

FREEDOM OF SPEECH IN ON-LINE PUBLICATIONS: TRADITIONAL CORNERSTONES AND CONTEMPORARY CHALLENGES IN THE LEGAL SYSTEMS OF ITALY, OF THE UNITED KINGDOM AND OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Gianluca Sardi

*Senior Lecturer of Public Law
Administrative Law,
Comparative Constitutional Law,
European Union Law and Legal Philosophy
London Centre for Interdisciplinary Research*

KEYWORDS

Freedom of speech; on-line publications; human rights; freedom of the press; digital media; Brexit.

SUMMARY: 1. Introduction. 2. Origin and development of freedom of speech. 3. Freedom of speech in on-line publications in the juridical system of the Italian Republic. 4. Freedom of speech in on-line publications in the legal system of the United Kingdom of Great Britain and Northern Ireland. 5. The safeguarding of freedom of speech in the internet era in the legal system of the European Convention on Human Rights. 6. Final remarks. 7. Bibliography.

1. INTRODUCTION

The present research aims to examine the conflict between freedom of speech¹, with particular reference to on-line publications, and the limits imposed on it by public institutions in order to preserve the dignity, honour and reputation of the subjects involved in the exercise of the aforementioned right².

Moreover, from an analysis of the classical bulwarks and of the current challenges of freedom of speech in on-line publishing in the legal systems of Italy, of the UK and of the ECHR, it will come to light that, due to the incessant legislative reforms and to the ongoing jurisprudential fluctuations, these topics can be compared to a building site with works eternally in progress.

2. ORIGIN AND DEVELOPMENT OF FREEDOM OF SPEECH

Freedom of speech, which is definable as the right to freely express one's own thoughts by words, by writing or by any other means of dissemination and which was known even in Ancient Greece³, came into full bloom during the French and the American revolutions and—in particular—in the United States of America.

With respect to the Declaration of the Rights of Man and of the Citizen, which was approved by France's National Constituent Assembly in 1789, Article 11 states that free communication of thoughts and opinions is one of the fundamental human rights, except in those cases as determined by law when this freedom is abused. As a result, even if the explicit elaboration of this liberty of free speech constituted a great step forward, the exception as stated in Article 11, as aforementioned, has considerably put this prerogative at great risk. In fact, in these circumstances judges

¹ Freedom of speech can be considered one of the most significant corollaries of freedom of conscience. On this last topic in the European context, see A. Fernández-Coronado González (Dir.), *Libertad de conciencia en el marco de la Unión Europea: pluralismo y minorías*, Colex, Madrid, 2002.

² According to C. Esposito, the right to freedom of speech is characterized by a "struttura intimamente sociale". Cf. C. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano*, reprinted in *Rivista italiana per le scienze giuridiche*, nuova serie, 2, 2011, 18.

³ With reference to freedom of speech in Ancient Greece, see G. F. Ferrari, *Le libertà. Profili comparatistici*, G. Giappichelli Editore, Torino, 2011, 6.

would be allowed to deal with the concept of abuse with very few limitations, which would potentially mean the conviction of individuals who may have expressed ideas considered abusive, based on the significantly dominant morality and on the long established tradition⁴.

As far as the United States of America is concerned, instead, it should be highlighted that Section 12 of the Virginian Bill of Rights established that the freedom of press⁵ was one of the great bulwarks of liberty, and could never be restrained, but by despotic governments⁶. After having examined the aforementioned provision, it is clear that freedom of speech was assured only in terms of freedom of the press. Consequently, the range of its protection was significantly limited.

In 1791, the First Amendment to the U. S. Constitution was added. According to it, Congress was not allowed to make any laws respecting an establishment of religion, prohibiting the free exercise of religion, abridging the freedom of speech, the freedom of press, the right to peaceably assemble or the right to petition for a governmental redress of grievances⁷.

From then on, the American constitutional system began to recognize both freedom of speech and freedom of the press, in order to allow everyone to express their thoughts and to make them available for the

⁴ "Hence, the Declaration established a categorical mandate to ensure and regulate by law the right to freedom of information [...]. The Declaration of the Rights of Man and the Citizen considers freedom of print as a right which must be positively preserved and which may, at the same time, collide with other rights. As a result, the State is presented as the guarantor of both this public service and the free exercise of all other rights". R. Magallón Rosa, J. M. Sanmartí Roset, G. Aguado Guadalupe, *Press-State Relations: A Comparative Analysis of Euro-Mediterranean and British Models*, in *Arts and Social Sciences Journal*, Volume 2010: ASSJ-1, published on-line: January, 2010, 2.

⁵ The aim to inform is one of the most important purposes of the press. According to Aristotle, information is a tool to access the mechanisms of social control of power. About the relevance of information in the thought of Aristotle, cf. C. A. Viano, M. Zanatta (eds.), *Aristotele. Política e Costituzione di Atene*, U. T. E. T., Torino, 1992, 273-274.

⁶ The Virginian Bill of Rights was proclaimed on the 12th of June, 1776, just a few weeks before the approval of the U. S. Declaration of Independence.

⁷ Freedom of speech is also the basis of religious freedom, which is one of the most important prerogatives even in the European Constitutions. With particular reference to religious freedom in the 1978 Spanish Constitution, see A. Torres Gutiérrez, *Los retos del principio de laicidad en España: una reflexión crítica a la luz de los preceptos constitucionales*, in *Anuario de Derecho Eclesiástico del Estado* 2017; XXXII: 663-722.

whole world not only through paper print, but also through every kind of media, including, of course, to what is commonly referred to as mass media⁸. As a consequence, it should be highlighted that the 1st Amendment was ahead of its time and has come to include even current forms of publication such as digital media and social networks, which were completely unknown at the time of its approval and that are entirely different instruments, which guarantee this fundamental liberty even more effectively.

During the nineteenth and the twentieth centuries, almost every western country approved its own legislation guaranteeing freedom of speech, freedom of the press and freedom of the media. In addition to that, the jurisprudence of the courts has ensured a constant development towards the protection of these rights⁹.

Moreover, the international dimension of the relevance given to freedom of speech emerges from Article 19 of the Universal Declaration of Human Rights, which states that “everyone has the right to freedom of opinion and expression” and that “this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”¹⁰.

However, even if both legislative evolution and jurisprudential verdicts have greatly safeguarded freedom of speech, with particular reference to on-line publications, the need to protect conflicting interests and, consequently, the necessity to guarantee a balance of opposite prerogatives have raised some significantly problematic issues about the limits of the aforementioned constitutional right, both in the civil law systems and in the common law countries.

⁸ “The plain, if at all times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes”. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975).

⁹ As I will explain later, this applies to both national and supranational courts, with particular reference to the verdicts of the European Court of Human Rights on these issues.

¹⁰ The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations in New York on the 10th of December, 1948.

3. FREEDOM OF SPEECH IN ON-LINE PUBLICATIONS IN THE JURIDICAL SYSTEM OF THE ITALIAN REPUBLIC

As far as Italy is concerned, Article 21 of the 1948 Republican Constitution states that everybody has the right to freely express his or her own thoughts by words, by written messages or by any other means of dissemination of information¹¹. According to the aforementioned article, the press cannot be subjected to the burden of authorization or censorship. Moreover, seizure by judicial authorities can only be carried out in cases of crimes, for which the law of the press specifically authorizes it. Finally, it should be noted that the same source of law states that printed publications, performances and all other events contrary to morality are forbidden.

However, it has to be taken into account that, although the Italian Constitution guarantees freedom of speech, with particular reference to freedom of the press, both the criminal code and the relative jurisprudence consider the right to honour and reputation as having the same importance as freedom of speech¹².

Even private law safeguards the right to honour and reputation, which jurisprudence considers fundamental prerogatives of the individual¹³.

¹¹ The topic of freedom of expression has always had significant relevance in the Italian juridical panorama. For example, it is worthwhile mentioning that the first verdict in history of the Italian Constitutional Court, which was issued on the 14th of June, 1956, was about freedom of expression.

¹² In fact, Article 595 of the Italian Criminal Code, which was approved in 1930 and entered into force in 1931 (when Italy was under fascism), states that whoever, by communicating with more than one person, offends the reputation of others, is punished either with imprisonment up to a year or with a fine of up to 1032 euros. Furthermore, if the offense is committed by means of the press or by any other means of publicity, or in a public deed, the penalty is either imprisonment from 6 months to 3 years or a fine of not less than 515 euros.

¹³ "[...] è particolarmente importante rilevare che, secondo Cass. n. 15742 del 2018 l'onore e la reputazione costituiscono diritti inviolabili della persona, la cui lesione fa sorgere in capo all'offeso il diritto al risarcimento del danno non patrimoniale, a prescindere dalla circostanza che il fatto lesivo integri o meno un reato, sicchè ai fini risarcitori è del tutto irrilevante che il fatto sia stato commesso con dolo o con colpa. Questo significa che ciò che più appare assumere rilevanza da un punto di vista civilistico è la verifica dell'esistenza o meno di una lesione non lieve dell'altrui reputazione [...], circostanza che andrà necessariamente valutata facendo riferimento al caso concreto". Cf. L. Delli Priscoli, *Solidarietà, uguaglianza e risarcibilità del danno*

Therefore, this conflict requires a delicate balance of reciprocal rights under certain conditions. As a result, the Italian Supreme Court of Cassation has constantly highlighted the three conditions on the basis of which the exercise of the right to report, with particular reference to the on-line press, is given predominance as compared to the possible crime of defamation. These three elements are the truthfulness of the information, the relevance of the information in the social context and the politeness and the decent expression of the language used in informing¹⁴.

Moreover, it is important to take into account that the United Sections of the Supreme Court of Cassation analyzed the topics of the limits of preventive seizure of the on-line press and of the on-line publications, which are not regulated by any written laws. In fact, according to a recent verdict, the aforementioned Article 21 of the Constitution, in the section wherein it describes the limits to the seizure of printed matter, includes a broad notion of press, which also contains the informational activity carried out by professionally organised on-line newspapers¹⁵.

In addition, the United Sections of the Court of Cassation distinguished the professional information area conveyed through an on-line newspaper, to which the guarantees of Article 21 of the Italian Constitution can be applied, from the spontaneous dissemination of news and information on the web¹⁶. According to the Supreme Court of Cassation, the notion of on-line press can be referred to the dissemination of information of a professional nature, and not to the spontaneous dissemina-

non patrimoniale, in *MANUALE RAGIONATO di diritto costituzionale europeo*, edited by F. Caringella, DIKE Giuridica Editrice, Roma, 2020, 307.

¹⁴ With particular reference to the requirement of the truth of information, the Supreme Court of Cassation recently stated that it can be considered *libel - due* to the absence of the justification of the right to judicial reporting-when the journalist uses the term "imputato" rather than "persona sottoposta alle indagini preliminari", in a newspaper article in cases where he reports a successful request for indictment, instead of the actual circumstance of the notification of the notice of conclusion of the preliminary investigations pursuant to Article 415-bis of the Code of Criminal Procedure, since such acts cannot be considered equivalent, because the latter, unlike the former, does not involve prosecution and aims to allow the suspect to exercise the right of defense, with the possibility of further investigations. Cf. Cass. civ., sez. I, 18th May, 2018, n. 12370.

¹⁵ Cf. Cass. pen., Sez. Un., 17th July, 2015, n. 31022.

¹⁶ *Ivi*.

tion of news via forums, blogs, newsgroups, newsletters and social networks, even if they certainly are an expression of freedom of speech²⁷.

Even if the absolute nature of the rule of law does not allow subsidiary sources of law to introduce restrictions to freedom of speech, the Italian Authority for Communications Guarantees (AGCOM) published an outline of regulations concerning the dispositions on the respect of human dignity and the principle of non-discrimination and contrasting hate speech²⁸. However, further comments about the aforementioned regulation if and when it will effectively come into force should be considered.

4. FREEDOM OF SPEECH IN ON-LINE PUBLICATIONS IN THE LEGAL SYSTEM OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

As far as the United Kingdom of Great Britain and Northern Ireland is concerned²⁹, it should be firstly noted that the Bill of Rights 1689, guar-

²⁷ In fact, "il *forum* è una bacheca telematica, un'area di discussione, in cui qualsiasi utente o i soli utenti registrati (forum chiuso) sono liberi di esprimere il proprio pensiero, rendendolo visionabile agli altri soggetti autorizzati ad accedervi, attivando così un confronto libero di idee in una piazza virtuale. Il *forum*, per struttura e finalità, non è assimilabile a una testata giornalistica e non è soggetto, pertanto, alle tutele e agli obblighi previsti dalla legge sulla stampa. Non diversa dev'essere la conclusione per il *blog* (contrazione di *web log*, ovvero 'diario in rete'), che è una sorta di agenda personale aperta e presente in rete, contenente diversi argomenti ordinati cronologicamente; [...] per i *newsgroup*, che sono spazi virtuali in cui gruppi di utenti si trovano a discutere di argomenti di interesse comune; per la *mailing list*, che è un metodo di comunicazione, gestito per lo più da aziende o associazioni, che inviano, tramite posta elettronica, a una lista di destinatari interessati e iscritti informazioni utili, in ordine alle quali si esprime condivisione o si attivano discussioni e commenti". *Ivi*.

²⁸ "L'AGCOM, per quanto la riserva assoluta di legge escluda che restrizioni alla libertà di espressione possano essere prescritte da fonti di rango *sub*-primario, ha emanato uno schema di regolamento —di cui alla delibera 25/19/CONS— recante '*disposizioni in materia di rispetto della dignità umana e del principio di non discriminazione e di contrasto all'hate speech*'. C. Luceri, F. Ribezzo, *La libertà di espressione: aspetti problematici nell'era di internet*, in *Ius in itinere*, 21st January, 2020, 6-7, <https://www.iusinitinere.it/la-liberta-di-espressione-aspetti-problematici-nellera-di-internet-25243>.

²⁹ For the analysis of on-line freedom of speech, with particular reference to the anglosaxon world, see G. L. Conti, *Manifestazione del pensiero attraverso la rete e trasformazione della libertà di espressione: c'è ancora da ballare per strada?*, in rivista

anteeing a parliamentary right to freedom of speech in Parliament, is still in effect in England and Wales²⁰.

A different but very similar document, the Claim of Right Act 1689, applies in Scotland.

Instead, the validity of the Bill of Rights 1689 in Northern Ireland is controversial²¹.

Moreover, it has to be highlighted that British citizens have a negative liberty to free speech under the common law.

In order to deal with the worrying diffusion of offensive and indecent messages, the Communications Act 2003 makes it a *criminal offence* to write or to communicate an offensive thought through an electronic communication network²².

According to a significant part of English jurisprudence, only those who write messages which constitute a real threat of offence, violence or stalking can be prosecuted.

In an important case, a man who threatened to bomb an airport if it had still been closed on the day of his flight, was arrested in terms of

A/C, 4/2018, 14th November 2018, 200-225, https://www.rivistaaic.it/images/rivista/pdf/Conti_4_2018.pdf.

²⁰ According to it, "The Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".

²¹ "With Brexit, and the collapse of the political institutions, it is time to think again about the Bill of Rights, as one part only of an agenda of enhanced respect. Whatever the recriminations about the past and whatever disagreements of principle (or otherwise) there are around this, hopefully people now know that genuine power-sharing politics must rest on a framework of rights and equality for all. Achieving this framework will not be easy in the current environment but Brexit, and the utter mess that surrounds it, may well shake everyone out of complacency soon. We believe that Northern Ireland still needs a Bill of Rights". Cf. C. Harvey, A. Smith, *Good Friday Agreement at 20: The Return of the Bill of Rights?*, in *QPol*, 29th March, 2018, <http://qpol.qub.ac.uk/return-bill-rights-ni/>.

²² According to section 127 of the Communications Act 2003, "A person is guilty of an offence if he sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or causes any such message or matter to be sent. A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he sends by means of a public electronic communication network, a message that he knows to be false, causes such a message to be sent; or persistently makes use of a public electronic communications network".

section 127 of the Communications Act 2003. The verdict was appealed by the defendant, who was acquitted because his words did not aim at threatening anybody²³.

As a consequence, it seems clear that expressions which are against the dominant morality, but do not put public order at risk, should not be considered crimes, because the fundamental right to free speech and to its diffusion has to be preserved in a democratic society.

Some authors also say that freedom of speech should allow the right to offend, otherwise the liberty would be meaningless²⁴.

Others, contrarily, believe that freedom of speech does not include the right to offend²⁵.

The Defamation Act 2013 pursued the balance between freedom of speech and publication and the safeguarding of the dignity and reputation of the general population²⁶.

A case showing the problems involved in checking a defamatory comment written on-line is the one which involved Lord McAlpine²⁷.

²³ *Chambers v. Director of Public Prosecutions* [2012] EWHC 2157.

²⁴ "Free speech includes the right to offend. A law to protect against that would diminish us [...]" K. Thapar, *Freedom of speech includes the right to offend*, in *Hindustan Times*, 12th March, 2017, <https://www.hindustantimes.com/columns/freedom-of-speech-includes-the-right-to-offend/story->.

²⁵ "If you have an opinion that seeks to harm another, one that is racist, homophobic, sexist, transphobic, etc., then your opinion first loses respect, then credibility, and later you lose your right to share that opinion. Freedom of speech does not mean you have the freedom to offend. And why would you want to argue over the right to offend someone anyway-it just makes that person look worse. You could argue that your opinion is not intended to offend someone and that people should just get over it, but if the person it is directed at is offended and tells you why, then it is offensive". G. Spicer, *Right to free speech does not mean right to offend*, in *Coppell Student Media*, 22nd January, 2016, <https://coppellstudentmedia.com/61778/opinions/right-to-free-speech-does-not-mean-right-to-offend/>.

²⁶ According to it, "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".

²⁷ BBC Newsnight broadcast a programme with a guessing game in which a Member of Parliament was accused of sexual abuse. False accusations against Lord McAlpine began to spread on-line. Then, Lord McAlpine took action against a woman who had published a tweet insinuating he had committed child abuse. The judgement was in Lord McAlpine's favour; the tweet was considered to be defamatory. *Lord McAlpine of West Green v. Bercow* [2013] EWHC 1342 (QB).

As will be better specified later, from the analysis carried out it is possible to deduce that a reform of the regulation of freedom of speech in the United Kingdom would be appropriate, in order to guarantee the preservation of the canons of legal certainty and of foreseeability of jurisprudential verdicts, which should be respected even in a common law nation, that is also a member State of the European Convention on Human Rights.

The fundamental relevance of the topic of freedom of speech in the United Kingdom and in the Commonwealth is clearly visible in a very recent Joint Statement by the Commonwealth Lawyers Association (CLA)²⁸ and by the Democratic Governance and Rights Unit²⁹ (DGRU)³⁰. In this document, the CLA highlights that "Freedom of expression is a cornerstone of democracy and underpins good governance, public accountability and respect for all human rights. Everyone has the right to freedom of expression, which includes the right to seek, receive and impart information and ideas of all kinds through any media and regardless of frontiers. Member states are urged to respect the right to freedom of expression and promote the free flow of information and ideas".

5. THE SAFEGUARDING OF FREEDOM OF SPEECH IN THE INTERNET ERA IN THE LEGAL SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

With reference to the limits of freedom of speech, with particular regard to on-line publications, we should not forget Article 10 of the European Convention on Human Rights, which states that everyone has the right to freedom of expression, that shall include freedom to hold opin-

²⁸ "The Commonwealth Lawyers Association is an international non-profit organisation which exists to promote and maintain the rule of law throughout the Commonwealth by ensuring that an independent and efficient legal profession, with the highest standards of ethics and integrity, serves the people of the Commonwealth". www.commonwealthlawyers.com.

²⁹ "The Democratic Governance and Rights Unity is one of Africa's leading research centres based in the Department of Public Law in the Law Faculty of the University of Cape Town". www.dgru.uct.ac.za.

³⁰ See the Joint Statement regarding Freedom of Expression, Freedom of Assembly and the use of force by Police in Nigeria, which was released by the Commonwealth Lawyers Association (CLA) and by the Democratic Governance and Rights Unit (DGRU) on the 29th of October, 2020.

ions and to receive and impart information and ideas without interference by public authority and regardless of frontiers³¹.

Through a careful examination of the European Court of Human Rights decisions, which are binding for the member States of the Council of Europe, it emerges that the Strasbourg judges seem to recognize the predominance of freedom of speech over the values of privacy and reputation. This opinion is based on an extensive interpretation of the aforementioned Article 10 of the ECHR, which authorizes limits and interference to freedom of speech only in some strict cases, for example when the preservation of public order is put at risk³².

In a recent case, judges reiterated that freedom of speech is one of the vital foundations of a democratic society and one of the most significant conditions for its progress and for each individual's self-fulfillment³³.

Given the general validity of this principle of law as promoted by the European Court of Human Rights, the possibility of extending it to on-line printing and publications seems certain. In support of this thesis, it is useful to report that the Recommendation on internet freedom, which was issued by the Council of Europe in 2016, requires Member States to periodically verify the level of respect for human rights and fundamental freedoms with regard to the internet and also requires the adoption of policies aimed at implementing their reinforcement. More recently, the Recommendation on the roles and responsibilities of internet intermediaries, which was published by the Council of Europe in 2018, recognizes the vital role of internet

³¹ According to paragraph 2 of Article 10, "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such 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".

³² "Tolerance and respect for the equal dignity of all the human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance [...], provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued". ECHR, *Erbakan v. Turkey*, 59405/00, 6th July, 2006.

³³ ECHR, *Paraskevopoulos v. Greece*, 64184/11, 28th August, 2018.

intermediaries in the contemporary world and encourages Member States to guarantee that the internet keeps on being an accessible and protected field where both freedom of speech and privacy are preserved.

Although these acts are not legally binding on Member States, they have a significant function of moral suasion, which is likely to produce actual results aimed at ensuring an effective protection of freedom of speech, of its corollaries and of the other fundamental rights of the individual.

Taking into account paragraph 2 of the aforementioned Article 10, freedom of speech should be guaranteed not only in reference to information and ideas that are regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broad-mindedness, which are the basis of a democratic society.

As stated in Article 10, freedom of speech is subject to some exceptions, which must, however, be applied strictly, and the need for any restrictions must be established convincingly³⁴.

Moreover, it should not be forgotten that on the 4th of October 2007 the Parliamentary Assembly of the Council of Europe adopted Resolution 1577 (2007), which encouraged Member States to apply laws prosecuting defamation with the utmost restraint, because they put freedom of expression seriously at risk.

This demonstrates once again the importance assigned to this right not only in the national sphere, but also in the international legal context and in the jurisprudence of domestic and international courts.

6. FINAL REMARKS

Having taken all of this into consideration, it would be appropriate for both the UK and the Italian Parliament to reform legislation on freedom of speech, with particular reference to on-line press and social media, whose distorted use causes a significant level of uncertainty to the operators.

In fact, as mentioned above, there is a strong possibility of the extension of the present legislation on the seizure of printed material to publications on the web.

³⁴ See also ECHR, *Perna v. Italy*, 48898/99, 6th May, 2003.

In a civil law system like the Italian one, the lack of a written regulation on this subject cannot be accepted, even if the Supreme Court of Cassation has been doing a praiseworthy job in unravelling doubts for several years. The respect of the principle of legality, particularly in criminal law, imposes that a piece of legislation approved by Parliament clearly defines when an article appearing on the web can be impounded and, in some particular cases, must be destroyed in order to preserve essential values, which are more important than freedom of the press.

Having said that, although in the United Kingdom the legal system is predominantly based on precedent, there should be a specific legislative discipline protecting the on-line press even in this common law State. In fact, a clear regulation of this delicate subject is imposed by Article 7 of the European Convention on Human Rights, saying that no one shall be found guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

In reference to this point, it is very important to notice that all the provisions of the ECHR will remain valid in the UK even after Brexit, because they are written in the European Convention on Human Rights, which applies to the Member States of the Council of Europe. Brexit, instead, will have an impact on European Union legislation and not on the dispositions as established under the European Convention on Human Rights³⁵. This last thesis was explicitly confirmed for the first time by a recent decision of the European Court of Justice, stating that the United Kingdom of Great Britain and Northern Ireland is part of the European Convention on Human Rights and that this Member State has incorporated the provisions of the ECHR into its domestic law³⁶. As a result, since the permanence of its participation in the ECHR is in no way linked to its membership of the European Union, the decision of the United Kingdom to withdraw from the EU does not affect its obligation to respect the European Convention on Human Rights and the rulings of the European Court of Human Rights. Consequently, even at the end of the transitional period of the United Kingdom withdrawal from the

³⁵ The European Convention on Human Rights, which was signed in Rome on the 4th of November, 1950 by the Member States of the Council of Europe, was ratified in 1951 by the United Kingdom of Great Britain and Northern Ireland and in 1955 by the Italian Republic.

³⁶ ECJ, 19th September, 2018, C-327/18 PPU, RO.

European Union, which will take place on December 31, 2020, the ECHR and the decisions of the European Court of Human Rights will continue to be fully effective in the UK.

This is a clear demonstration of the assumption that the fundamental freedoms of the individual, as regulated in the international conventions and part of the common constitutional traditions of the Member States, will not be jeopardized even by withdrawals such as Brexit, because they have now become part of the backbone of the whole legal system.

However, it should be noted that the UK government's Policy paper about *The Future Relationship with the EU: The UK's Approach to Negotiations*, which was issued in February 2020, highlighted that the agreement on Law Enforcement and Judicial Cooperation in Criminal Matters "should not specify how the UK or the EU Member States should protect and enforce human rights and the rule of law within their own autonomous legal systems"³⁷. Moreover, the Preamble to the UK's Draft working text for an agreement with the EU on law enforcement and judicial cooperation in criminal matters does not mention the European Convention on Human Rights.

In light of divergences between the two sides, the Chair of the UK's Joint Committee on Human Rights (JCHR), Harriet Ruth Harman MP³⁸, recently noted that "the UK's refusal to commit to continued adherence to the ECHR may seriously affect the extent of cooperation that is possible with the EU on law enforcement and judicial cooperation"³⁹. She also expressed concern that the UK's position "may signal its future intention to withdraw from the ECHR, or to reform the Human Rights Act in a way that would prevent individuals from being able to bring human rights claims before domestic courts"⁴⁰. As a consequence, while the govern-

³⁷ HM Government, *The Future Relationship with the EU: The UK's Approach to Negotiations*, February 2020, chapter 31, 25, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf.

³⁸ Harriet Ruth Harman is the member of the UK Parliament for Camberwell and Peckham.

³⁹ L. Moxham, O. Garner, *Will the UK uphold its commitment to human rights?*, in *LSE Brexit 2020. Latest thinking and research about Brexit from LSE*, 30th June 2020, <https://blogs.lse.ac.uk/brexit/2020/06/30/long-read-will-the-uk-uphold-its-commitment-to-human-rights/>.

⁴⁰ *Ibidem*.

ment has not yet published details of how it plans to “update” the Human Rights Act, according to a part of the doctrine its past record raises concerns about the future protection of human rights⁴¹.

However, it has emerged recently that a compromise was now in play, under which the trade and security deal between the United Kingdom and the European Union would include a commitment by HM government not to “materially alter the spirit” of the Human Rights Act⁴². In reference to this topic, a UK government spokesman said that the United Kingdom would remain committed to the European Convention on Human Rights⁴³.

Consequently, if the above news were confirmed, it would emerge that even in the United Kingdom both the provisions of the ECHR and the jurisprudence of the European Court of Human Rights on the protection of freedom of speech, with particular reference to online press, would continue to be in effect even after the 31st of December, 2020, when the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union will definitively have taken place.

And, in times of particular uncertainty and of increasing restrictions to the fundamental rights of individual citizens and of communities, this aspect would be profoundly relevant. It could even be an inspiration and a starting point for future reforms about regulations disciplining freedom of speech and its corollary of the on-line press, which, in respect of the ideals that inspired the authors of provisions safeguarding the freedom of expression of thought, should always aim to guarantee an extension of these liberties, and not to reduce their perimeter.

In fact, an unjustified limitation to freedom of speech, with particular regard to the online press, would risk making the aforementioned countries much more similar to some totalitarian and despotic regimes than to the democratic ones.

⁴¹ *Ibidem*.

⁴² D. Boffey, *Boris Johnson set for compromise on Human Rights Act-EU sources*, in *The Guardian*, 7th October 2020, <https://www.theguardian.com/politics/2020/oct/07/boris-johnson-set-to-make-compromise-on-human-rights-act-eu-sources>.

⁴³ “The UK remains committed to the ECHR-we have been clear on that time and time again, including in Parliament”. *Ibidem*.

