that sees freedom as the norm and the imposition of limitations as the exception (Gauss, 1996, pp. 162-166).

Given the importance of freedom of expression, it is necessary to understand how and why it can be restricted. In particular, it can be argued that good motivation lies in what Rawls called 'public reason', which implies, in his view, the justification of political decisions through the use of values and standards that are publicly available and acceptable (Rawls, 2005, pp. 234-235). These reasons can be defined as public because equal citizens accept them as such and represent the majority of society.

The use of public reason becomes evident and important in the political and judicial spheres. In particular, the first refers to the moment when the legislature must intervene to manage a pathological phase present within its own public space of competence, with the need to intervene to restore internal public order. The second, on the other hand, relates to the intervention of the courts (national and international) called upon to settle a clash between rights. In these situations, the issue to be resolved is to understand how to balance recognition and enforcement between two conflicting rights, mediating between individual and general interests.

There is currently a widespread conviction, also at the institutional level, that public security requirements play an important role in the balancing of interests to such an extent that they take precedence over the fundamental rights of the individual.

In the doctrine, there have been those who have spoken in favor of the reconfigurability of an individual right to security, even if it is not expressly provided for in the Constitutional Charter. The idea is to define this right as a 'super-primary' value to be considered *'the product, so to speak, of history, as well as of ordinary legislation implementing the constitutional guarantees provided for the protection of fundamental freedoms'* (Cerrina Feroni, Morbidelli, 2008, p. 32).

The balancing act between individual and general interest is, according to one part of the doctrine, part of a legal operation that it has called the 'proportionality test' (Tridimas, 2007, p. 139).

First, the State should pursue an objective that serves a compelling or legitimate interest to be able to restrict a right (Kumm, 2004, pp. 578-579). Next, the presence of a rational nexus between the specific measure applied to limit the right and the interest underlying that right is tested according to a suitability test (Arai-Takahashi, 2005, pp. 27-29). The third stage also called the necessity test, leads to an understanding of whether the measure applied is capable of promoting or preventing obstacles to the interest in question. Finally, the last analysis certifies that the measure taken is proportionate and capable of bringing about an advantage when the reduction in the enjoyment of the right is measured against the level at which the interest is advanced (Rivers, 2006, pp. 185-186).

The reason behind the presentation, albeit in a general way, of the functioning and application of freedom of expression and its limits lies in the desire to understand how this right functions at a time of affirmation and contraction in the American and French legal-legislative systems.

Far from being able to think of exhausting the debate on this right through this examination, the set objective is to address the nuances and implications related to free expression in a particular context such as the school/university context. Specifically, the

focus will be on the balance between free expression and the neutrality of the school/university environment and the need to maintain its order and protect the regular observation of daily student activities.

For this reason, it will proceed through a micro- and a macro-comparison. The first derives from a comparison with the decisional modalities and reasoning that American and French judges have assumed and promoted to settle the issues that have seen the clash between the aforementioned interests. The second, on the other hand, is connected with the desire to understand how and to what extent the even political dimension of the consequences of such events can bend a legal reasoning to the political expediency that may be determined by the strategic geopolitical position, as in the case of the USA, or by the particular fragility and delicacy of the social and demographic fabric of France.

2. FREEDOM OF EXPRESSION IN THE UNITED STATES: LAWS, LIMITS AND SUPREME COURT INTERPRETATION

Freedom of expression in the United States finds its deepest legal root in the American Constitution (not forgetting, though not considered here for the choice of a national-level analysis, the provisions contained in the individual Constitutions of the 50 States). In this regard, the First Amendment of the National Basic Charter protects¹⁶ religious freedom and the rights of speech (including the right to the press, peaceful assembly and petitioning the government). This provision, in turn, must be read in conjunction with the Fourteenth Amendment, which prohibits states from enacting or enforcing laws that deprive certain persons of such freedom without due process of law.

The constitutional force of these two predictions stems from the debates on the drafting and ratification of the Constitution. Here, a large number of federalists (Sherman, Ellsworth, Hamilton, to name a few) sought to reassure their critics that the new federal government would have no power to censor the press.

In the mid-1870s, Madison asserted that, about freedom of the press and free speech, the power of censorship would be available to the people over the government, not the other way around (Reed Amar, 1998, p. 36). After the American Civil War, Republicans infused the vision of free speech as written and contained today in the Fourteenth Amendment, recognizing this freedom as a sacred privilege and granting citizens immunity in the enjoyment of this right that should not be restricted by the government or federal states.

Moreover, it is also relevant for the reasoning put forward here, to focus on the presence of the word '*speech*' in the definition of freedom of expression. This term also appeared in the original American Constitution (the one that covered only the first thirteen former British colonies, the so-called *Articles of Confederation*), in Article 1, Section 6. This provision protected internal speech or debate in Congress. What was contained in the aforementioned *Articles*, in the early 1880s, reaffirmed this idea by stating that freedom of speech and debate in Congress should not be impeached or questioned in any court or place outside that forum. Such an indication of this freedom was, in turn, derived from the English *Bill of Rights*, which stated that speech and parliamentary debate outside the parliamentary assembly should not be judged.

The doctrinal debate on these predictions emphasized that what was contained in the two Amendments referred to political speech. Instead, wanting to focus on a more social aspect of this freedom (more directed, therefore, towards public opinion), American

doctrine has spoken of the 'marketplace of ideas' to refer to the free use of speech as a means of promoting the creation of new knowledge and the discovery of truth (Post, 2013, pp. 477-478; Bohannon, 2020, p. 105). From this perspective, it follows that speaking and writing deserve special legal, constitutional, and political protection because the unconditional exchange of ideas advances truth and knowledge.

American doctrine, over the years, has grappled with the subject of freedom of expression, recognizing it as an important support in various areas, including judicial references that have fueled discussion on this right. The first is that of the freedom to criticize government policy, even if this includes extreme invective and departing from the accuracy of the facts represented (Reed Amar, 2010, p. 504). In this sense, we find a judicial reference in the 1964 case *New York Times v. Sullivan*. The dispute stemmed from a civil rights advertisement in Montgomery, Alabama, that praised the leadership of Martin Luther King and criticized various public officials in the Southern United States for violating the rights of African Americans. The ad contained several factual inaccuracies that were the basis of a defamation lawsuit by a Montgomery police commissioner. The Alabama Supreme Court ruled for the suspension of the advertisement, stating that the protection of defamatory advertisements does not fall within the First Amendment's scope of protection.

The subsequent discussion at the US Supreme Court was a landmark decision, providing a limit to the ability of public officials to sue for defamation. Specifically, the justices recalled that the American nation has a deep commitment to the principle that debate on public issues should be 'uninhibited, robust, and very open'. Therefore, as the ruling states, such discussion can include "vehement, caustic, and, at times, uncomfortably strong attacks on government and public officials".

Despite the historicity and absolute importance of the aforementioned ruling, the orientation adopted by the Supreme Court in 1964, according to a part of the doctrine, does not conform to the *common law* tradition from a formal point of view (Epstein, 1986, p. 785). In that case, the assessment of the American judges took a very guaranteeing position because the case represented one of the very first decisions on freedom of expression and the application of the First Amendment. Over the years, the Court itself has specified that a method of verifying published news called the 'malice test' is needed to assess defamation charges. The latter is not present in the Constitution but has been developed here by the Court itself. The purpose of this test is to ascertain the actual intention to cause a harmful result by referring to and disseminating untrue news. Over time, the Court did not limit itself to the mere 'harmful result' but included in this test knowledge of the falsity of a statement and reckless disregard for the truth. Although there was this profound doctrinal revolution after 1964, the line of judgment in the Sullivan case inspired courts and Congress. Today, allowing errors in public debate is considered a way to save freedom of expression (Lewis, Ottley, 2014, p. 21). The current formulation of the malice standard has provided (and continues to do so) what the Court has called '*breathing space for a wide variety of communications made in the public interest*'.

Remaining on the subject of freedom of expression, it is impossible not to mention here another famous American court case, namely *Tinker v. Des Moines Independent Community School District* (1969). The importance of this ruling, because of the phenomenon of university protests mentioned above as an introduction and premise to what is stated here, lies in the analysis made on freedom of expression in school

environments.

The case originated when, in September 1965, a group of parents and students in Des Moines (Iowa) decided to protest against the war in Vietnam, declaring their opposition to this national military commitment. Among the actions they chose to express their dissent was the wearing of black armbands to school. Upon learning of this initiative, the school officials quickly adopted a regulation to ban such bracelets. This, however, did not stop the action of the students who, as a result, were expelled for violating the new rules.

By challenging the expulsion before the Iowa courts, the state judges agreed with the school, finding the school regulation to be a reasonable tool to prevent unrest among students.

These findings were not upheld in the judgment before the Supreme Court. The text of the judgment mentions the difficulty in believing that students or teachers could give up their constitutional rights, specifically freedom of speech or expression, just because they were in the vicinity of a school. Moreover, school officials could not point to any evidence that the wristbands would disrupt school activities (Russo, 2020, p. 197). The judgment also recalls that the official memorandum prepared after the suspension, listing the reasons for the ban on wearing wristbands, did not refer to the need to prevent a disruption of school activities.

Moreover, the specific choice to prohibit the wearing of a particular accessory symbolized the prohibition to express a particular opinion. This view was echoed in an earlier decision of the Court, namely *Burnside v. Byars* (1966) in which the wearing of buttons on an apron as a protest against racial discrimination was challenged. In the latter decision, we read that school officials may not censor student expression unless it is reasonably foreseeable that such expression will create a substantial disruption or material interference with school activities, or at least invade the rights of others.

Even today, several years later, the 1969 ruling is considered a milestone in American jurisprudence because it represents the first case argued before the Supreme Court concerning freedom of expression within an educational institution and because the judges' decision is the highest point of First Amendment protection.

A final case, by way of example, that is taken into consideration to understand the adaptation of freedom of expression on political and public interest issues is the 1971 *Cohen v. California* ruling.

Specifically, the ruling concerned the conviction by the Californian courts of a man who wore a T-shirt bearing the words '*Fuck the Draft*' (a vulgar expletive against the military draft) in the public corridors of a courthouse in Los Angeles. The State Courts' decisions were based on the fact that this action violated the Californian Criminal Code, which prohibits (Section 415) maliciously and intentionally disturbing the peace of any neighborhood or person by offensive conduct.

Again, the court overturned the previous verdicts by stating that the plaintiff had not engaged in any conduct detrimental to the peace of the city at all because he had done nothing but wear a jacket.

As explained in the judgment, it is possible to accept this kind of conduct for several reasons. The first relates to location. Although the corridors or courtrooms of a court are special places, maintaining order in these places is not a constitutional value, but an incidental restriction on the time and place in which one may speak freely; such restrictions are necessary to carry out the government's interest in enforcing the law. Moreover, there

is no discipline as to what to wear in the courts indicating destructive words. Moreover, the Court recognized that the expression on the T-shirt could be defined as obscene and this would have allowed an intervention against the plaintiff. However, as also recalled by Krattenmaker, the obscenity review at the time of the facts was mainly concerned with the presence of erotic content (Krattenmaker, 2012, p. 661). Finally, about the obscene nature of the language used, we can read in the judgment that the defendant could only be criminally punished if his speech (i.e. the words present on the jacket) fell within a specific category of speech not protected by the First Amendment. Although the swear word present contained foul language, it was not outside the protection of said Amendment. The ban on so-called *fighting words* did not stop the plaintiff either, because these do not refer to promoting civilized speech, but to pointing out that insults directed at individuals do not enjoy constitutional protection (Caine, 2004, pp. 443-445).

Since we do not presume to want or be able to delimit the judicial references and reasoning of the US Supreme Court to these three cases alone, we focus on these three precedents to describe the nature of freedom of expression to highlight the scope of this right, its application, and the presence of limits on how and where this freedom can be exercised.

As defined in the first paragraph, even such a relevant right has limits. Therefore, again as an example, some Supreme Court rulings will be examined to see how the American courts have recognized and delimited the exercise of free expression.

The first limitation that is examined is related to the content of the objections perpetrated in school environments, against the school administration itself. In this regard, we cite the *Hazelwood School District v. Kuhlmeier* (1988).

The lawsuit concerned the publication in the newspaper 'The Spectrum' (sponsored and financed by the Hazelwood school) of articles on teenage pregnancy and the impact of divorce on young people. Faced with these articles, the headmaster decided to remove these contributions from the newspaper's publication.

The case came before the Supreme Court, which held that the headmaster's action was not contrary to the students' right to free speech. Stressing that the newspaper was sponsored by the school, the judges pointed out that the school had a legitimate interest in preventing the publication of articles that it deemed inappropriate and that could give the idea that they had an *imprimatur* from the school. Specifically, the court pointed out that the newspaper did not function as a public forum where everyone could share their ideas, but rather one limited by the presence of a final review by the institute.

As examined by some authors later, the Court's ruling legitimized the headmaster's choice because the interest behind the expulsion of those articles was not related to maintaining the order and decorum of the institution, but had an educational nature. In the first case, the judges would not have agreed because restricting freedom of expression for these values could have undermined the students' autonomy of thought and political freedom (Bryson, Detty, 1982, 74). By enhancing, on the other hand, the educational aspect, the school perfectly fulfils those tasks, recognized by the Court itself, of 'taking the place' of parents who have the power to decide on the education to be given to their children (*Wisconsin v. Yoder*, 1972).

Another limitation to freedom of expression stems from the need to respect public order and internal peace.

An early reference is *Cox v. New Hampshire* of 1941. In a small New Hampshire town,

a group of Jehovah's Witnesses organized a parade on the pavements without first obtaining a license; this resulted in a fine for violation of the law.

Hearing the case, the Supreme Court rejected the plaintiff's claim of violation of freedom of expression. Specifically, the judges stated that although the government cannot regulate the content of speech, it can impose restrictions on the place, time, and manner of speech for reasons of public safety. Moreover, going even more specifically into the ruling in question, the Government has a greater interest in defending public order in those events that have the dimension of a large public demonstration. The interest on the part of the institutions becomes even more evident when, to maintain order and peace, it becomes necessary to mobilize a greater number of police forces to monitor the smooth running of the event.

This last point is an essential aspect in understanding how the Court balanced freedom of expression and the maintenance of public order. The presence of adequate protection during a demonstration is necessary to ensure public order, which in turn is important to promote public safety and effective communication. The need to seek prior authorization (essential to mobilize sufficient law enforcement in advance) is useful for local governments to bear the costs of public demonstrations and discourage excesses that increase the costs of public speech without a corresponding general benefit (Wiseman, 1986, p. 995).

Staying with the defense of public order, the second case is the 1969 *Brandenburg v. Ohio* case. This judgment represented an opportunity for the US Supreme Court to set legal boundaries to freedom of expression.

Specifically, the ruling focused on the application of the criminal syndicalism law of the State of Ohio against Mr. Brandenburg, a leader of the Ku Klux Klan, for his speech at a demonstration of this organization. It made it illegal to promote crime, sabotage, violence, or illegal methods of terrorism as a means to achieve industrial or political reform.

The Supreme Court, in this case, declared that the Ohio law violated the right to freedom of expression and suggested a two-pronged check to assess how speech is used and thought is expressed. The first, on a possible prohibition of speech if it is directed at inciting or producing an imminent illegal action. The second, on the likelihood that the language used may incite or produce such a consequence. The unconstitutionality of the state law lay, in the view of the judges, in having made the advocacy and teaching of doctrines illegal, ignoring whether or not the dissemination and/or teaching of these would actually incite imminent illegal action. It was precisely the lack of this line of difference that made the law excessively broad and in violation of the Constitution.

As examined in the doctrine, the expression used by the Court '*inciting or producing imminent lawless action*' was, at the time, an innovative contribution to the language of the First Amendment (Lynd, 1975, p. 191). This was because freedom of expression was coupled with a test, referred to in the doctrine for the occasion as the '*Brandenburg test*', aimed at verifying that the words used in a speech did not pose an imminent danger to public safety. This test, in the opinion of the judges, must be applied in those cases where the State intends to apply criminal sanctions for the speech made. At the same time, however, the Court, while providing for this possibility, was not unanimous that this test should also be adopted for those speeches that do not involve the imposition of a criminal sanction (Lynd, 1975, p. 165).

For the non-decision on this last point, the doctrine has pointed out that this 'test' was not formally annulled, but was disappplied because this effectively made the time element (punctuated by that 'imminent' link between the speech and the clear and present security risk) more definite and rigorous (Schwartz, 1995, pp. 238-239).

The judicial reconstruction of freedom of expression provides an insight into the extent to which the Supreme Court, over the years, has been protective of the exercise of that freedom by American citizens.

Expanding the reconstruction of this right to include their protection within university premises, it is possible to see how the intervention of police officers was carried out regularly. In particular, recalling the trespassing and defacement of private property, we learn from the *Cornelius v. NAACP Legal Defence & Education Fund* ruling of 1985 that the state, like any entity that owns the property, has the power to preserve it. Indeed, as part of the doctrine recalls, university spaces are categorized as a 'designated public forum'. In this regard, it means a space intentionally created by the government to gather public expressive activities, even if that same space has not been used exclusively for that reason. A designated public forum is generally accessible to all speakers, similar to the broad expressive activity permitted in what is termed traditional public forums (e.g. streets or squares). Concerning the designated public forum, the government is not obliged to construct or maintain it open, but as long as it is open and functioning, the government is subject to the same restrictions that apply to a traditional public forum, i.e. adopting regulations or measures that are neutral with respect to the content of the speeches made in these and that allow ample alternative channels of communication (Nickodem, Wilson, 2022, pp. 2-3).

Defining the university as a designated public forum raises, however, an important question concerning the guarantee of freedom of expression also in private universities (which were involved in large numbers in the protests described in the previous paragraph). In this case, the doctrine points out that in these not even the First Amendment prevented restrictive measures on the right in question (Sarabyn, 2010, p. 145). In 2006, Congress adopted a resolution reporting that one of the tasks of the university was to facilitate the free and open exchange of ideas. This provision, however, was not binding in nature and private universities were able to proceed undisturbed with their regulation.

The Supreme Court, as early as 1967, emphasized the necessity of making the university an open and free place to ensure the development of the nation (about *Keyishian v. Bd. of Regents*). On the other hand, from the point of view of freedom of expression, the same Court affirmed (*Sweezy v. New Hampshire* (1957)) that teachers and students must be free to investigate, study, and research to attain new knowledge and awareness; while, in 1972, the same judicial body defined college and university classrooms as markets of ideas to be supported by safeguarding academic freedom (*Healy v. James*).

Although freedom of speech in American universities has received significant protection, it has also been suppressed under certain circumstances. In the past, the restriction of this right was linked to fear of communist groups and others perceived as a threat to traditional American values. Today, policies restricting freedom of expression on campuses can be traced to other factors. Firstly, there is concern for minorities, women, and other historically disadvantaged groups on campuses (in this regard, there are many universities that have enacted regulations and banned offensive speech against these groups). These restrictions follow the interpretation of the First Amendment that does not

protect 'incitement to hatred' (Matsuda, 1989, p. 87). Secondly, American universities work hard to attract funds from students, donors, and alumni; for this reason, they increasingly try to manage their images and also avoid the appearance of controversy. To this end, universities may use tactics that include restricting public expression to small 'free speech zones', proscribing offensive or uncivil language, and requiring prior approval of leaflets, student publications, and protests (Herrold, 2006, p. 949).

Considering the elements examined, it is possible to understand why and how law enforcement agencies intervened in anti-Israel demonstrations at American universities. These acted for two reasons, as seen in the introduction to this paper. The first is inherent in the commission of crimes such as the destruction of private property; the second is because the protests disrupted the normal course of academic activity. There was no ban on demonstrations or a declaration of the illegality of student initiatives.

Besides the commission of offenses, the real problem was the disruption of lectures and graduation ceremonies. Such an event is prohibited both by Supreme Court rulings, but also by the 2014 '*Chicago Statement on Freedom of Expression*'. This represents a document, shared by more than a hundred American universities, that sets out the rules for exercising freedom of expression in university spaces.

Specifically, the declaration guarantees all members of the academic community the widest possible freedom to speak, express, challenge, and learn, with exceptions provided only for unlawful expressions that harass or defame; it provides for freedom to express oneself on the most relevant and difficult topics of current events even if these may be offensive or unpleasant; it states the universities' task to protect and promote this freedom without hindering opinions that are in the minority or that they detest (Stanley, 2019, p. 58). This, however, must not interfere with everyday university activity.

Therefore, it can be argued that the intervention of police officers on American campuses was dictated by legitimate requests from deans in deference to laws, rulings and academic regulations.

3. FREEDOM OF EXPRESSION IN FRANCE; LAWS, LIMITS AND INTERPRETATION BY THE CONSTITUTIONAL COUNCIL

Freedom of expression in France finds its legal basis in the French Constitution of 1958. In particular, the last paragraph of Article 4, included in the *Titre premier (De la souveraineté)*, states that the law guarantees the plural expression of opinions and the equal participation of political groups and parties in the democratic life of the nation. This provision, in turn, took up the legacy of another provision in the '*Déclaration des droits de l'homme et du citoyen*' of 1789, which defined natural and imprescriptible rights. Specifically, Article 11 states that the free communication of thoughts and opinions is one of man's most precious rights. This premise allows every individual to speak, write, express himself, and print freely unless called to account for any abuse in cases expressly provided for by law.

This freedom, as reported in doctrine, represents, especially following the adoption of the Declaration of 1789, an 'acquisition' of the Enlightenment cultural current and individualism that led to the consecration of the central role of man, understood as an individual, within the democratic organization of social life, free from the presence of the regal and religious limits of sovereign authority and the Church (Verpeaux, 2008, p. 235).

What has just been described places this freedom for median protection between 'mere' opinion and the possibility of communicating one's ideas. Analyzing the above-mentioned constitutional provision, it can be said that the French Constitution does not enshrine a specific provision on political speech or on expressing oneself on political matters. For this area, the Constitutional Charter relies on Article 3 (right to vote) and the privileged role recognized by political parties in the expression and dissemination of ideas in Article 4. Subsequently, 'French' free expression saw further protection by the EU. With the entry into force of the 'European Charter for Regional or Minority Languages' - in 1992 - there was a Union enhancement of language as a mode of expression or vehicle used by political discourse. The French Constitutional Council, while judging this Charter to be partially incompatible with the Constitution, considered that this freedom implied the right of each individual to choose the terms he or she considered most suitable for the expression of his or her thoughts, in the name of freedom of expression⁴². The Council's intervention argued that the existence of a national language cannot prohibit or restrict freedom of expression. Considering that Article 2 of the Constitution stipulates that the language of the Republic is French, the constitutional judges left it to the legislature to intervene to reconcile this constitutional provision with the freedom of communication and expression proclaimed in Article 11 of the Declaration of Human and Citizen's Rights. The intervention of the constitutional judges closes by arguing that this freedom implies the right for each individual to choose the terms he or she considers most suitable for the expression of his or her thoughts. In addition, the need for the French language to evolve by integrating terms from different sources into the usual vocabulary, i.e. expressions from regional languages, so-called popular words, or foreign words (Verpeaux, 2003, p. 94) was emphasized.

Regarding the limits to freedom of expression, the French legislator worked on this with a specific law. The *loi du 29 juillet 1881 sur la liberté de la presse* provided penalties for insult, defamation, provocation of *crimes*, and *delits* and attacks.

In particular, an insult means an insulting expression, terms of contempt, or invectives that do not contain the imputation of any fact. Concerning the modality of an insult, the *Cour de Cassation*, in a ruling in 1962, established that any word (in this case, the adjective '*mesquin*', which can be translated as 'mediocre person' or 'little one') can be considered offensive, depending on its use and context (Fontier, 2004, pp. 2-3)⁴⁴. Defamation, on the other hand, covers any accusation or imputation of a fact detrimental to the honor or consideration of the person or entity to whom the fact is attributed. This accusation may take the interrogative, conditional, doubtful, or insinuating form. Concerning the provocation of *crimes* and *delits*, this includes speeches, shouts, or threats uttered in public places or gatherings, whether by writings, including printed matter, offered for sale or displayed in public places or gatherings, or by signs or posters exposed to public view. In this regard, if in the United States, we have seen that the Supreme Court, in order to condemn the commission of offences 'provoked' by freedom of expression, uses the clause of imminence of offences committed, the French Courts, on the other hand, have affirmed that the effect of provocation is verified if it is directed towards actually provoking a person to commit an offence.

In this regard, we cite an important court case from the Nanterre court in 2004. The judge ruled on the interview of a singer who, referring to the guru Raël (leader of a spiritual group) said '*I think we should kill Raël*'. The court stated that the expression in

question had a metaphorical meaning. This meaning, as stated in the text of the ruling, derives from the fact that there was no intentional element necessary for the commission of a crime, with a decanted and provocative humor. Finally, on the punishment of attacks, the law punishes those that harm the institution and not the people. Contempt is intended to protect constituted bodies, holders of public power, and persons entrusted with a public service mission (such as ministers, magistrates, police officers, etc.).

Subsequently, in 1990, the *loi Gayssot* introduced a new article, 24 bis, into the 1881 law, punishing the crime of denialism, targeting all those references that dispute the existence of one or more crimes against humanity.

Another change came with the law of 13 November 2014. This tightened the penalties for crimes of inciting and provoking terrorism committed on the Internet. This updated the 1881 law that punished the same actions but carried out in the press.

This is the legislative framework for this freedom. At this point, one must ask how the Constitutional Council defended the application of free expression. Again, as we have seen with the jurisprudence of the American Supreme Court since we cannot quote the entire work of the French judges, we will limit ourselves to considering a part of their decisions to provide a sufficiently adequate view of how to protect the institution in question.

As pointed out in the doctrine, freedom of expression first indirectly appeared in constitutional jurisprudence. The occasion came from the protection or recognition of other freedoms such as academic freedoms, the right to the collective expression of ideas and opinions, and pluralism (Mignon, 2012, p. 866).

The first judgment is the one of 1993, No. 322, concerning the constitutionality of the law on public institutions of a scientific, cultural, and professional nature. Specifically, the Constitutional Council stated that a law cannot restrict the right to free communication of thoughts and opinions guaranteed by Article 11 of the 'Declaration of the Rights of Man and the Citizen' only to the extent of the needs of the public service in question. The judges emphasized that, by their very nature, teaching and research functions not only allow but require, in the very interest of the service, that the free expression and independence of staff be guaranteed by the provisions applicable to them. This fundamental principle, initially limited to teachers, was later extended to teacher-researchers as well. The aforementioned judgment closes with a reflection by the judges, who recall their duty to intervene to ensure, if necessary, that this right is exercised with sufficient rigor.

The focus on academia was further underlined by the fact that French universities enjoy a high level of autonomy and self-government. This would also protect the so-called freedom of science, which includes an individual and a collective dimension. The former refers to the need for scientific activity to be free from any external public intervention; the latter, on the other hand, refers to the right of academics to participate in an adequate organization of higher education (Fernandes, 2023, p. 2).

A subsequent decision of the Constitutional Council (Judgment No. 352 of 1994) enshrined the right to the collective expression of ideas and opinions, without explicitly linking it to a specific regulatory reference. The legislative provisions assessed based on freedom of expression allowed, on the one hand, the prefect to prohibit the carrying or transporting of objects that could constitute a weapon in cases where the circumstances give rise to the fear of serious disturbances to public order in the event of a demonstration on the public highway and, on the other hand, extended the possibilities of searching vehicles in the latter situation. In particular, some of these provisions, challenged this time

concerning freedom of expression by the applicants, established a penalty in addition to the prohibition of taking part in demonstrations on the public highway in certain circumstances. These are therefore the provisions that confront the right to the collective expression of ideas and opinions. This right comes close to freedom of demonstration if one considers the latter as a collective means of expressing ideas and opinions. However, freedom of collective expression is not enshrined in an autonomous and general manner. Therefore, the decision of the French constitutional courts did not represent a legal novelty, but rather the realization that freedom of expression can also be exercised collectively.

As seen in the United States, freedom of expression also encounters limits in France. These have been enforced in the jurisprudence of the Constitutional Council, which has referred, in some cases, to constitutional principles and, in others, to laws. Here again, I follow some decision-making references by way of example.

The first limitation is the public order, which, in some cases, is anticipated by the moral order.

The Constitutional Council, in its judgment No 467 of 2003, considered the limitation applied to the freedom of expression concerning the defense of the national emblem and anthem from public indignation to be reasonable and justified. This possibility stems from the application of Article 433-5-1 (entitled 'contempt') of the French penal code, introduced by 239/2003 on internal security. This provision covers words, gestures or threats, writings or images of any kind that have not been made public, or the sending of objects addressed to a person entrusted with a public service mission, in the exercise or on the occasion of the exercise of his or her mission, that are capable of offending against his or her dignity or the respect due to the function he or she is entrusted with (Carcassonne, 2012, pp. 58-59). The judges, however, despite the constitutional coverage given to these two important national symbols, specified that the incrimination would not be general, but would be limited only to public events of a sporting, recreational or cultural nature that takes place in contexts subject to laws and regulations, hygiene, and safety rules due to the number of people present.

Part of the doctrine supported the above law and the Council's orientation by linking the defense of national symbols to a dual sphere, military and civil. The former would be justified by the obligation of loyalty that members of national armed forces must swear and guarantee to the State; the latter, on the other hand, focuses on the maintenance of the moral order. The protection of the latter would be preparatory to the defense and observance of public order (Cabannes, 2003, pp. 10-11).

Also, in observance of national public policy, Council Judgment No. 801 of 2020 is relevant. This concerned the constitutionality review of a provision of the Avia Act (766/2020). In particular, it referred to the provision of the time limit, 24 hours from the receipt of reports, set for the administrators of sites or social networks to remove pornographic content concerning minors or content that encourages and supports acts of terrorism. The judges, recalling the exclusive competence of the national legislator in this matter, and emphasizing that the *ratio* of this provision is to guarantee a freedom of expression that does not undermine the solid political and social foundations of the State (with an interest in the defense of public order), argued that the 24 hours provided for were short given the possibility of receiving many reports, the time needed to check them, the sensitivity of the judgment on a given content and the good protected by the law in question. This led the Council to define the above-mentioned time frame given by the legislature as

an inadequate, necessary, and proportionate limitation concerning the need to guarantee and ensure free expression.

At this point, the question arises as to what is meant by public order in French law. By this expression, a part of the doctrine has included the set of imperative rules that concern the organization of the nation, the economy, morality, health, security, public peace, fundamental human rights, and freedoms (Lagarde, 2001, p. 745). At the expense of this definition, the jurisprudence of the French Constitutional Council has broadened the concept of public order compared to how a very long French administrative legal tradition has framed it. In particular, the latter described the principle in question as the defense of good order, security, health, and public tranquility. Constitutional judges, on the other hand, have over the years reconstructed public order as a clause aimed at ensuring the effective guarantee of constitutional rights and principles. This is the narrowest notion of public order. At the heart of this seems to be the principle of 'security' guaranteed by the 1789 Declaration: there is no freedom possible in a society in which individuals fear for the security of their person (Mazeaud, 2003).

The Council gave legal value to a notion of public policy that includes the view of the national administrative tradition and the Court's guidelines. In particular, the focus has been on the safeguarding of an objective of constitutional value, i.e. an imperative related to social life that must guide regulatory action. This defense action also allows considerations of general interest to be taken into account in order to mitigate the scope of certain constitutional rules, including rights or freedoms.

With reference to the latter, the courts, in Judgment 20 of 1981, ruling on security and freedom, ruled that individual freedom and the freedom to come and go must be reconciled with what is necessary for the protection of purposes of general interest with constitutional value, i.e. precisely the maintenance of public order.

Besides the limit of public order, freedom of expression knows the limit of offense against the individuals to whom a message or communication may refer. Referring to France, one cannot fail to mention in this context certain cases involving the editorial office of *Charlie Hebdo*, which was repeatedly accused by certain religious groups for its satire. A 1992 ruling by the Paris High Court held that the right to humor and satire is part of freedom of expression, but is permitted within certain limits. According to the High Court, this freedom, applied to a satirical register, allows an author to force features and alter the personality of the depicted subject as long as there is no disrespect.

Another example comes from the 2007 ruling of the Paris Court. In this case, the monocratic judge acquitted the newspaper of the charges of offense for caricature images of Mohammed because one can make humor, albeit desecrating, against a religion, but not against an individual for his beliefs. The Court's reasoning started from the observation that, despite the shocking, even offensive, nature of the drawings published in *Charlie Hebdo*, they appear to exclude any deliberate intention to directly and gratuitously offend all Muslims.

In light of what has been seen and examined within the legal-legislative dynamics of free expression, one wonders how this right is implemented within French universities.

In France, there is no law explicitly prohibiting the occupation of a school/university building. However, a provision of the Education Code, No 811-1, intervenes in defining the rights and duties of students concerning blockades. The provision specifies that the latter have freedom of information and expression concerning political, economic, social, and

cultural issues; they may exercise this freedom individually and collectively, under conditions that do not prejudice teaching and research activities and do not disturb the internal order.

Therefore, it can be said that French law allows protest activities and student gatherings within universities, as long as these actions are confined to an area of the building that does not impede university programming. In addition, there is an absolute prohibition on discriminating entrances to universities; the protest action must not prevent other people from entering these premises.

Considering this legislative basis, we can understand how the police intervention was legitimate. The student protests were not limited to certain areas of the universities, but blocked academic activities and prevented some students from entering because they were Jewish. This allowed the rectors to activate the police intervention.

In fact, as stated in Article 712-1 of the Education Code, in France, the rector is regarded as an administrative authority (Condette, 2004, pp. 71-73) who must manage the university space and, in the event of disorder, intervene by appealing to the police. The conference of French rectors in 2020 formalized the power of this figure to ask the administrative judge to evict illegally occupied university premises; then, at a later stage, the judge will give his consent or not.

Despite informing the judicial authority, this discipline accepts the fact that even without consent, the rector can request and obtain the intervention of the police because the law allows it.

The lack of uniformity between these two figures could result from the different readings of the situation. On the one hand, the rector fulfils a task of his own, supported by a decision taken in direct connection with the prefectural services of the department concerned and the rector's cabinet; on the other hand, the administrative judge might consider the rector's request disproportionate since the task of safeguarding public order is also, and more specifically, the responsibility of the prefect.

The provision regarding the rector's powers has deep historical roots dating back to 1229-1231. In 1229, several Parisian university students were killed during a crackdown by the city guards. Following this episode, the University of Paris went on strike for two years, until the intervention of Pope Gregory VII who, with the bull *Parens scientiarum* of April 1231, defined the bishop of Paris as the only person responsible for public order in the university, giving him a power exempt from the control of civil justice. Later, this institution evolved to recognize the authority of the rector. This, however, did not prevent some specific cases of direct intervention by the police, without the request of the academic authority. Among these options, the imperial decree adopted by Napoleon I in 1811 indicated cases of *flagrante delicto*, disaster (e.g. fire), or requisition by the Public Prosecutor's Office.

Returning to the relationship between freedom of expression and universities, French law (Article 511-2 of the Education Code) recognizes students' freedom of information and expression while respecting pluralism and the principle of neutrality. These freedoms are extended to high school students, who, as stated in Circular No. 129 of 2010, on the responsibility and commitment of high school students, requires headmasters to provide them with spaces reserved for communication actions undertaken on their own initiative.

In France, unlike the United States, there is no difference in treatment and discipline on this freedom between private and public universities. However, what characterizes

transalpine legislation is the effect of the presence and application of the principle of secularism within university institutions.

Limiting ourselves to presenting the aforementioned principle only insofar as it is useful for this discussion, secularism, present in French legislation for the first time in the 1946 Constitution, in the thirteenth paragraph of the Preamble, explicitly provided that the organization of public education, free and secular at all levels, was the duty of the state. Subsequently, this principle became more and more stabilized in transalpine legislation to the point of expanding to cover also the agents (and not also the users) of the public service. The Constitutional Council, in this regard, recalled in ruling 2012-297 of 2013 that the principle of secularism implies the neutrality of the State, imposing, more precisely, a requirement of neutrality of the agents (in this case, the teaching staff) and not of the users (the students) of the public service. If users retain the right to express their religious beliefs, this must be exercised within the limits of respect for the neutrality of the public service and does not authorize any proselytism.

Although the aforementioned ruling focuses exclusively on secularism in religious matters, the Education Code, *ex* Article 141-6, affirms the secular nature and independent of any political, economic, religious, or ideological influence of the public service of higher education. This tends to the objectivity of knowledge and respects the diversity of opinions. This, as reported in doctrine, is an important element for the serenity of teaching and the development of critical thinking that enables scientific progress (Sild, 2024, pp. 54-55).

Such an approach demonstrates the impossibility for universities (through the voice of managers or employees) to publicly take a position on national policy because it would violate legislative and constitutional dictates.

If the constraint for universities is linked to their nature as public bodies, it is important to ask what happens, on the other hand, for private ones. In this case, there is a difference between contractualized and non-contractualized private universities. The former are institutions that, after at least five years, are recognized by the state and this recognition entails the above-mentioned constraint on neutrality. This is not the case for those institutions that, on the other hand, have no contractualization.

As already mentioned, the constraint of neutrality does not affect the users of the education service, i.e. the students. In this regard, one is reminded of the ruling of the French Council of State (decision no. 494003 of 2024), which deemed legitimate the requests of the Paris-Dauphine University's internal Palestinian Committee to the rector to take all necessary measures to guarantee public order within the university when organizing a conference (Decision N. 494003, 2004). It is precisely the defense of public order that is the condition laid down in the Education Code; this, as seen above in the university context, means not interrupting or disrupting academic activities, not vandalizing the institution's facilities and property, and increasing the risk of crimes being committed.

4. CONCLUSION

The comparison between the United States and France, first on the legal aspects, then on the legislative references, allows us to understand how the balancing act between the guarantee of free expression and the safeguarding of constitutional and legislative limits to the recognition of this right works.

From the French rules on the right in question and the rulings of the National Constitutional Council, we learn of the greater sensitivity (compared to what we have seen in the United States) to the protection of public order when it comes into collision with freedom of expression.

Despite this different level, in both judicial and legislative experiences, it is possible to refer to the need to consider and protect a public order that, in this circumstance under analysis, can be examined in a micro and macro dimension.

The first refers to specific public order within universities. In both countries examined, as seen, it is necessary to ensure respect for academic activities (both teaching and administrative) and the decorum of university spaces. The second, on the other hand, relates to a dimension outside the confines of the university campus and it is precisely here that an important political and social game is played.

University protests focused on criticism of support for Israel, in favour of the Palestinians' social and humanitarian motives. Supporting the latter does not mean, as a direct consequence, supporting Hamas and its actions. Had this been the case, there would have been a violation in both of these legal systems.

Indeed, it must be remembered that Hamas has been defined as a terrorist organization by both Washington and Paris. In particular, the US State Department made this classification in 1997, while the EU (along with its member states), under pressure from the UK and the Netherlands, in 2013.

The judicial experience in the United States concerning freedom of expression concerning terrorist groups underwent an important evolution in the aftermath of 11 September 2001. One example is the Supreme Court's ruling in *Holder v. Humanitarian Law Project* in 2010, which ruled on a federal law prohibiting the provision of material support to terrorist organizations designated as such by the US State Department. The plaintiffs challenged this provision in the name of the First Amendment (arguing that their support would not affect the group's ability to spread violence), and the justices, recognizing how that law burdened the content of the amendment in question, held that the government's interest in restricting all activities in favor of these organizations was sufficiently strong to justify the burden imposed on First Amendment rights.

In France, on the other hand, the boundary of non-coverage between freedom of expression relating to terrorist organizations is anticipated, as recalled by an important recent guideline of the Constitutional Council (ruling 845 of 2020). In this case, it established the need to condemn the possession, with full knowledge of the facts, of files or documents qualifying the apologia for acts of terrorism if this possession is accompanied by adherence to said ideology. These actions would allow the existence of an offense of concealment of apologia for acts of terrorism to be recognized.

The shift from the defense of 'university' to 'national' public order would highlight an even greater interest in France, which would, in turn, have a greater need to settle this student-fueled debate in a respectful and balanced manner.

Indeed, Macron's country is the state with the largest Jewish (around 500,000 people) and Muslim (7-8% of the national population) minorities in Europe.

Channeling the confrontation on the Israeli-Palestinian issue and averting the reiteration of episodes of discrimination against Jewish students would represent an important interest of the French State in safeguarding national public order that responds to political needs and principles that find a synthesis in the unitary consideration of the fundamental

interest of the State (Groppali, 1980, pp. 79-80).

In a global context in which society, through the network and the consequent rapid dissemination of information, shares certain messages and ideas, also expressed through strong demonstrations, the state apparatus inevitably stands as the last bastion of an internal order and stability necessary to safeguard the political, social and legal balance of communities. This happens through certain political choices linked to specific interests that affect the population, identified in certain spatial and temporal dimensions that mark its originality.

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