ARTICLES

IS FREEDOM OF THOUGHT STILL RELEVANT?

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Abstract

The most recent broadcast technologies do nothing other than enrich constitutionalism. They simultaneously maintain guarantees in order to ensure the full exercise of freedom of thought and determine which limits of it must inevitably be accepted. This freedom of thought lies at the root of all political debate and is inherent to ideological pluralism. Freedom of thought may be exercised in different ways, for example, by simply expressing an opinion by virtue of the right of criticism, by the freedom of the press, and by the complex engagement with information right through to the right to satire. A satirical message may enter into conflict with constitutional rights to honour, decorum or reputation and thus, as is the case for freedom of the press and the right to criticism, it is necessary to weigh up the interests in conflict. Freedom of thought, in its various manifestations, is necessary subject to limits. One of the most debated issues nowadays concerns the rules applicable to the internet, which potentially impinge upon various consolidated constitutional rights. The direct circulation of opinions and information through the web has proved to be one of the now sacrosanct characteristics of modern communications systems, which have proved to be essential for politics and the economy. The matter has been considered both by states and international institutions. The case law is thus fluid and in practically all countries the constitutional courts have been called upon to fill in gaps in the law.

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1. Premise

The development of technology and the role of the internet[1], have not prevented traditional freedom of thought and the right to express it actively through different means of dissemination from remaining one of the linchpins of liberal democracy[2]. This is the case both with regard to interpersonal relations and to broader relations involving means of communication and broadcasting which influence social and political behaviour through the formation of public opinion[3]. This freedom intersects in various ways with freedom of religion, scientific research and teaching, which are covered by separate provisions under constitutional law and international treaties, all of which are characterised by the elaboration and dissemination of ideas, opinions and beliefs. The most recent broadcast technologies do nothing other than enrich the panorama of current constitutionalism both as regards the need to maintain

[1] B. Wagner, *Global Free Expression - Governing the Boundaries of Internet Content* (2016); N. Lucchi, *The Impact of Science and Technology on the Rights of the Individual* (2016); U. Carlsson, *Freedom of Expression & Media in Transition: Studies and Reflections in the Digital Age* (2016).

[2] E.M. Barendt, *Freedom of Speech*, 2nd ed., (2007); K.W. Saunders, *Free Expression and Democracy: A Comparative Analysis* (2017).

[3] On means of broadcasting and freedom of expression see: E.M. Barendt, *Broadcasting Law: A Comparative Study* (1995).

guarantees in order to ensure the full exercise of freedom of thought and also in order to determine which limits must inevitably be accepted.

This freedom is recognised in all constitutions inspired by liberal principles. On the other hand, it is subject to significant limits under authoritarian constitutions operating within a different ideological framework, which share the common feature of controlling public opinion by impairing the circulation of ideas and information, which is only permitted where it is compatible with the official political positions of the regime. The authoritarian regimes may assure free speech, but to qualify it by clarifying that the right must be exercised "in accordance with the provisions of the law" or some similar limits. For example, such language is present in the constitutions of Vietnam, Jordan and Qatar. In other words, there is little correlation between the written constitution and the real degree of protection provided[4]. The limits, stemming from Article 10 ECHR, though, have to fulfil precise requirements to fall within the range of restrictions that are permissible under Article 10 ECHR. All interferences with the exercise of freedom of expression, provided by Article 10 ECHR must be based on law, serve a legitimate aim and should be necessary in democratic society.

International conventions are replete with provisions establishing guarantees.

The Universal Declaration of 1948[5] covers freedom of thought, conscience and religion in Article 18. Article 19 protects freedom of opinion and expression including the right not to be harassed on account of one's own opinion and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Also the International Covenant on Civil and Political Rights[6] from 1966 makes similar provision in Articles 18 and 19, specifying however in a rather detailed manner the possible restrictions that

[4] A. Bhagwat, *Free Speech Without Democracy*, in 49 U.C. Davis L. Rev. 68 (2015) available at https://lawreview.law.ucdavis.edu/issues/49/1/Articles/49-1_Bhagwat.pdf.
[5] UNESCO, *The Universal Declaration of Human Rights: A History of Its Creation and Implementation, 1948-1998* (1998).
[6] S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed., (2013).

may be adopted by law that are necessary in order to respect the rights of others or prove to be necessary on the grounds of national security, public order, health or public morals. Article 13 of the 1969 American Convention on Human Rights[7] guarantees the right to seek, receive, and impart information and ideas of all kinds. Needless to say, these universal principles are respected in very limited areas of the globe and are systematically violated or subjected to serious challenge, above all in Asia and Africa.

Within Europe, the ECHR[8] from 1950 provides for freedom of thought, conscience and religion in Article 9, whilst Article 10 protects freedom of expression including freedom to hold opinions and to receive and impart information and ideas. This right must be guaranteed to all persons without interference by public authority and regardless of frontiers. However, the right is not explicitly extended to the right to search for information. Restrictive measures may be adopted in accordance with the law, provided that they are "necessary in a democratic society" and justifiable on the grounds of national security, territorial integrity, public order, prevention of disorder or crime, the protection of health or morals, the protection of the rights of others, protection of classified information and protection of the judicial function. Thus, the Convention leaves scope for a truly broad spread of possible restrictions.

When reviewing applications deeming the violation of Article 10 ECHR the Court uses the margin of appreciation to allow the State to choose the restrictions which it considers necessary. The State in question can justify its restrictions by reference to protection of national security, public morals, reputation and rights of others, prevention of disorder and crime. Moreover, if states, for example, justify their restriction by reference to national security – they must define the concept in a strict and narrow way avoiding the inclusion of areas which fall outside the real scope of national security. Equally,

[7] For an up-to-date comment on the American Convention on Human Rights see: T.M. Antkowiak & A. Gonza, *The American Convention on Human Rights: Essential Rights* (2017).

[8] Among the many publications concerning the ECHR see the classic: D. Harris, M. OôBoyle, E. Bates & C. Buckley, *Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights*, 3rd ed., (2014).

states must prove the existence of a real danger against the protected interest, such as national security, and must also take into account the interest of the public in being given certain information. If all these are ignored such limitations on the freedom of expression have an absolute nature and are inconsistent with Article 10, paragraph 2[9].

These articles are confirmed almost verbatim by Article 10 and Article 11 of the Charter of Fundamental Rights of the European Union[10]. The second paragraph of Article 11 adds that "The freedom and pluralism of the media shall be respected".

2. Freedom of Thought as The Root of All Political Debate

Within the legal systems inspired by liberal principles, freedom of thought is also at the root of all political debate. It is inherent within the ideological pluralism which characterises the very essence of democracy. It leads to differences in cultural and political outlook and the juxtaposition of different opinions within the country and the institutions, lying at the root of the right to dissent and thus to political opposition, including parliamentary opposition.

Even in systems which we are accustomed to consider as liberal, this freedom (which nobody denies in words) is constantly jeopardised by the traditional trend towards conformity which characterises social and political relations and is placed under continuous threat by the trend towards uniformity of conscience, which is facilitated by the control of the most important means of communication either by the political authorities or by economic operators occupying a monopolist or oligopolist position.

As regards its structure, it amounts not only to a negative freedom (i.e. the right not to be impaired in relation to the formulation of one's own opinions and the expression of beliefs as a maxim requirement to be protected, as it is inherent within human personality), but also a positive freedom as active thought directed

[9] M. Macovei, *Freedom of expression. A guide to the implementation of Article 10 of the European Convention on Human Rights*, available at https://rm.coe.int/168007ff48, 23.
[10] R. Arnold, *The Convergence of the Fundamental Rights Protection in Europe* (2016).

dynamically at other persons within a context of social complexity using different means of dissemination, which politics must not hinder and, in particular, must contribute to upholding.

Freedom of thought may be exercised in different ways, reflecting the possible range of different content. For instance, one may simply express an opinion by virtue of the right of criticism, freedom of the press and the complex engagement with information through to the right to satire.

In protecting the right of criticism, the legal system guarantees the aspect of freedom of thought that is functional to democratic debate. Guaranteeing that right reaches well beyond the mere protection of opinions. Freedom of opinion enables individuals to express their own ideas in relation to a given question. Freedom of criticism on the other hand involves a polemical opposition aimed at objecting to the opinions or behaviour of others. The intention is to shake up a situation, to provoke a reaction. Freedom of criticism is clearly distinguished from freedom of the press, which involves reporting an actual phenomenon (fact or conduct). Since reporting involves information, it must be objective. Since criticism involves personal assessments, it is subjective. Reporting emerges with the fact, which it describes, whilst criticism follows and evaluates the fact. Reporting expresses an identity between an actual phenomenon and the information conveying it, whilst criticism expresses a form of dissent towards an actual phenomenon (see ECtHR – Bladet Tromso v Norway, Application No.21980/03, Cumpănă and Mazăre v. Romania, Application No. 33348/96).

In this way the full richness of the right to inform emerges which in the context of Italy stems from freedom of the press under Article 21 of the Italian Constitution. This must be supplemented by the "reflex effects" resulting from the need to be informed, insofar as the recipients of information have an undoubted interest in receiving the maximum level of information without any impediment whatsoever. The variety of sources of information and their free accessibility is characteristic of a social right. The rules applicable to duties of secrecy thus take on a particularly delicate role and can only

be justified in cases involving a plausible justification under constitutional law in order to protect particular interests.

Freedom of the press and the right to criticism are not unlimited rights, and must be exercised in a manner that respects the reputation of the individuals affected by those exercising the rights.

Not only constitutions but also all international law instruments have permitted and continue to permit various exceptional limits on the grounds of security, public order, health and morals, which in liberal democracies may only be imposed by law and are subject to judicial review.

3. The Freedom of Satire as a Convergence Between the Expression of Thought and Criticism

An interesting convergence between the expression of thought and criticism occurs in the right of satire, which straddles Articles 21 and 33 of the Italian Constitution, as it impinges both on the expression of thought as well as freedom of artistic creativity.

Satire understood in its traditional sense, involves the pillorying of a public figure by placing him or her on the same level as the man on the street. From this point of view, satire is considered as a vehicle for democracy as it entails the application of the principle of equality.

A satirical message may enter into conflict with constitutional rights to honour, decorum or reputation and thus, as is the case for freedom of the press and the right to criticism, it is necessary to weigh up the interests in conflict. This balancing operation must take account of the special characteristics of the satirical work.

It is important to note that, again with reference to Italy, satire also falls within the scope of Article 21 as the starting point for the creative process of the author lies in the freedom of opinion, which is exalted by the manner of artistic expression. A special feature of satire is the *public interest* pertaining to the public figure represented, which provides the sole criterion for assessing the legitimacy of the satire. This interest is construed in broader terms than in relation to freedom of the press and freedom of criticism.

The significance of the "nexus of causal coherence" between the public prominence of the public figure targeted and the content of the satirical message may be appreciated by bearing in mind the difference between satire on the one hand and reporting and criticism on the other. *Reporting* captures the reality (or the presumed reality), which is disseminated through various means of transmission, highlighting the public dimension of the public figure. *Criticism* expresses a judgment regarding one or more aspects of the public figure. *Satire* selects certain aspects, which it moulds and develops.

It is precisely this artistic activity that is protected in Italy by Article 33 of the Constitution. This means that satire is not subject to an obligation to respect the truth. In fact, the principal characteristic of satire is precisely the *distortion of reality*, or its representation in paradoxical terms.

Some commentators consider that this fact distances satire from the scope of Article 21 or any other provisions put in place in order to protect freedom of thought in its multiple manifestations.

We do not agree with this position, considering that the essence of satire nonetheless lies in freedom of opinion.

The question is not merely academic but is absolutely tangible with particular reference to satire that is not directed at people who are alive, but at spiritual entities or religious symbols, and which thus has the potential to harm not the reputation of a particular individual but religious sentiment, as is demonstrated by the recent case involving anti-Islamic cartoons and the dramatic conclusion of the terrorist attack on a Parisian satirical magazine[11]. Religious satire gives rise to a conflict between opposing constitutional values, on the one hand, artistic freedom under Article 33 of the Constitution and on the other hand – no longer the right to reputation (as in the other cases mentioned above), but – religious sentiment, which is protected in Italy under Article 19 of the Constitution enshrining freedom of religion. In reality, the evident problem which arises involves not so much giving preference to the issue of protecting religious sentiment over and above artistic expression but in the much more serious

[11] H. Esmaeili, M. Irmgard, & J. Rehman (eds.), *The Rule of Law, Freedom of Expression and Islamic Law* (2017).

question as to whether or not to accept that the protection of religious sentiment prevails over the freedom of expression resulting in the graphic formulation of the satirical message. It is ultimately necessary to decide whether to salvage or eliminate the right of critical assessment expressed in satirical terms. It is astonishing that in the 21st Century a secular state can accept forms of censorship based on an alleged "blasphemy" or the causing of offence to a religious creed, and unfortunately the feeling is that the only justification for such potential censorship is the fear of violent reprisals, and thus an act of cowardice.

Obviously, it is not easy to propose a solution to this dilemma since, according to some commentators, the protection of religious sentiment should take absolute precedence. However, it must be reiterated that this line of thought leaves serious doubts. The impression is that the cause which results in a limitation of the right to satire in scenarios such as the Charlie Hebdo case[12] is quite different, as it consists in the, albeit understandable, fear of serious reprisals by terrorists. It is not out of place to think that the religious sentiment argument would never have been advanced in the event that satire had struck out in another direction at the sensitivity of Christians or Jews, who would never have responded with violence.

4. The Limits to the Freedom of Thought

Freedom of thought, in its various manifestations, is necessarily subject to limits. Alongside the legal limits, which are a structural part of all liberal legal systems and are intended to balance out the expression of that right against the respect for individual reputations, public morality and public security, a reference must be made to the significant expansion in the scale of security limitations, which have found a new impetus and justification throughout various legal systems from the enhanced danger of terrorist attack.

The wave of fear which crossed the globe following the terrorist attack of 11 September 2001 had significant repercussions on

[12] A. Zagato (ed.), *The Event of Charlie Hebdo: Imaginaries of Freedom and Control* (2015).

freedom of information. The emergency legislation aimed at contrasting terrorism, which was introduced by common acclaim, subjected this freedom to severe limits even in countries with a strong tradition of guaranteeing rights.

In particular, as we know, controversy surrounded the adoption of emergency legislation in the United States introducing exceptions to the Freedom of Information Act (FOIA)[13], above all in relation to the information that could be obtained with reference to measures limiting the individual freedom of suspected terrorists detained without fundamental legal guarantees. Not only did the legislation appear to many to be excessively restrictive, but also the case law– through to the Supreme Court rulings from 2004 onwards – has demonstrated its acceptance of the priority of security requirements also over freedom of information and access to information.

Finally, it is also important to note the recent anti-terrorism law enacted in France (Law no. 2014-1353 of 13 November 2014, followed by Law no. 2015-912 of 24 July 2015, the latter in response to the Charlie Hebdo massacre). Through decision no. 713 DC of 23 July 2015, the Constitutional Council struck down several provisions of Law no. 912, which were deemed to be incompatible with the constitutional right of freedom of expression. Following the objections raised by the Council, Parliament made the amendments considered necessary, following which the law was promulgated.

Both of the recent laws have significant implications for freedom of expression in relation to the use of new technologies. In particular, it is important to note: the attention dedicated by the French Government to the transmission of potentially dangerous messages over the internet; the exploitation of cooperation with Internet Service Providers (ISP) with the aim of conducing massive and invasive investigations involving the processing of information collected from the internet; the identification and localisation of individuals regarded as dangerous by cross-referencing any online traces left behind; the presumption of affiliation with terrorist

[13] U.S. House of Representatives Committee on Oversight and Government Reform, *FOIA Is Broken: A Report* (114th Congress, January 2016).

organisations on the basis of regular visits to websites regarded as dangerous, or on the basis of the posting of seditious content on social networks; the expansion of crimes of opinion through the punishment of forms of expression that represent a danger for public order involving the intention to pursue jihad[14].

In many aspects, the new French legislation has various points in common with the Turkish legislation introduced by the Erdogan Government during the Arab Spring[15]. The administrative power to block websites without authorisation by the courts is one example, along with forced cooperation on the part of ISPs.

5. The Dissemination of New Technologies and the Freedom of Thought

Particular questions arise in relation to the dissemination of new technologies[16]. This section will be limited to a few references, and will start by recalling the importance of legislation governing access to data.

As noted above, the right to receive information from the public authorities and to access electronic archives and databases is of particular significance. The more up-to-date legislation is normally now cumulated with rulings on the traditional formulation of the guarantee of freedom of thought and of opinion along with the dissemination of information.

For example, in the United Kingdom the Freedom of Information Act 2000 regulated the passive aspect of freedom of information including, in particular, the duty of the government to guarantee a constant flow of information concerning its own activities

[14] For a very recent study on terrorism and the use of social networks see: L. Scaife, *Social Networks as the New Frontier of Terrorism: #Terror* (2017).

[15] On the waves and reverse waves of democratization in North Africa after the start of the so-called Arab Spring see: J.O. Frosini & F. Biagi, *The Political and Constitutional Transitions in North Africa. Actors and Factors* (2015).

[16] D.R. Johnson & D.G. Post, *Law and Bordersï The Rise of Law in Cyberspace*, in 48 Stan. L. Rev. 1367 (1996); D.G. Post, *Against ñAgainst Cyberanarchyò*, in 17 Berkeley Tech. L.J. 1365 (2002); J.L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, in 5 Ind. J. Global Legal Stud. 475 (1998); Id., *Against Cyberanarchy*, in 65 U. Chi. L. Rev. 1199 (1998).

for the benefit of voters and representative bodies[17]. Similarly, Article 20 of the 1987 amended Austrian Constitution requires the central authorities and the *Länder* to provide information to citizens. Article 110 of the Dutch Constitution, as amended in 1983, stipulates the requirement of transparency of administrative action, but not an explicit right of access, which was subsequently provided for by a specific law in 1991. Constitutional amendments have resulted in the introduction into the Argentinean Constitution of the right of *habeas data* (Article 43), which entitles individuals to request information concerning persons detained by the public authorities, and also by private bodies, and where necessary to require their rectification or cancellation in the event that they are false or detrimental.

Other provisions may be found in Article 5(2) of the 1999 Brazilian Constitution and Article 32 of the 1996 South African Constitution, whilst a very large number of examples may be found on both constitutional and legislative level.

The right of access has a long history, even though in its most recent conception it is presented as a relatively recent right. In fact, the adoption in Colombia of the Code of Political and Municipal Administration dates back to 1888, granting citizens the right to request documents held by the public authorities. The significant moment for freedom of information in Italy came with the establishment in law of the right of access (Law no. 241 of 1990), which grants citizens the right to gain information relating to documents held by the public administration.

6. The Debate Concerning the Rules Applicable to the Internet

One of the most debated issues nowadays concerns the rules applicable to the internet, which potentially impinge upon various consolidated constitutional rights. The matter has been considered both by states and international institutions.

[17] For an interesting comparison between Freedom of Information in the United Kingdom and Italy see: P. Leyland, D. Donati & G. Gardini, *Freedom of Information in the United Kingdom and Italy – L'accesso alle informazioni nel Regno Unito e in Italia* (2010).

It will suffice here to refer to the report on "Freedom of expression, media and digital communications" published in 2012 by the European Commission in which it stressed the importance of the new web platforms for the purposes of improving pluralism within democracies in transition, as well as fragile democracies, also thanks to the individual contribution of all web users[18]. In fact, whilst the advent of the internet has concentrated considerable power in the hands of a few giant internet service providers, it has also expanded the freedom to convey content and messages far beyond the national borders of the printed press, rendering regimes of pseudo-censorship practically impossible. This fact became clearly apparent – a fact which was duly acknowledged by the Commission – during the period of the Arab Spring where various governments attempted in all possible ways, albeit unsuccessfully, to block messages considered to relate to terrorism or to be otherwise subversive. The Commission went on to stress the role of the Union in maintaining the regime of freedom of digital communication based on Article 11 of the Charter of Fundamental Rights. It also pointed to the urgent need for new regulations within the digital realm that were capable of reconciling copyright law with freedom of expression and the requirements of public security.

The attention of part of the Italian political world was echoed in the Declaration of Online Rights drawn up by a dedicated working group established at the Chamber of Deputies, which was released at the end of July 2015[19]. It seeks to present itself as the authoritative statement of the issues that would require systematic treatment by lawmakers, although it is only a proposal and it is not known whether it will be implemented by the Government or Parliament.

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[18] A. Puddephatt & P. Oesterlund, *Freedom of Expression, Media and Digital Communications: A Practical Guide* (2012) available at https://ec.europa.eu/europeaid/sites/devco/files/study-freedom-expression-communication-guide-201212_en_1.pdf, accessed January 30, 2017.

[19] Commissione per i diritti e i doveri in Internet, *Dichiarazione dei diritti in Internet* (2015) available at http://www.camera.it/application/xmanager/projects/leg17/attachments/upload_file/upload_files/000/000/187/dichiarazione_dei_diritti_internet_pubblicata.pdf, accessed January 30, 2017.

In a nutshell, the fundamental rights which should be recognised within the ecosystem of the internet should include: the right of access (Article 2), the right to information (Article 3), the protection of *privacy* (Article 5 and, with regard to various aspects, Articles 7 and 8, construed as the inviolability of systems and protection against automatised processing) along with the right to be forgotten, derived directly from the now famous judgment of the Court of Justice (Article 11), which operates in parallel to the right to identity (Article 9). It is important to point out the classification of net neutrality as a right of the individual, which is construed in terms of non-discrimination against data transmitted and the prohibition on restrictions or interference (Article 4(1)) and is regarded as an essential precondition for the effective exercise of fundamental rights online (Article 4(2)).

It may appear singular that it is precisely a document which purports to engage with the entire panoply of the consequences resulting from new information technologies that has practically forgotten to make a strong reference to freedom of expression, which is confined to an article dedicated to network security, whilst the (positive) right of access to the internet acts as the cornerstone for the hypothetical charter.

The Declaration could turn into a point of reference also on international level, proposing a convergence of the various legislation providing for protection (above all on European level). This vocation is evidently driven on by the intention to provide – also on a formal level, as is stated in the final recital of the Preamble: in substantive terms the issue can already be asserted *in nuce* – a constitutional basis for protecting the rights of the individual within the "network of networks"[20].

[20]Commissione per i diritti e i doveri in Internet, *Dichiarazione dei diritti in Internet* (2015) available at http://www.camera.it/application/xmanager/projects/leg17/attachments/upload_file/upload_files/000/000/187/dichiarazione_dei_diritti_internet_pubblicata.pdf, accessed January 30, 2017.

7. Is There A Right of Access to the Web?

The rights debated include the right of access to the web, which involves the adaptation in line with current technologies of the traditional right to express one's own thoughts freely, and thus also entails the specification through regulation of potential limits on its exercise. Several legal systems have already adopted specific legislation in this regard. In other systems it is the courts that are responsible for identifying its scope and limits. The discussion is thus very open and extremely topical.

What appears to have been clear for some time is the apparent inability of Article 21 of Italian constitution to cover the issue comprehensively, even though a broad reading of that provision would appear to extend its scope to the right of each of us to look for and access information, to inform others and to be informed by accessing the web.

Freedom of expression nowadays involves the right to receive under equal conditions any service provided in order to convey and share content. Moreover, freedom of expression over the internet entails the protection of net neutrality. This is because, as the Court of Justice has asserted on various occasions, every new information society service itself constitutes the exercise of freedom of expression, and as such must be defended against interference by the state and the public authorities in general.

It would appear to be an innovative solution to provide clear recognition of a genuine right of access. Many countries have already taken steps in this direction. Following the constitutional amendment of 6 April 2001, access to the internet is already regarded as a right in Greece. Article 5A(2) provides that "everyone has the right to participate in the information society", specifying for this purpose that "the state is obliged to facilitate access to information circulating in electronic form, along with the production, exchange and dissemination of this information".

The provisions of the 2008 Ecuador Constitution appear to be more decisive, Article 16 of which refers to an individual right.

In other countries this step has been taken within constitutional case law and by the merits courts. At least two very well-known judgments may be cited in this regard.

On freedom of expression on the internet in the United States, the Supreme Court (Reno v American Civil Liberties Union, 521 U.S. 844, judgment of 26 June 1997) ruled unconstitutional the Communications Decency Act prohibiting indecent online communications under certain circumstances on the grounds that it violated the First Amendment, which enshrines freedom of expression, irrespective of the essence of the content asserted. As part of a balancing of interests, it held that the aspect relating to the expression of speech prevailed over that relating to the confidential and secret status of the communication, which is also protected under constitutional law by the Fourteenth Amendment. According to the Court, "The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship".

In France, in the Constitutional Council ruling (decision no. 2009-580 DC, 10 June 2009) on the law concerning the Hadopi – the administrative authority with competence over the protection of rights on the internet – the court identified the "fundamental right" to access the internet as prevailing over the protection of copyright because, against the backdrop of the generalised diffusion of the internet, freedom of communication and expression necessarily presupposes the freedom to access those online communication services.

The Constitutional Council held that it is not possible for an administrative decision to block services in order to protect copyright without a prior court order, because such an act would conflict with Article 11 of the 1789 "Declaration of the Rights of Man and the Citizen".

The case law is thus fluid and in practically all countries the constitutional courts have been called upon to fill in gaps in the law. The Italian Constitutional Court was seized by the administrative courts (Regional Administrative Court for Lazio, 1st Division, orders no. 10016 and 10020 of 2014 of 26 September 2104) with a question as to whether it was possible for an administrative authority to order the removal of online content. According to the position stated by the lower court, the various rights in play were balanced against the "right of access to online communication". The Court was requested to "read the constitutional provisions on freedom of expression and the right to information in such a manner as to guarantee protection equivalent to that in place for the printed press also to new means of dissemination of expression through the 'web', not because the printed press and 'internet' are equivalent (in fact, the manner of operation is radically new and different) but because today's information society, which is networked and united in real time by the 'web', has supplemented the role of the printed press with that of the 'internet' as an essential moment of freedom of expression, the right to inform others and to be informed, democratic pluralism and freedom of economic initiative under conditions of full competition". It is important to note the stress placed by the Regional Administrative Court on the fact that the internet "may already be defined as one of the principal instruments for implementing 'freedom of expression' enshrined in Article 21 of the Constitution"; for the first time since the advent of the internet, the Constitutional Court was discussing the issue of freedom of expression on the internet as a political right. We shall see whether, thanks to the Court's intervention, it will be possible to establish clarity on the constitutional relevance of rights related to the internet.

8. Concluding Remarks

Broadly speaking, it can be confirmed that, by providing a guarantee of its various manifestations and exploiting the possibilities offered by the conquests of modern technology, freedom of thought – as it has evolved over time – continues to be one of the

keystones of any democratic system as it is closely related to the practical possibility for individuals to gain information and to remain up to date, including in particular in relation to matters of relevance for the national and local political community. The direct circulation of opinions and information through the web has proved to be one of the now sacrosanct characteristics of modern communications systems, which have proved to be essential for politics and the economy. Within this context, governance of the web has become essential. Here the as yet still not fully clarified question concerning the relationship between internet self-regulation and the role of politics intersect with each other. This question is vital in order to guarantee access to ideas, opinions and information by anyone who intends to avail themselves of this means of communication and dialogue. This also establishes the essential importance of information as related to the principle of publicity, transparency and the rejection of forms of secrecy that make it impossible to gain knowledge and, as a consequence, create obstacles on the assessment of political behaviour, as a result rendering problematic the commitment of political responsibility made by governments.

Democracy also means responsibility and good government. Citizens have the right to control the actions of their own leaders and to engage in an in-depth discussion of those actions. They must be capable of assessing the performance of the government, which is dependent upon access to information concerning the state of the economy, social systems and other questions of public interest. One of the most effective ways of dealing with instances of poor administration involves open and informed debate. Freedom of information is also a fundamental instrument in the fight against corruption and governmental wrongdoing.