FREEDOM OF EXPRESSION AND FREEDOM OF THE PRESS

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Focus on Facts

a) Freedom of Expression by way of the Access to the Internet

Many and multifarious were the events that contributed in 2012 and 2013 to showing the impact produced by the "constitutionalisation of the Net" on freedom of expression and freedom of the press as per Article 21 of the Constitution.

On the other hand, that the Internet has taken on constitutional importance is out of the question. Only think of the many rights that have been spread or re-defined by way of the Internet, or of the interplay on the Net between the traditional constitutional freedoms and new rights. Against this backdrop, freedom of expression, which is safeguarded at constitutional level irrespective of the means of such expression – be it speech, writings or any other dissemination tool – could not but be impacted (in fact, overwhelmed) by the communication media of today's digital society. This is why the right to impart and receive information is taking on a new dimension in the virtual sphere of the Net.

Given this background, it is indispensable to start from the cases that have refueled, in the past few years, the discussion on the features of a *constitutional* right to access the Internet.

From a regulatory standpoint, several countries including Finland, Greece, Estonia, Peru have enshrined access to the Internet as a fundamental right of individuals by relying on different constitutional or legislative instruments.

As for case-law, the judgment No. 14 of 24 January 2013 by the German Federal Court - which followed the precedents of the US Supreme Court in 1997 and the French Conseil Constitutionnel in 2009 – granted a citizen the right to compensation for the harm suffered on account of the illegitimate disconnection from the Internet.

b) Freedom of Expression vs. Privacy

In February 2012, several media reported, once again, on Wikileaks. This time they had allegedly disclosed several emails by Stratfor staff. It is no mere leaking of confidential information; in fact, this case mirrors the new dimension of the relationship between right to impart information and right to receive information in the digital society.

It is unquestionable that the opportunities to meet several needs of the most diverse nature are rife in the virtual space of the Net – from research to knowledge, from interpersonal communication to the circulation of ideas, from exchange to information; however, it is exactly in the dimension where there appears to be no room left for privacy that the right to privacy must be protected better and more effectively.

A significant example in this regard is provided at regulatory level by the Proposal for a Regulation on the protection of personal data that was submitted by the European Commission on 25 January 2012; the proposal was amended repeatedly in the course of 2013 and is meant to come into force during 2014. Many and indispensable are the innovations brought about by this instrument, given that the legislation in force (Directive 95/46/EC) has become obsolete by now; special importance should be attached in this respect to the introduction of a right to be forgotten in order to strike a reasonable, though difficult, balance between freedom of expression and protection of privacy, honour and reputation in electronic publications. Under Article 17 of the proposed Regulation, a data

subject has the right to request the manager of a website, after a given period, to remove personal data or information that, taken out of their context and having remained frozen at the time they were first published, belong to the past and do not correspond any longer to reality.

Judicial decisions on the balancing between freedom of expression and right to be forgotten are quite divergent and sometimes mutually in conflict.

At domestic level, the Court of Cassation stepped in with its judgment No. 5525 of 2012; this judgment adjusted the principles of the right to privacy to ensure that everyone is provided with tools to safeguard their own digital identity and, at the same time, that information is placed in the right context and is truthful. The case at issue concerned publication by online media of the news concerning the charges of corruption brought against a well-known politician. The trial had ultimately resulted into the acquittal of the accused, but the news of the charges remained stored in the media archives and, surprisingly enough, no reference could be found to the acquittal.

The lower court and the appellate court had ruled out that this might have to do with the right to be forgotten because the news in question had not been published again; however, the Court of Cassation found that "a piece of information that was originally *thorough* and *truthful* becomes *obsolete* and is accordingly *partial* and *inaccurate*, i.e. it becomes ultimately *untrue*."

Accordingly, the Court ordered the website owner to place the news in context, that is to update it.

A different view was held at European level by the Advocate General Niilo Jääskinen, who, in his conclusions of 25 June 2013, stated that "the *right to delete and block data* provided for in Article 12, letter b) and the right to object provided for in Article 14, letter d), of directive 95/46 *do not allow the data subject* to apply directly to a provider of search engine

services *to prevent indexing of information that concerns him or her directly*, published lawfully on third party web pages, by establishing his or her wish that such information should not be disclosed to Internet users, where the data subject believes that the information in question might be prejudicial to him or her or wishes such information to be forgotten."

According to this argument, it would not be lawful to modify the contents of information previously published in digital format not only because this "would be tantamount to historical falsification" and entail a veritable "censorship of published contents by a private entity", but also because it would result into the excessive as well as unjustified sacrifice of "primary rights such as freedom of expression and freedom of the press."

A different stance, which is actually closer to that taken by the Court of Cassation, is the one by the Strasbourg Court; in its judgment of 16 July 2013, the Court considered it disproportionate and in breach of freedom of expression to order the deletion of an article from the website of an online daily. The case had to do with the publication of several articles where two journalists working for a Polish daily alleged that two lawyers had gained unlawful profits from various connections with politicians. The two journalists had been convicted of libel, and the lawyers had accordingly requested the articles to be removed from the website. However, these requests were rejected both by domestic courts and by the Strasbourg Court; in striking the balance between right to respect for private and family life under Article 8 of the ECHR and the freedom of expression set forth in Article 10 of the Convention, the Court found the latter to prevail. Since freedom of expression is the harbinger of democracy, special care must be taken in introducing derogations from or limitations on such freedom. Having established that taking down the news was disproportionate, the Court ordered a notice to be added to the article in order to report on the judicial decision concerning the defamatory nature of the news as originally published.

c) Freedom of Expression vs Cyberbullying

The data by Eurispes and Telefono Azzurro [A helpline meant for children] are a source of concern: in 2012, one child out of four was the victim of online cyberbullying in Italy. In most cases, the cyber-bullies rely on the dissemination of images and pictures to make fun of the victim's bodily features or sexual orientation.

Faced with these data, the European Council of June 2013 launched a campaign against web-based hatred, intolerance and violence targeted to children.

In January 2014, during a technical meeting chaired by the Deputy Minister for Economic Development, the first draft Code of Conduct against cyberbullying was adopted – in agreement with representatives from institutions such as Agcom [Italian Communications Supervisory Authority], the Childhood Guarantor, Italian sector-specific associations such as Confindustria Digitale and web giants including Google and Microsoft. Mechanisms and systems were envisaged to report and stop, as quickly as possible, situations that may be dangerous or harmful for children.

As for regulatory approaches, a significant step forward was made in Italy thanks to Law No. 172/2012, which ratified Council of Europe's Convention for the protection of children against exploitation and sexual abuse, as undersigned in Lanzarote in 2007.

Regarding case-law, reference should be made to the sentence imposed on 16 November 2013 on a nineteen-year-old youth from Monza (imprisonment for two years and eight months plus payment of a fine amounting to eleven thousand Euro); after asking a fourteen-year-old girl who had a crush on him to give him "a token of her love", he published the videos and pictures she had sent him on Facebook and YouTube and circulated them among his friends and the circles of uptown Monza.

Inducing the underage girl from Monza to produce pornographic

materials and disseminating such materials are but one of the many, destabilizing forms of violence that are perpetrated in today's digital society.

Only consider the equally embarrassing case – known as "Google-Vivi Down case" – concerning the online posting of a video showing young bullies that were harassing a disabled youth. The first-instance proceeding had led to the conviction of the three managers from Google Italy on account of unlawful processing of data under Section 167 of the Privacy Code; however, the Court of Appeal acquitted them in full by a judgment that was filed on 27 February 2013: the Court held that there was no case to answer because the host and the ISP "are not empowered or required to carry out preventive checks."

As well as privacy per se, other legal assets have to be protected and safeguarded in these cases including the right to honour, the right to image, safety of children and, above all, human dignity.

d) Freedom of Expression vs Holocaust Denial

May or should freedom of expression be limited with regard to the dissemination of Holocaust denial views? Should the pluralism of ideas and democratic systems safeguard the development and dissemination of whatever opinions and beliefs, including subversive and inimical ones, or may such opinions be banned from one's legal system, albeit via anti-democratic tools, in order to safeguard – paradoxically enough – the very democratic essence of such a legal system?

This highly sensitive as well as controversial issue (a veritable *vexata quaestio*) came once again under the limelight after the demise of Erich Priebke – the German military officer serving a life sentence because of the contribution given to the massacre at the Fosse Ardeatine in Rome, who had never repented. On 8 October 2012 a bill was tabled to introduce holocaust denial as a criminal

offence in our legal system. Based on the said proposal, Section 414 of the Criminal Code should be amended to introduce, on top of an aggravating circumstance of the activities consisting in inducement and endorsement, a separate statutory offence to punish "whoever denies the existence of war crimes, genocides or crimes against mankind."

In fact, this was not the first attempt to introduce holocaust denial as a criminal offence. Only think of the bill submitted by Mastella [former Minister of Justice] in 2007, which failed because of the end of the legislature period.

On the other hand, many European countries such as Spain, Switzerland, Germany, Belgium, Poland and Hungary do punish holocaust denial or any conduct that may be related to the latter.

This is hardly a simple issue, partly in the light of the doubts and questions raised quite frequently by historians and Holocaust denial supporters. According to the Criminal Bar Association, the Shoah is so deeply rooted in Italy's history and culture that it is in no danger of being downsized or jeopardized by a bunch of scholars (or would-be scholars) denying its existence or playing down its importance. On the other hand, settling a cultural issue by stemming the flow of ideas and threatening imprisonment is not only in conflict with freedom of expression as a pillar of democracy, but also utterly misleading.

On 27 January 2014 the European Commission's Report on implementation of framework decision 2008/913/JHA was published – concerning the fight against certain forms and expressions of racism and xenophobia by criminal law. The decision requires Member States to criminalise several types of conduct including the adoption of the necessary measures to ensure that "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin" is punishable under criminal law; adoption of the necessary measures to ensure that "publicly

condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group" are punishable under criminal law; adoption of the necessary measure to ensure that "publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group" are punishable under criminal law.

As for case-law, reference should be made regarding the two years taken into consideration to the decision rendered on 28 February 2012 by the Conseil Constitutionnel and the judgment of 17 December 2013 (case of *Perinçek vs. Switzerland*) by the European Court of Human Rights.

In the former decision, the French Conseil declared Law No. 674/2012 - "*visant à réprimer la contestation de l'existence des genocides reconnus par la loi*" - to be unconstitutional. Whilst several questions had been raised in terms of possible conflicts with constitutional principles, the reasons provided by the Conseil are worded very concisely: the relevant provisions are illegitimate because they are in breach of freedom of expression as enshrined in Article 11 of the 1789 Declaration of Human and Citizens' Rights.

In the latter judgment, the Strasbourg Court also found that a sentence imposed for having contested the existence of the Armenian genocide was in breach of freedom of expression as per Article 10 of the EHRC – which is actually a significant innovation in terms of

the benchmark applied, since the Court had dealt with denial issues up to then by relying on Article 17 of the Convention. The facts of the case dated back to the summer of 2005, when the President of Turkey's Workers' Party, Mr. Perinçek, stated that referring to the massacre perpetrated by the Ottoman empire against the Armenian people in 1915 was an international lie. Having been sentenced on charges of racial discrimination, he applied to the European Court claiming the violation of Articles 10, 6, 7, 17 and 18 as applied jointly with Article 10 of the Convention. The Court found the sentence to be disproportionate and stated that freedom of expression should be afforded "not only with regard to favourable information or ideas, considered to be inoffensive or indifferent, but also in respect of such information or ideas as are offensive or disturbing or cannot be shared, so as to guarantee the need for pluralism, tolerance and open-mindedness without which no democratic society can exist."

Discriminations and Violence

5 April 2012. **Rome.** The Court of Cassation (judgment No. 5525) ruled that a politician accused of corruption and then acquitted at trial was entitled to having the online news updated.

14 October 2012. Ferrara. Marcella Ravenna, 61, professor of social psychology at the Faculty of Humanities of Ferrara University, of Jewish descent, a member of a well-known family in 20th century Ferrara that had experienced the Holocaust tragedy directly, was the subject of heavily insulting and defaming posts of anti-Semitic import on the Web.

22 October 2012. Rome. Another very serious case of anti-Semitic violence concerned the municipal councillor for cultural and juvenile policies and affirmative actions of the XI municipal district, Ms. Carla Di Veroli, who was dubbed as "the umpteenth case saved from Holocaust" and posted to be recognized as a

person to be blacklisted: “Here is the specimen at issue”, read the legends to the pictures showing her.

November 2012. Rome. The Court of Rome sentenced the four managers of the Italian section of the *Stormfront* neo-nazi website to up to three years’ imprisonment “for disseminating ideas, both online and via pamphlets, grounded in the superiority of the white race, racial and ethnic hatred, and inciting to the commission of acts of discrimination and violence on racial grounds”; for the first time, it was acknowledged that criminal association may be of a “virtual” type, i.e. may take shape on the Web.

20 November 2012. Rome. The “pink trousers” boy committed suicide because he could no longer stand the derisive comments posted against him on the Web.

December 2012. Bologna. This is when the passion of Flora started – a 17-year-old girl, “guilty” of having won a competition awarding a free ticket for the One Direction concert in New York. The other fans developed a grudge against her for this reason and sent her all possible threats via social networks.

January 2013. Novara. Carolina, a 14-year-old girl, committed suicide following the unrelenting violence she was exposed to on the Web. The abuse against her continued coming even after her demise.

26 April 2013. Milan. The Court of Milan ordered the taking down of an article, which had been published legitimately but did no longer mirror the current situation, from a daily’s IT archive and found that

the publisher was liable for the payment of non-pecuniary damages.

6 June 2013. Rome. The Civil Court of Rome rejected the claim for damages amounting to Euro 50,000 as lodged by Claudio Moffa, a University Professor, who had been dubbed as "anti-Semitic" and "Holocaust denial supporter" in the report drafted by Milan's Jewish and Contemporary Documentation Centre that had taken into consideration the professor's activities on the web – in particular his personal blog.

25 June 2013. Venice. A professor who was a well-known supporter of Holocaust denial theories was removed from his office as President of the State exams committee at Liceo Curiel in Padua following the criticisms levelled by him on the Web against the methods implemented by the said high school, rather than on account of the dissemination of his beliefs; however, there remain several doubts on the appropriateness of this decision.

1 August 2013. Rome. By its judgment No. 18443, the Court of Cassation ruled out that an employer could rely on sensitive personal data relating to an employee's religious or political beliefs or sex life as part of a procedure for firing the said employee.

13 November 2013. Rome. A arts history professor that had been reported to judicial authorities in 2008 by the father of a student at an Arts School in Via di Ripetta was acquitted in full of the charges on grounds of "no case to answer". The professor had stated that "in his view, the stories about the Holocaust and concentration camps were not true and the footage on deportations was forged as it had been created several years afterwards rather than in those days"; further, he had questioned "the number of deaths, and affirmed that

there was no certainty about the six million figure, it was a wrong estimate. And during the war everybody was lean, not only those in concentration camps."

December 2013. Genoa. An investigation was initiated concerning Beppe Grillo on charges of "inducement to disobedience" as he had allegedly invited police agents to stop protecting politicians during the protestations staged by the "Forconi" movement [a movement so dubbed from the "forks" used in farming].

Legislation and Policies

a) The Legal Qualification of the Right to Access the Internet

The freedom of expression principle enshrined in Article 21 of the Constitution would appear to mirror and take up the notion whereby "truth is not a given, as it happens continuously; it is no thing, as it is rather a thought, in fact it is thinking itself" [1]. Accordingly, any obstacles to the free movement of ideas may sometimes prove harmful both to the opponents and to the supporters of a given idea[2]. In the light of this risk and in order to ensure that this right, a veritable cornerstone of the democratic regime as safeguarded by the Constitution[3], be not overridden, any limitations on freedom of expression may only be legitimate to the extent they are "grounded in specific provisions of the Constitution that account for their imposition."[4]

Assuming that the limitations in question may apply both to

1 Quoted from B. Croce, *Liberismo e Liberalismo (1927)*, in *Etica e Politica*, Bari, 1981, 283.

2 On this view, see A. Pace, *Problematica delle libertà costituzionali*, Padua, 1992, 283.

3 Out of the first judgments by the Court of Cassation, see Nos. 9 and 25 of 1965, 84 of 1969, 105 of 1972, 1 of 1981.

4 This is the view held by C. Esposito, *La libertà di manifestazione del pensiero nell ordinamento italiano*, 1958, 10.

the contents and to the means used to express one's ideas, and since the drafters of our Constitution were clearly unable to forecast the coming of the Internet, one has to consider the dramatic impact produced by this communication medium on freedom of expression.

A precondition to address the peculiarities and, above all, the limitations encountered by the movement of ideas on the Net consists unquestionably in understanding whether and to what an extent a right to access the Internet does exist. Thus, before assessing the risks and benefits arising out of the use of the Internet, one should dwell, albeit cursorily, on what might be termed the configuration of this right.

This is actually rather daunting an issue.

There is little doubt that the Net should be regarded as "an artificial, borderless space", a "non-place, where will (…) manifests itself beyond States and States' laws" [5] – as a territory without any physical barriers, geographical links, "one of paradigms of globalized society." [6]

Access to the Internet mirrors the unprecedented shift from the *nomos* of the land to the *nomos* of the sea[7], and thereby outlines a new dimension of existence. [8]

Conversely, doubts and questions arise as for the legal qualification of access to the Internet.

From a regulatory standpoint, the many, often inconsistent legislative measures[9] were supplemented in 2012 by Law no. 2012,

5 See N. Irti, *Il diritto nell'età della tecnica*, Naples, 2007, 27.

6 C. Caruso, *L'individuo nella rete: i diritti della persona al tempo di internet*, in www.forumcostituzionale.it.

7 C. Schmitt, *Il nomos della Terra*, 1991.

8 On this view, see L. Nannipieri, *Costituzione e nuove tecnologie: profili costituzionali dell'accesso ad internet*, Report at the workshop of the "Pisa Group" on *Lo studio delle fonti del diritto e dei diritti fondamentali in alcune ricerche dottorali*, Università Roma Tre, 20 September 2013, p. 2 et seq.

9 Reference can be made, for instance to Law No. 4/2002, whose Section 1(2) provides that "In particular, the right by persons with disabilities to access the IT and computerised services of public administration and public utilities shall be protected and afforded in pursuance of the equal treatment principle set forth in Article 3 of the Constitution"; and to legislative decree No. 82/2005, whose Section 5 provides that the State is tasked with promoting

which introduced measures intended to strengthen broadband access, and in 2013 by the so-called Action Decree ("Decreto del fare"); the latter was converted into Law No. 98/2013 and amended the legislation on publicly available Internet connection services by doing away with the need for the user's prior authorization and introducing important innovations as for the electronic health record and the so-called digital domicile.

The above measures show the attention paid by the lawmaker to a situation that is changing continuously and substantially; however, they are not such as to meet the demand for a consistent, unified approach that is a must in this sector.

Regarding case-law, nothing changed compared to the stance taken by the Constitutional Court back in 2004, when the Court did not provide any clear-cut views on the constitutional foundations of access to the Net (Decision No. 307). The Court did not take up the argument submitted by the defendant, the Revenue Agency, to the effect that this was a right instrumental to the exercise of other fundamental rights; it merely recognized that a constitutional value was at issue, namely that of IT culture the Republic is tasked with safeguarding in pursuance of Article 9 of the Constitution.

There is a wealth of jurisprudence on this issue, with several different views that are sometimes difficult to reconcile.

Some scholars argue that one has to do merely with a type of *freedom*, others consider conversely that one is faced with a *constitutional right* by relying on the arguments brought by yet other scholars, who refer to a *personal right* or a *primary collective right*.

In the 1980's, access to the Internet was believed to be a token of the so-called computer freedom as enshrined in Articles 15 and 21 of the Constitution[10]. However, this analysis was heavily criticized and was subsequently relinquished in the light of the nature

"initiatives aimed at fostering citizens' computer literacy with particular regard to the categories at risk of being excluded, also in order to enhance the use of computerized service by public administrative bodies."

10 See, in this connection, V. Frosini, *L'orizzonte giuridico dell'Internet*, in *Il diritto dell'informazione e dell'informatica*, 2000, 271.

of computerized tools – which allow one to be not just a passive terminal, but an active participant[11].

That access to the Internet has taken on by now "the features of a full-fledged personal right" may be inferred, according to some scholars, by its being intended as a tool to benefit less-favoured individuals – as is the case of Law No. 4/2004 – or else, more specifically, by the need for some services to be delivered exclusively via computerized networks[12] as per the Digital Administration Code. Other scholars harbor some doubts and questions on the possibility to consider access to the Internet as a personal right, and they point in this connection to the structure and substance of personal rights – which could hardly be tailored to the cases at issue.[13]

A view that is related to the foregoing one, but is actually different and much more controversial, is the one whereby access to the Internet is a social right – or rather, whereby individuals may claim such access as a public service. [14] Since Internet is no longer a tool to only exercise freedom of expression, but also to implement other rights such as education, health, or the payment of taxation[15], access to the Net has become indispensable to enable "inclusion of individuals in social and political processes." [16] If the relationship between citizens and administrative bodies is construed as a type of digital citizenship, it is up to the Republic to afford every user access to the Net. [17] Unlike other social rights, the right to be connected is "a

11 This is the view held by L. Nannipieri, *Costituzione e nuove tecnologie: profili costituzionali dell'accesso ad internet*, quoted, 4.

12 See P. Costanzo, *Miti e realtà dell'accesso ad internet (una prospettiva costituzionalistica)*, in www.giurcost.org, 2012.

13 This is the view expounded by C. Caruso, *L'individuo nella rete: i diritti della persona al tempo di internet*, quoted, 9.

14 Out of the many contributions on this point, see T. E. Frosini, *Il diritto di accesso ad internet*, in www.confronticostituzionali.it, 18 November 2013; G. De Minico, *Uguaglianza e accesso a Internet*, in www.forumcostituzionale.it, 6 March 2013; P. Tanzarella, *Accesso a Internet: verso un nuovo diritto sociale?*, in Proceedings of the annual conference of the "Pisa Group" Association: "*I diritti sociali: dal riconoscimento alla garanzia. Il ruolo della giurisprudenza*", Trapani, 8-9 June 2012, in www.gruppodipisa.it.

15 See F. Donati, *Democrazia, pluralismo delle fonti di informazione e rivoluzione digitale*, in www.federalismi.it, 20 novembre 2013, 3.

16 Quoted from G. De Minico, *Uguaglianza e accesso a Internet*, 1.

17 T. E. Frosini, *Il diritto di accesso ad internet*, quoted, 1.

social right entailing multiple different benefits" because "it does not meet, per se, any need: satisfaction of one's interests is conditional upon the acquisition of the final assets, as made available from time to time by browsing." [18] There are several doubts raised regarding this analysis in the light of the ambiguities the very definition of "social rights" [19] is fraught with as well as on account of the economic difficulties resulting from the costs of such rights. [20]

Finally, the view whereby the right to access the Internet is a fundamental right of the individual grounded in Constitutional principles[21] would appear to be received more favourably. The debate on the constitutional foundations of this right refueled the *querelle* on the interpretation of the provision contained in Article 2 of the Constitution. Some scholars argue it leaves room for the recognition of new rights[22], so that the right to access the Internet could become part of our legal system; other scholars construe this provision conversely to only list the rights set forth in the constitutional charter[23] and accordingly to prevent recognition of the right at issue. At all events, if the Net can also foster individuals' social dimension, Internet might find its constitutional foundations exactly in Article 2 to the extent it is a social formation; one could thus interpret the traditional safeguards enshrined in the Constitution in this perspective, without the need to refer to new rights[24]. One cannot then but acknowledge that Article 2 is to be read jointly with

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18 This view is discussed by G. De Minico, *Uguaglianza e accesso a Internet*, quoted, 1.

19 See, in this regard, E. Rossi, *Prestazioni sociali con corrispettivo? Considerazioni giuridico-costituzionalistiche sulla proposta di collegare l'erogazione di prestazioni sociali allo svolgimento di attività di utilità sociale*, in www.gruppodipisa.it, 2012, 1.

20 L. Nannipieri, *Costituzione e nuove tecnologie: profili costituzionali dell'accesso ad internet*, quoted, 5.

21 See, out of the many contributions on this point, V. Zeno Zencovich, *Access to network as a fundamental right*, Presentation held at the Conference on "*Human Rights and new technologies*", Florence, 2008. F. Borgia, *Riflessioni sull'accesso ad internet come diritto umano*, in *La comunità internazionale*, 2010, 395; S. Rodotà, *Il diritto di avere diritti*, Rome-Bari, 2013, 130 et seq., G. Azzariti, *Internet e Costituzione*, in www.costituzionalismo.it, 6 October 2011, 5.

22 See, out of the many contributions in this regard, A. Barbera, Art. 2, in Branca (edited by), *Commentario della Costituzione. Artt. 1-12. Principi fondamentali*, Bologna, 1975, 50 et seq.; F. Modugno, *I "nuovi diritti" nella giurisprudenza costituzionale*, Turin, 1995, 5.

23 P. Barile, *Diritti dell uomo e libertà fondamentali*, Bologna, 1984, 54.

24 See S. Rodotà, *Una Costituzione per internet?*, in *Pol dir.*, 2010, 348 et seq. .

Article 3(2) of the Constitution, so that the Net should be regarded as "a virtual lever producing real effects, essential to do away with the initial inequalities that hamper the full development of individuals."[25]

Finally, one should not fail to consider the view whereby the right to access the Internet is a subset of the broader right to freedom of expression. A significant proposal was put forward in this regard – but remained dead letter – by Stefano Rodotà in 2010 – namely, adding Article 21-a to the Constitution in order to ensure that "Everyone has the right to access the Internet, under equality terms, in accordance with technologically adequate arrangements that can remove any obstacles of an economic or social nature."

b) Protecting Digital Identity: From the Right to Be Forgotten to the Safety of Children

Having considered the "upstream" qualification – peculiar, at times contradictory – of the right to access the Net, one should now see how the Net is used "downstream". On the other hand, it is unquestionable that Internet, as well as being the most effective communication tool, is an unprecedented means to expand and express one's own personality[26]. This cannot but entail the need to balance freedom of expression as practiced on the Net with other constitutional values; thus, one should investigate whether and to what an extent freedom of expression may be implemented on the Web without jeopardizing the protection of other rights set forth in the Constitution.

Suffice it here to mention the rights relating to privacy, confidentiality, personal identity. These rights are mostly grounded in what is traditionally termed the "right to be let alone" as developed by US scholars at the end of the 19th century[27] – when it was defined at

25 See G. De Minico, *Uguaglianza e accesso a Internet*, quoted, 3.

26 In this connection, see P. Passaglia, Internet *nella Costituzione italiana: considerazioni introduttive*, in www.giurcost.org, 18.

27 A well-known contribution on this point is the one by S. D. Warren- L. D. Brandeis, *The*

the right to defend one's personal sphere against possible interferences by the public opinion regarding strictly private circumstances that, if disclosed publicly, might cause embarrassment and scandal to the individuals concerned. [28]

The impact produced by the Internet on the protection afforded to these rights is unquestionably disruptive. The Net is changing not only the amount, but the very nature of communication: on the Web, "past and present merge into an undifferentiated set of information that makes up a sort of everlasting present." [29] In Internet's global memory there is retained information, often unfiltered, relating to past or present events that often does not correspond any longer to reality – regardless of whether such information is true, likely to be true or false - and may be prejudicial, accordingly, to identity, confidentiality and privacy of individuals.

This is the backdrop to the right to be forgotten. This right exists in a sort of limbo between the individuals' right to respect for their privacy and dignity and freedom of expression and the press.

Whilst one may not allow, in the name of the latter, the dissemination of whatever piece of information, especially if it is untrue, unsubstantiated, or defamatory in nature, without affording adequate remedies to the data subject – albeit ex post – , it would appear on the other hand that respect for personal identity should not be carried to the extreme by making the free movement of ideas conditional upon unrelenting, continuous checks over truthfulness, topicality and accuracy of the information that is posted on the Web.

Freedom of expression and the press, on the one hand; respect for personal data on the other hand: there is permanently a tension between these rights, a permanent state of confrontation.

True, the digital society is increasingly taking on the features of

Right To Privacy, in *Harward Law Review*, 1890.

28 See L. Ferola, *Riservatezza, oblio, contestualizzazione: come è mutata l'identità personale nell'era di Internet*, in F. Pizzetti (edited by), *Il caso del diritto all'oblio*, quoted, 173.

29 See L. Ferola, *Riservatezza, oblio, contestualizzazione: come è mutata l'identità personale nell'era di Internet*, quoted, 175.

a new Eden, where "the impulse to partake of the apple of knowledge is stronger than any resistances or impediments"; however, it is increasingly difficult to strike painstakingly the balance between "the temptation to know and understand all and one's wish to be protected from knowledge" if the latter proves harmful and prejudicial[30]. In balancing these rights one can find the source and the driving force of the right to be forgotten – as a means to limit further dissemination of news that were legitimately posted on the Net "if the rationale underlying knowledge of such news does not justify any longer the limitation imposed on a person's right to protect her privacy and dignity." [31] Accordingly, this right is "a means to re-construct an individual's social dimension by preventing the past from hampering the present." [32]

Indeed, as is often the case, the permanence on the Web of information that had been published legitimately and mostly related to a person's involvement in judicial proceedings may undermine that person's digital identity and produce destabilizing effects with immediate real-life consequences.

Where the current identity does not match with the virtual identity because the former changed on account of various events, the data subject's claim must be granted "to take back control over one's personal history", to be empowered, once again, to manage his or her own personal circumstances[33] – indeed, the world of the Internet is unquestionably *immaterial*, but this is not enough to make it *less real*. [34]

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30 See F. Pizzetti, *Le ragioni di questa collana*, in Id. (edited by), *Il caso del diritto all'oblio*, quoted, X.

31 This quote is taken from F. Pizzetti, *Il prisma del diritto all'oblio*, in Id. (edited by), *Il caso del diritto all'oblio*, Turin, 2013, 32.

32 See M. Mezzanotte, *Il diritto all'oblio. Contributo allo studio della privacy storica*, Naples, 2009, 121.

33 See C. Chiola, *Appunti sul c.d. diritto all'oblio e la tutela dei dati personali*, in *Percorsi cost*., 2010, I, 39.

34 See, in this regard, L. Ferola, *Riservatezza, oblio, contestualizzazione: come è mutata l'identità personale nell'era di Internet*, quoted, 184.

Several remedies have been devised to ensure the protection of this right.

The Italian data protection authority has repeatedly ruled out that data subjects may have news removed or put in context, that is to say that the data may be updated. For the sake of historical records and the free movement of ideas, such measures would not be admissible. Indeed, the Italian DPA's view is that updating or deleting the data would entail veritable changes in the contents of a news article and thereby not only give rise to a conflict with the historical purposes underlying the continued publication of such article, but also violate freedom of expression as already manifested. The balance between historical truth and freedom of expression, on the one hand, and right to be forgotten, on the other hand, was struck by requiring the publisher, i.e. the website manager, to no longer allow indexing of the web pages where the relevant pieces of news were located, whilst the archives of the newspaper as a whole remained untouched. [35] This solution produced the expected effects, as shown by the several recent decisions of "no case to answer" the Italian DPA rendered having established, in the course of complaint proceedings, that the individual website managers had implemented the technical measures required to prevent indexing of the relevant contents from their online archives. [36]

As already pointed out, the solutions devised by the highest Courts in Europe diverged over the past few years.

Whilst the Strasbourg Court, and the Italian Court of Cassation, have found that the difficult balance between digital identity and freedom of expression could be struck by putting the news in context and – only in extreme cases – taking down such news, the Advocate General of the European Court of Justice (case C-131/12) would appear to basically deny the existence of a right to be forgotten in the

35 See, in this regard, the decisions adopted by the Italian DPA on 19 December 2008 (web doc. No. 1583152), 15 July 2010 (web doc. No. 1746654).

36 See, in this regard, the decisions adopted by the Italian DPA on 22 July 2011 (web doc. No. 1748818), 16 February 2012 (web doc. No. 1882081), 21 March 2012 (web doc. No. 1892254).

EU's legal system; indeed, his view is that nothing might justify the request to modify the contents of information in digital publications without bringing about the falsification of history. [37]

Taking down data, putting news in context, implementing technical measures to prevent the indexing of certain contents in online archives: there are as of today many diverse, at times contradictory, remedies to safeguard the right to be forgotten, all of them being the outcome of the difficult balancing between freedom of expression and digital – actually, personal – identity.

If the right to be forgotten is closely related to the dissemination of news that, albeit no longer mirroring current reality, had been legitimately published on the Internet and were not defaming in nature, striking the balance between the values at stake – i.e. between freedom of expression and protection of personal identity – becomes all the more difficult when one is faced with abuse, persecutions and threats posted on the Net against children.

The frequency, fierceness and cruelty, often unprecedented, of the harassment perpetrated in this area over the past few years make it necessary to consider how important the legal asset is one is striving to protect. It has to do not only, and not so much, with honour, image, privacy, as with the definitely more valuable asset consisting in human dignity – which is increasingly trampled upon through destabilizing forms of violence that take place in the virtual world and produce their disruptive effects in the real one.

Online bullying is by now closely related to conventional bullying – in fact, it is sometimes more prevalent.

On the other hand, today's children are the so-called digital natives: for them, the Net is not "a feature of technological evolution to be used for recreational or occupational purposes, as it is rather part of the environment they were born into". It is the habitat where

37 See L. De Grazia, *La libertà di stampa e il diritto all'oblio nei casi di diffusione di articoli attraverso internet: argomenti comparativi*, in www.associazionedeicostituzionalisti.it, 29 October 2013.

their individual personalities take shape and develop. [38]

Given this background, "digital" bullying comes on top of "real" bullying and becomes, at times, even more dangerous. In conventional bullying the aggressor can restrain himself or herself or stop harassing, because of some empathy arising in seeing the suffering of his or her victims; conversely, with digital bullying this is not the case and the violence can be fiercer, more cruel, more unrelenting. The bullying of the virtual world is more invasive than its counterpart in the real world: persecution can be lasting, continuous, unstoppable. There is no safe haven for the victim. Not even one's home can be a castle against the commission of such abuses. [39]

Whilst there are no specific regulations in our legal system to address these issues, the Italian DPA has ever been quite active in dealing with cyberbullying; however, its interventions cannot but consist in calls for awareness-raising to foster the responsible use of social networks in the hope that Parliament steps in timely and effectively. [40]

c) The Blurred Boundaries of Freedom of Expression in Holocaust or Genocide Denial

That a piece of information published on the Net, having become sort of frozen, is no longer topical when taken out of its context, or that it is from the start a misrepresentation of reality, is actually irrelevant in most cases – especially for digital natives. "I found it on the Internet" – that is what one can hear more and more frequently, as if this were tantamount to drawing from the sole, inexhaustible well of truth. Thus, the digital divide is a gap separating not only those having access to the Internet from those having no such access,

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38 See, in this connection, S. Calzolaio, *Internet e minori. Rassegne tematica per una indagine giuridica*, in *La tutela dei minori di fronte ai "media"*, Quaderni del co.re.com. Emilia Romagna, Bologna, 2012, 105 et seq.

39 See L. Califano, *Privacy e sicurezza*, in www.democrazieesicurezza, 2013, 47.

40 See the decision by the Italian DPA of 22 March 2013 (web doc. No. 2332205).

as it also separates two generations: one that grew up using books and encyclopaedias and another one that is growing up using almost exclusively the Net but is often totally unaware of the "knowledge pitfalls" that pave the way of the Internet. [41]

The peculiarities of web-based publication include the ease of dissemination, the possible equivalence of opinions and rebuttals, facts and stories, assumptions and evidence; all of this is often grounded in considerable skills to persuade and be intellectually appealing. This has refueled the debate on holocaust or genocide denial and freedom of expression. On the other hand, there is little doubt that historical narration on the web "feels like the repetition of an everlasting present, where the redundancy of certain opinions is more important than any investigations into the substance and truthfulness of the information provided." [42]

This is why holocaust or genocide denial theories are taking on new life from the Internet; they can penetrate pervasively everywhere and reach a large audience of indeterminate traits.

In the two years taken into consideration, the proposal put forward in October 2012 to introduce holocaust or genocide denial as a statutory offence in our legal system sparked anew the discussion on the tension between freedom of expression and denial theories.

If holocaust or genocide denial means an ideological process aimed at denying the truthfulness of certain historical events relating to acts of genocide, ethnic cleansing, crimes against mankind, then one has to question the very essence of freedom of expression in order to better understand the scope of such freedom.

It is unquestionable that holocaust or genocide denial is rooted in racism and the ideologies derived from racism[43]; it is "the tip of a millennium-old iceberg made up of layers of hatred-oriented

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41 See S. Luzzatto, *La neo-ignoranza è un digital divide*, in *Il Sole 24 ore*, 31 October 2010.

42 See C. Vercelli, *Il negazionismo. Storia di una menzogna*, Rome-Bari, 2013, 184 s.

43 See F.R. Recchia Luciani-L. Patruno, *Premessa*, in Id (edited by), *Opporsi al negazionismo. Un dibattito necessario tra filosofi, giuristi e storici*, Genoa, 2013, 6.

language" [44]; it is grounded in the "creation of historical falsehood by way of the reversal of factual truth" [45] in order to cancel the events "and deny their disruptive substance, bringing about the negation of negativity, the destruction of destructivity"; in short, it is merely a political lie, albeit a highly dangerous one[46]. Given the above premises, it is unquestionable that several legal systems punish holocaust or genocide denial in order to safeguard and protect historical truth as consisting both in "a collective right, based on which society may access information that is key for the development of democratic systems, and in a personal right vested in victims' relatives" [47] – as well as in order to react to the discrimination such a denial entails and protect the dignity of victims, and to protect public order and peace to the extent they can be disrupted and jeopardized by the dangerousness lurking behind this lie.

Still, freedom of expression as the cornerstone of every democratic society, the harbinger of institutional pluralism, is inherently dangerous[48]. There would be no point in recognizing the existence of this right, if one were then to require it to be exercised "to express our own opinions or those opinions that are commonly received." [49] To be truly free, the expression of ideas "may, in fact must also be disturbing, dissonant, divergent compared to the prevailing truth and even to historical truth." [50]It has to be safeguarded even with regard to unpleasant, shocking or offensive opinions as last recalled by the European Court of Human Rights. [51]

This does not mean that punishing holocaust or genocide

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44 D. Bifulco, *Che cos'è la verità?. Il silenzio di Gesù, l'eloquenza del diritto e le soluzioni delle democrazie contemporanee in tema di negazionismo*, in F.R. Recchia Luciani-L. Patruno (edited by), *Opporsi al negazionismo*, quoted, 19.

45 This quote is taken from F.R. Recchia Luciani-L. Patruno, *Premessa*, quoted, 5.

46 C. Vercelli, *Il negazionismo. Storia di una menzogna*, quoted, IX.

47 See, in this regard, the annual report by the European Commission for 1998.

48 See E. Fronza, *Il negazionismo come reato*, Milan, 2012, 144.

49 In this regard, see A. Di Mario, *Eguaglianza tra le opinioni politiche: le tendenze antidemocratiche nei regimi liberali*, in A. Celotto (edited by), *Le declinazioni dell'eguaglianza*, Naples, 2011, 135.

50 E. Fronza, *Il negazionismo come reato*, quoted, 145.

51 ECHR, 17 December 2013, *Perinçek vs. Switzerland*.

denial is bound to be detrimental to democracy and the rule of law; rather, "lawmakers should be recommended to take precautions, to acknowledge the need for balancing and constitutional caution" [52] in order to avoid that the long-standing as well as difficult issue of holocaust or genocide denial be settled by way of the "legal shortcut of prohibition" [53] without an adequate and unrelenting cultural and social confrontation.

Reccomendations

1. Fostering an approach to law-making that is equal to the global dimension of the Internet and can ensure the fair balancing between freedom of expression and its limitations.

2. Ensuring the right to access the Internet under equality terms. Outlining the specific configuration of the right to access the Internet would ensure the effective as well as appropriate exercise of this right and additionally help clarify, once and for all, the judicial remedies to be resorted to in case of illegitimate disconnection from the Net.

3. Ensuring and regulating the right to be forgotten, to be construed as the outcome of the difficult balancing between freedom of expression and digital identity, by way of consolidated as well as consistent regulations.

4. Regulating use of the Net and the management of social networks to protect children and prevent cyberbullying.

5. Promoting effective as well as pervasive governmental measures with regard to administrative bodies in order to ensure that every

52 See J. Luther, *Costituzione, memoria e garanzie di innegabilità*, in F.R. Recchia Luciani-L. Patruno (edited by), *Opporsi al negazionismo*, quoted, 88 et seq.

53 See, in this regard, S. Rodotà, *Il diritto alla verità*, in G. Resta-V. Zeno Zencovich (edited by), *Riparare risarcire ricordare. Un dialogo tra storici e giuristi*, Naples, 2012, 497.

individual may exercise their digital citizenship rights vis-à-vis public bodies.

6. Fostering the balancing exercise judicial authorities should perform by seeking to mediate between the rights at issue pending the adoption of thorough provisions that are equal to the complexity of these questions.