

# ARTICLES

## FREEDOM OF EXPRESSION, HONOUR AND CONTROL OF POWER. DEVELOPMENTS IN THE RIGHT OF POLITICAL CRITICISM, BETWEEN THE NATIONAL AND EUROPEAN COURTS

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### *Abstract*

The essay analyses in depth the crucial relationship between freedom of expression and political power in the public sphere, pointing out the social counter-majoritarian role played by the freedom of expression itself, in order to protect fundamental rights. Starting from a practical perspective, the author critically underlines the different approach followed by domestic and European Courts and their different judicial techniques, adopted for balancing freedom of expression with other constitutional values, such as honour and reputation, especially when a political body is involved.

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### 1. Dangerous freedom and the debate of ideas

Press freedom – like freedom in general, according to the teaching of Benedetto Croce – continues to live “*as it has lived and will live forever throughout history, under threat and fighting*”<sup>1</sup>.

Undoubtedly under threat is the existence of those who subject those affirmations that are handed down “from on high” to the most intense criticism and who desecrate what is considered most sacred and inviolable by a part of the population, challenging those who feel the need to defend by all and any means an “absolute truth”, revealed by the prince or the ministers of some or other deity<sup>2</sup>. Journalism is not, however, necessarily a tranquil occupation even for those who exercise it in liberal systems or in areas where the reaction of those who feel offended is usually restricted to a lawsuit and not death threats or murder.

The notion that comes down through the centuries and various political regimes is that, as in the famous phrase attributed to Edward Bulwer-Lytton, *the pen is mightier than the sword*, influential and therefore a source of danger to authority in all its forms, clerical or secular, for individuals who might find their dignity offended, but also for those who use that pen in expressing their beliefs and direct some light on to the realities of society.

From this point of view, what Constitutions need to protect is the value of the free exchange of ideas, one suitable to arrive at a truth that is necessarily relative and provisional. And it is the voice of the irreverent, those who mock the most deeply held beliefs of society, which should be guaranteed above all. Thus, the effective guarantee of an open and tolerant space continues to be one of the main criteria for evaluating the “wellbeing” of a liberal-democratic system, a system where even thoughts that “*offend, shock or disturb*”, according to now ritual formula of the Strasbourg

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<sup>1</sup> B. Croce, *La storia come pensiero e azione* (1967).

<sup>2</sup> According to data provided by the International Press Institute of Vienna, around the world journalists killed because of their work number about one hundred every year; cf. the dossier “Death Watch”, available at <http://www.freemedia.at/death-watch.html>, which shows a progressive increase in killings from 1997 to recent years. Data for 2015 is obviously influenced by the eight journalists murdered in the terrorist attack of January 7 on the offices of the satirical newspaper “Charlie Hebdo”.

Court<sup>3</sup>, have a place, as instead does the harshest criticism of authority. Limiting, restricting and conditioning public discourse, in fact, ends up creating a chilling effect, a cooling, almost a stifling of freedom of information and, therefore, of the free debate of ideas.

In fact, if democracy postulates the transparency of decision-making mechanisms and an ongoing process of information and the shaping of public opinion, the existence of a space where a comparison of the different interpretations of reality can develop freely becomes a necessary condition for the creation of a favourable environment for the widest possible circulation of any information or idea, and therefore to render effective the right of citizens to be informed and – consequently – to contribute to determining national policies.

In other words, the free circulation of ideas is an individual right and a fundamental value of the democratic system, an instrument for the realisation of the person and for the search for truth in the fields that are most relevant to community life (politics, law, religion, economics, etc.) and, in this vision, a “guarantee for the guarantees”, a condition for the maintenance of all other freedoms.

In this sense, I feel I have to reiterate – despite the authoritative criticism of Alessandro Pace<sup>4</sup> – that freedom of expression can be defined as a right which is individual and social at the same time; a fundamental right of the individual “so that – according to the famous definition of Esposito – *man can join his fellow man in thought and with thought*”<sup>5</sup>, but also a social right, that is, there is an expectation of active behaviour on the part of the State, so that, through the formation of informed public opinion, not only is “the development of the human person” guaranteed, but also “the effective participation of all workers in the political, economic and social organisation of the country”, as laid down in Article 3, para. 2, of the Constitution<sup>6</sup>.

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<sup>3</sup> Among the first European Human Rights Court judgments, 7 December 1976, *Handyside v. United Kingdom*, Appl. no. 5493/72, para. 49, still today a fundamental leading case concerning the right of criticism.

<sup>4</sup> A. Pace, *Informazione: valori e situazioni soggettive*, 26 *Dir. & Soc.* 743 (2014).

<sup>5</sup> C. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano* (1958).

<sup>6</sup> G.E. Vigevani, *Informazione e democrazia*, in M. Cuniberti, E. Lamarque, B.

This reading does not imply a functionalist interpretation of Article 21 of the Constitution, nor does it lead to a recognition of a “right to be informed” as a subjective legal situation of a favourable nature, which corresponds to a general obligation for those who inform to provide information or, even more, information that is “true”.

The “social” right to information instead seems to imply an obligation on the part of the system to make as accessible as possible news regarding the public sphere; hence the “privileged” nature of freedom of expression in the judgment of equilibrium with other personal rights, when through such freedom power becomes visible and can be controlled, be it political, economic, religious, scientific or cultural<sup>7</sup>.

This reading also makes it possible to render the interpretation of the freedom to inform pursuant to Article 21 of the Constitution more consistent with the traditional approach of the European Court of Human Rights, which presupposes “the diversification of the level of protection of a news item in terms of its specific contribution to a debate of general interest”<sup>8</sup>, and thus to encourage a gradual integration of the systems of guarantee for the freedom of expression<sup>9</sup>.

To measure concretely the actual extent of the free marketplace of ideas and interactions between legislator, national courts and supranational bodies it is necessary to climb down from the ivory towers and study everyday case law on the right to criticise.

The verification of how freedom of expression and other

Tonoletti, G.E. Vigevani & M.P. Viviani-Schlein (eds.), *Percorsi di diritto dell'informazione* (2011).

<sup>7</sup> This seems to be the position of Pace and Petrangeli, when they explain that information correctly disclosed by a journalist prevails in the balance of judgment insofar as “Article 21 of the Constitution and, more generally, in the overall context of the constitutional framework, there exists... also the freedom to seek information (cf. among others, Article 10, para. 1, of the European Convention on Human Rights), which though passive... is, in ours as in other systems, as an immanent constitutional value” (A. Pace & F. Petrangeli, *Diritto di cronaca e di critica*, 5 Enc. dir. 307 (2002).

<sup>8</sup> Thus, G. Resta, *Dignità, persone, mercati* (2014).

<sup>9</sup> On the topic, allow me to refer to G.E. Vigevani, *Libertà di espressione e discorso politico tra Corte europea dei diritti e Corte costituzionale*, in N. Zanon (ed.), *Le corti dell'integrazione europea e la Corte costituzionale italiana* (2006).

personal rights confront each other in courtrooms helps, in fact, to define those bradyseisms that move, sometimes even only by millimetres, the line between the right to inform and other conflicting interests and perhaps demonstrates the trends of liberal-democrats legal systems and, for our purposes here, of the Italian system, more than great affirmations of principle which are pronounced perhaps in the wake of traumatic events.

## **2. The crime of offending the honour and prestige of the President of the Republic of Italy between national echoes and the indications of the European Court**

Recent legal proceedings also show how the path of press freedom is a rocky one, with a direction that is certainly not straight and how, in many cases, the legal system provides instruments for those who want to prevent expressions intended to show that the king is naked, whether adorned with a crown or a tiara.

A paradigmatic example in some ways is represented by the maintenance in our system of a crime of “lese majesté”, namely the crime of “insulting the honour or prestige of the President of the Republic” (Penal Code Article 278)<sup>10</sup>, recently “revived” in a judgment of the Court of Rome of 21 November 2014, which condemned the former senator Francesco Storace to six months in prison (suspended) for this crime, for a comment, published on his blog, which questioned the morality and dignity of the then Head of State<sup>11</sup>.

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<sup>10</sup> The same protection is extended to the Pope, for public offences and insults against him committed in Italian territory, pursuant to Article 8 of the Treaty between the Holy See and Italy of 11 February 1929, which came into effect with Law no. 810 of 27 May 1929.

<sup>11</sup> The story dates back to 2007: the Government led by Romano Prodi had on several occasions obtained a majority in the Senate thanks to the votes of life senators, and for this reason a part of the opposition launched a campaign for the repeal of Article 59 of the Constitution. In this context, a highly critical comment was published on the website of the then senator and secretary of “La Destra”, Storace, which defined the venerable senator for life Rita Levi Montalcini a “*crutch*” of the executive and announced the delivery to her home of a pair of these walking aids. A few days later, the President of the Republic Giorgio Napolitano said it was “simply unworthy” to lack respect and seek to intimidate the Senator; words to which Storace replied by addressing the President in these terms: “*For your unseemly personal history, for your blatant and*

This is, as we know, one of the “crimes of opinion” that harks back to pre-republican times and was kept alive by the legislator despite its obvious anachronism and incompatibility with the Constitutional position of the individual in the democratic state. This applies particularly for crimes of defamation (of the Republic, of the constitutional institutions and the armed forces, of the Italian nation, the flag or other State symbols) that are placed on a collision course with the free expression of thought and the right to criticise, even bitterly and disrespectfully, power and those who personify it<sup>12</sup>.

Article 278 of the Penal Code, placed among the crimes against the state, seeks to protect the honour and prestige of the institutional figure who represents national unity and to ensure the smooth performance of the functions related to the office, through the provision of a penalty (imprisonment from one to five years) which is far more severe than that provided by Article 595 of the Penal Code for libel<sup>13</sup>.

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*nepotistic family status, for obvious institutional bias, you are unworthy of a position usurped by a majority*”. Hence the opening of an investigation by the Prosecutor of Rome, the granting by the Minister for Justice of the authorisation to proceed, pursuant to Article 313 of the Criminal Code, the annulment by the Constitutional Court, with judgment no. 313 of 10 December 2013, of a resolution of the immunity of the Senate, as a result of a conflict of attribution raised by the Court of Rome, and finally, the trial which concluded in the first instance with the condemnation of Storace. For the reconstruction of the affair, see the essay by T.E. Frosini, *Libertà di critica vs. vilipendio*, in 4 *Federalismi.it* (2015). A careful examination of the early stages of the affair can be found in A. Filippini, *La vicenda Storace-Montalcini-Napolitano*, in 3 *Costituzionalismo.it* (2007); for the offence under Article 278 of the Penal Code cf. M. Sbriccoli, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna* (1974) and B. Pezzini, *Presidente della Repubblica e Ministro della Giustizia di fronte all'autorizzazione a procedere per il reato di offesa al Presidente (art. 278 c.p.)*, in 5 *Giur. Cost.* 3286 (1996), in addition to the previously mentioned work by T.E. Frosini, *Libertà di critica vs. vilipendio*, cit.

<sup>12</sup> On the topic cf. E. Lamarque, *I reati di opinione*, in M. Cuniberti, E. Lamarque, B. Tonoletti, G.E. Vigevani & M.P. Viviani-Schlein (eds.), *Percorsi di diritto dell'informazione*, cit. at 6, which *inter alia* recalls the crystal-clear reasoning of Paolo Barile according to which “one of the characteristics of democracy is the protection of criticism, not prestige, or reverence for the institutions, which the opposition must be able freely to undermine”. P. Barile, *Il “vilipendio” è da abolire*, in 2 *Temi* 539 (1969).

<sup>13</sup> Thus the Supreme Court Penal Sect. I, on 4 Feb 2004, no. 12625, held that: “The provision of an offence under Article 278 P.C. (Offence against the honour and prestige of the President) clearly does not contrast with Articles 3, 21, 24, 25

It is no coincidence, in fact, that on 4 June 2015 the Senate approved a bill<sup>14</sup> which, while not going as far as *abolitio criminis*, modifies the applicable sanctions: it restricts the possible use of a prison sentence (a minimum of fifteen days and a maximum of two years) only to cases where the offence against the Head of State consists in the attribution of a given fact, and replaces it with a fine in other cases. It seems clear that the completion of the legislative process would alleviate the doubts about respecting the criteria of proportionality and necessity imposed on a democratic society, as will be seen below, by the Strasbourg Court.

However, returning the application of the incrimination in the “Storace” case, the *punctum dolens* is not to be found in the sentence imposed, but in the identification of the area of the criminal offensive with different and wider criteria than in cases of defamation. In other words, the Court of Rome, excluding that the incriminating words constitute a legitimate exercise of the right to political criticism, seems to assume that the law in question finds an insuperable limit in the protection of the prestige, dignity and authority of the highest institution. And thus it seems somewhat impervious to the guidelines of the European Court of Human Rights, which tends to leave no room for restrictions on freedom of expression which might limit the free discussion of matters of

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para. 2, and 111 of the Constitution, and it can be complemented by statements which, falling outside the bounds of the legitimate right to criticise, have (assessed in the whole context in which they are contained) a character that is insulting, abusive and ridiculous”. A few years earlier, the Constitutional Court had declared manifestly unfounded the question of the constitutionality of Article 278 P.C., raised, with reference to Article 27 para. 3 of the Constitution, in the part which provides a statutory minimum penalty of one year in prison (Constitutional Court, 20 May 1996, no. 163). For the judge, the constitutional value protected by the provision – identified in the prestige of the republican institution itself and the national unity that the President of the Republic as Head of State is called on to represent – justified the provision of a range of sanctions that properly highlighted the particular negative value for the entire community of the offence against the honour and prestige of the highest judiciary of the State.

<sup>14</sup> Senate of the Republic, XVII leg., Bill nos. 667 and 1421-A “Modification of Article 278 of the Penal Code, in terms of the offence against the honour or prestige of the President of the Republic”. For a considered criticism of such a reading and in general the choice of the republican legislator to limit itself to replace the figure of the King with that of the President, despite the overturning of the system of laws and principles in relation to sovereignty, cf. T.E. Frosini, *Libertà di critica vs. vilipendio*, cit. at 11, 54.

public concern and requests of those who hold public office a greater tolerance to any criticism they might receive.

From this point of view, in two cases with elements not dissimilar to the one mentioned above, the Strasbourg judges have assumed a fairly restrictive view regarding the conformity of the crime of insulting a Head of State with the freedom of expression protected by Article 10 of the Convention.

In the judgment *Colombani and Others v. France* of 2002<sup>15</sup>, the Court found incompatible with the Convention the regulation of the crime of offence against a foreign Head of State, provided by Article 36 of the French law of 1881 on the freedom of the press, insofar as this norm, unlike the general rule in libel actions, did not allow the journalist to rely on the *exceptio veritatis*, namely the proof of the truth of the facts alleged, as exonerating the offence. According to the Court, in fact, a discipline that had as its goal that of depriving the right to criticise foreign heads of state only because of their function or status granted them an exorbitant privilege, not compatible with “*la pratique et les conceptions politiques d’aujourd’hui*” (para. 68). An interference with the freedom of expression based on that regulatory substratum did not answer, therefore, any overriding social need that might justify such a derogation from the right to inform. It was excessive in relation to the objective pursued by the law, that is, the interest of the State in maintaining friendly relations with the rulers of other countries<sup>16</sup>. Following the decision, the French legislature repealed the offence in question and introduced the offence against foreign Heads of State among the aggravating circumstances of the crime of defamation.

More recently the judgment *Eon v. France* 2013<sup>17</sup>, in which

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<sup>15</sup> European Court of Human Rights 25 June 2002, *Colombani and Others v. France*, Appl. no. 51279/99; the case concerned the conviction of the editor and a journalist of “Le Monde” for the crime of offending a foreign head of state (in this particular case, the then King of Morocco Hassan II).

<sup>16</sup> On this decision, cf. D. Voorhoof, *Cour européenne des Droits de l’Homme - Affaire Colombani (Le Monde) c. France*, in 9 IRIS 212 (2002), which can be found at <http://merlin.obs.coe.int/iris/2002/9/article1.fr.html> e P. Gori, *Brevi note sulla libertà di critica ad un Capo di Stato nella CEDU: il caso Eon, affinità e differenze con l’affaire Colombani*, in [www.europeanrights.eu/public/commenti/GORI.pdf](http://www.europeanrights.eu/public/commenti/GORI.pdf).

<sup>17</sup> European Court of Human Rights 14 March 2013, *Eon v. France*, Appl. no. 26118/10; for a detailed commentary, cf. I. Gittardi, *Vilipendio al Presidente della Repubblica e libertà di espressione alla luce della Convenzione europea*, in 23 Dir. Pen.



the Strasbourg Court considered a conviction, albeit a symbolic one (a 30-euro fine), contrary to the Convention for the crime of “*offense au Président de la République*”<sup>18</sup>, of a Socialist activist who had help up a sign reading “*Casse toi pov’con*” addressed to President Sarkozy, on the occasion of a visit to his hometown. This particularly trivial expression mimicked an identical phrase pronounced by Sarkozy himself against a protester some time before, which made the President an easy target for satire.

Unlike the *Colombani* case, the European Court does not arrive at a declaration of outright incompatibility with the Convention of the crime of offence against the President of the Republic<sup>19</sup>. However, it believes that in this case there has been a breach of Article 10 of the Convention: according to the Court, the applicant had intended to publicly address a criticism of a political nature to the Head of State, employing the weapon of albeit extreme irony, and Article 10, para. 2, of the Convention leaves no room for restrictions on freedom of expression in the context of political debate or public issues. The limits to the right of criticism of a politician (among whom we find, par excellence, the President of the Republic) are, in fact, wider than those of an ordinary citizen, since the former inevitably and knowingly exposes his behaviour to thorough checks, both in the press and on the part of the mass of the citizens, and must therefore exercise greater tolerance (paras. 58-59). In addition, the European judge believes that in this case the applicant made his criticism employing a satirical tone, which allows the use of exaggeration and distortion of reality. Thus, criminalising such behaviour would result in a deterrent effect on satire aimed at public figures, which is not compatible with the democratic system.

What seems to emerge from these two decisions is a secular

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Cont. 63 (2013).

<sup>18</sup> Article 26, law on the freedom of the press of 29 July 1881, later abrogated by Law no. 2013-711 of 5 August 2013. This norm stated that: «*An offence against the President of the Republic using one of the means indicated by Article 23, is punishable with a fine of 45.000 euros*».

<sup>19</sup> Thus I. Gittardi, *Vilipendio al Presidente della Repubblica*, cit. at 18, where he gives an account of the dissenting opinion of Judge Power-Forde, in which he argues that the Court should have judged the removal of the President of the Republic from criticism, which the very existence of the crime seems to guarantee, as in the *Colombani* case, as a privilege incompatible with the current way of thinking about politics.

vision of the institutions, which excludes “any ‘sacred’ concept of the public authorities, that might justify the repression of the thought of the *quisque de populo*”<sup>20</sup>. This condition does not rule out *a priori* the possibility for states to provide special arrangements for heads of state, but that system cannot result in free zones or excessively condition the activity of providing information. In fact, even the organ placed at the top of a constitutional system is not beyond the incisive control of the public and cannot claim some sort of immunity from criticism and even bitter and irreverent satirical expressions, invoking a sacral conception of his/her person and role. On the contrary, the involvement of “absolute personalities of contemporary history”, which is what institutional leaders are, extends the right of criticism up to also covering mere expressions of indignation and personal animosity towards the state and whoever exercises significant portions of its power<sup>21</sup>.

This applies just as much to the French President, invested by the Constitution of the Fifth Republic with a decisive role in identifying the political direction of the country, as to the King of Morocco, the victim in the “Colombani” case, a key figure in the form of government in his country, especially before the constitutional reform of 2011.

The constitutional position of the Italian Head of State is not comparable with that of the French president nor with that of the sovereign of Morocco, especially during the reign of Hassan II.

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<sup>20</sup> Thus C. Caruso, *Il “Political speech” nella Convenzione europea sui diritti dell’uomo: il caso Eon c. France*, in [www.diritticomparati.it](http://www.diritticomparati.it) (2013).

<sup>21</sup> Emblematic in this respect, the European Court of Human Rights 1 July 1997, *Oberschlick v. Austria* no. 2), Rec. 1997-IV, where the Court concluded that the conviction of an Austrian journalist who had called the then governor of Carinthia Jörg Haider “an idiot” constituted a disproportionate interference with the exercise of the freedom of political expression and was not necessary in a democratic society. A partial exception to this trend is represented by the decision *Rujak v. Croatia* of 2 October 2012 (rec. no. 57942/10). The applicant was sentenced to a term of imprisonment for the offence of damaging the reputation of the state, because after an argument he had disowned his belonging to the Croatian state and railed against its Christian roots. The Strasbourg Court declared the appeal inadmissible, because the words spoken were intended to offend the state institutions and not to express critical opinions. In this way, the Court seems to “consecrate, for the first time in half a century of work, the merits of a new form of logical limit to freedom of expression”, according to P. Tanzarella, *Il limite logico alla manifestazione del pensiero secondo la Corte europea dei diritti*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it) (2013) 3.

However, in Italy, since at least the time of President Cossiga, the conventional rule that excluded the resident of the Quirinal from the political controversies of the day seems to have been applied less and less, a rule stating that political players should refrain from politically censuring the President of the Republic and demanding, in return, a position from the President that was extraneous to party-political goings-on<sup>22</sup>.

Italian constitutional doctrine itself, having overcome a conception that was more attentive to preserving the sanctity of the highest judiciary of the Republic, has largely held that, in light of the gradual demystification of the presidential role, a diffuse political responsibility may also be attributed to the Head of State, which is mainly reflected in the submission of his/her acts and conduct to the critical judgment of the public as well as of political forces<sup>23</sup>.

From this point of view, the guidance that emerges from Strasbourg, according to which unquestionable power is incompatible with “la pratique et les conceptions politiques d’aujourd’hui”, and protected as well from irreverent and disrespectful criticism, could be taken as a guideline by the national courts to verify the effective existence of an offence against the majesty of the State and its Head.

### **3. Trends in the field of political criticism in dialogue with the Strasbourg Court**

In relation to the crime of offending the President of the Republic, Strasbourg case law appears to have had more influence on the legislature than the court of Rome; in other areas that affect the width of the space available for criticism, the indicators developed at European level are producing not insignificant changes in Italian courts.

What we are witnessing, in fact, is a slow movement

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<sup>22</sup> On this convention, cf. G.U. Rescigno, *La responsabilità politica* (1967); ID., *La responsabilità politica del Presidente della Repubblica. La prassi recente*, in 1 St. parlam. & Pol. Cost. 10 (1980).

<sup>23</sup> In this sense N. Pignatelli, *La responsabilità politica del Presidente della Repubblica tra valore storico e “inattualità” costituzionale della controfirma ministeriale*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it) (2005), which states that “the evolution of the form of government has brought out a “widespread” political responsibility, which has proved very important in constitutional dynamics”.

towards a more libertarian conception of the relationship between freedom of the press/criticism and other conflicting interests, especially when the subject who believes they have been offended is a public figure. Identifying a trend from the extensive case law, which is often contradictory and, in any event, linked to the peculiarities of the actual case such as that on defamation, is an operation that opens itself to easy objections. However, it does not seem arbitrary to gather evidence of a shift in the balance towards freedom of information, reading both the declarations of the Supreme Court<sup>24</sup> as well as statistical surveys on the case law of the main appeal courts<sup>25</sup>.

This trend is accompanied by a process of gradual osmosis

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<sup>24</sup> Among the most significant in recent months Supreme Court Penal Section V, April 20, 2015, no. 20998 and Supreme Court Civil Section III, 20 January 2015, no. 841, which states that where the narration of facts is supplied along with opinions, so as to constitute at the same time exercise of the press and criticism, the evaluation of the moderation requires a balancing of the interest to reputation with that of the free expression of thought, a balance that is apparent *“in the relevance of the criticism to the interest of public opinion in knowledge not of the fact subject to criticism, but the interpretation of the fact”*. Supreme Court Penal Section V, September 23, 2014, no. 49570. A few years earlier, but exemplary in its clarity Supreme Court Penal Section V, 3 October 2012, no. 38437, reiterates in a particularly clear way the width of the boundaries to be allowed to political criticism *“because it guarantees the full unfolding of the democratic process and allows citizens to form strong opinions about the various events; criticism can also be very harsh, irreverent and ironic, provided, however, that they meet the standards of public interest in the news and/or affair criticised, that the presuppositions actually exposed to criticism are true and that there is an exhibitory moderation, even if the harshness of the political and union struggle allows criticism that is also very pungent and the use of phrases and images that are likely to capture the interest of the distracted reader and the listener”*.

<sup>25</sup> Vincenzo Zeno-Zencovich has recently published an interesting statistical study on the guidelines of the Civil Court of Rome regarding damage to reputation and the unlawful processing of personal data, analysing the judgments filed in the year 2013. V. Zeno-Zencovich, *Quantificazione del danno alla reputazione e ai dati personali: ricognizione degli orientamenti 2013 del Tribunale civile di Roma*, in 32 *Dir. Informazione e Informatica* 405 (2014). These indicate that, with regard to damage to reputation, there is a prevalence of negative decisions (73% versus about 40% twenty years ago); the figure is even more unequivocal as regards politicians, who did not see even one of their 23 cases taken any further (p. 408). A not dissimilar although less sharp tendency also emerges from the analysis of Sabrina Peron on the judgments issued by the Civil Court of Milan, in 2011-2012, on defamation through the media (S. Peron, *Diffamazione tramite mass-media. Un biennio di giurisprudenza ambrosiana*, in *Resp. civ. e Prev.*, 2013, pp. 1839 ff.).

between the different levels of jurisdiction, demonstrated *inter alia* by the increasing frequency with which Italian courts cite Article 10 of the Convention and Strasbourg case law to justify decisions, particularly in the area of political criticism, that recognise the prevalence of the freedom of expression<sup>26</sup>, as though, as I have observed elsewhere<sup>27</sup>, Italian legislation and case law are not always capable of providing a sufficiently solid basis.

The outcome of this process is, in reference to the right to political criticism, the accentuation of the distinction between “judgments of fact” and “of value”, and the resulting limited importance of the requirement of the truth of the fact in the latter case, insofar as the request to prove the truth of a value judgment leads to an evident deterrent effect on the freedom of information<sup>28</sup>.

Dialogue with Strasbourg has also had some effect also on the interpretation of the requirement of the “civil form”. For the European judges, “*the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression, as it may well merely stylistic purposes. Style constitutes part of communication as a form of expression and is as such protected together with the content of the expression*”<sup>29</sup>. Criticism expressed with foul and abusive language can therefore prevail over the right of an individual to be protected from personal insults if the value judgment refers to characters with an important public role and is based on known

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<sup>26</sup> Among the most recent, Supreme Court Penal Section I, on 5 November 2014, no. 5695, which will be dealt with below, and Supreme Court Penal Section I, 13 June 2014, no. 36045, where it is stated that “*Moreover, as noted by ECHR case law (...), the right to freely express opinions does not only have to do with ideas that are favourable or inoffensive or indifferent, the occurrence of which nobody would ever be opposed to, but is, on the contrary, mainly aimed at ensuring freedom of opinions that offend, shock or disturb. And all the more so if such vehement opinions are addressed to persons holding or representing a public power, and are therefore felt to be justified by the need to respond with violence to the violence of power (except, as stated, for mocking expressions or ones that strike for no reason in private sphere, i.e. argumenta ad hominem which are not admitted*”.

<sup>27</sup> G.E. Vigevani, *Libertà di espressione e discorso politico tra Corte europea dei diritti e Corte costituzionale*, cit. at 9, 475.

<sup>28</sup> Thus Supreme Court Penal Section V, 26 September 2014, no. 48712, citing the European Court of Human Rights 27 February 2013, *Mengi v. Turkey*, nos. 13471/05 and 38787/07.

<sup>29</sup> European Court of Human Rights, 21 February 2012, *Tusalp v. Turkey*, no. 32131/08, para. 48.

facts and opinions, the subject of public debate.

Some evidence to that effect is obtained by illustrating, albeit in an “impressionist” way, two recent legal proceedings.

At the end of 2014, the First Penal Section of the Supreme Court<sup>30</sup> ruled that the criticism of a public figure has very wide margins, allowing the use of a degree of exaggeration or provocation, as long as the event which inspired it is true. The ruling put an end, with dismissal without appeal, to the odyssey of a preventative action, which began with the sequestering of two articles which described the then President of the Upper Council of Cultural Heritage in an irreverent tone, taking their cue from a number of episodes of managing public money that were not entirely limpid. The Court makes a distinction between harsh, biting and sarcastic polemic, permissible if directed against public figures, and gratuitous aggression, illegal insofar as it affects the moral sphere of the person without any relation to the facts. The balance appears to be as follows: the greater the power, the more necessary the control of public opinion and therefore the lower the limits also in terms of the means of spreading news. According to the Supreme Court, because the form is “civil” it is not necessary to use language that is “grey and anodyne”. There is room for provocative polemic, for biting satire and the desecration of those who manage public affairs, provided that the facts forming the basis of the criticism are true.

It really is like hearing from the mouth of the Italian judge that refrain of the European Court of Human Rights, according to which freedom of expression is the rule and the protection of reputation the exception, which requires a narrow interpretation, especially when it comes to a discussion on issues regarding the *polis*.

The same wind seems to be blowing in an equally recent judgment<sup>31</sup>, in which the Supreme Court, altering the appeal decision, considered it legitimate to express concerns about the handing of an assignment of a political nature to a magistrate who in the past had been subject to disciplinary and criminal proceedings, if the facts underlying the criticism are true, the tone is not offensive and the exculpatory outcome of those proceedings

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<sup>30</sup> Supreme Court Penal Section I, on 5 November 2014, no. 569.

<sup>31</sup> Supreme Court Civil Section III, 12 March 2015 no. 4931.

is described. According to the Supreme Court, judges do not have to teach journalism to journalists, but only mark out the boundaries of what is permissible; moreover, it has been stated that *“neutrality is a requirement that might the duty of journalist who reports facts, not of one who makes judgments of political criticism”*, who indeed has a duty not to be neutral, since only the alternation of thesis and antithesis allows the reader to achieve a new and more comprehensive synthesis. Therefore, heretical opinions have full citizenship in our system, provided they are based on true facts and expressed in a way that is non-trivial.

#### **4. The prevalence of Strasbourg: heading towards the end of prison sentences for defamation**

The influence of Strasbourg case law is evident, then, in the perhaps most significant movement regarding the rules for journalists, namely the gradual rethinking of the provision for custodial sentences for crimes of defamation, considered excessive compared to the feeling of the social conscience and supranational case law.

As we know, Italian legislation provides for rigorous penalties for this crime<sup>32</sup>, which though is not matched by a similar severity at the time of its concrete application and actual implementation<sup>33</sup>. There are, thus, relatively infrequent – but not

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<sup>32</sup> “Simple” defamation (Article 595 Penal Code) is punishable with the alternative penalty of imprisonment up to one year or a fine of up to €1,032. The legislature has provided for an aggravated hypothesis: if the offence consists of a determined fact the penalty is imprisonment up to two years or a fine of up to €2,065; if it committed through the press or by any other public means (internet, for example), or in a public act, the penalty increases again and imprisonment is from six months to three years or a fine of not less than €516. If then the offence is aimed at a political administrative or judicial body, one of its representatives or an authority formed by a college, the penalties are increased by one-third. In addition to those listed, there is a further aggravating factor contained in Article 13 of Law no. 47 of 1948 (“Law on the Press”): when the defamation is committed by means of the press (and only with this, in virtue of the principle of the obligatory nature of prosecution in criminal matters) and consists of the attribution of a given fact, it provides for the cumulative application of imprisonment and a fine (imprisonment from one to six years and a fine of not less than €258), while in all other cases the two sanctions are alternatives.

<sup>33</sup> Despite the severity of the penalty prescribed by law, in practice it is quite rare for prison sentences to be handed down to journalists, even in the

entirely sporadic – cases where a prison sentence is imposed: recent research by “*Ossigeno per l’informazione*”<sup>34</sup>, found that in the last four years about twenty journalists were sentenced to imprisonment<sup>35</sup> and only two of these spent a few days in jail (Francesco Gangemi from Reggio Calabria, sentenced to two years’ imprisonment for defamation and perjury) or under house arrest (the editor of “*Il Giornale*”, Alessandro Sallusti).

The problem remains that current Italian legislation hardly seems compatible with the very well-known, established case law of the European Court – which made its debut with the sentence of the Grand Chamber of 17 December 2004, *Cumpănă et Mazăre v. Romania* and which involved the Italian system with the judgments in *Belpietro v. Italy* of 24 September 2013, and *Ricci v. Italy* of 8 October 2013<sup>36</sup> – according to which, in their assessment of the proportionality of the restriction, it is necessary to verify that the nature and severity of the sanction are not likely to deter others from the exercise of the right of criticism. Therefore, the provision of prison sentences for crimes related to the exercise of

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hypothesis of Article 13 of the Law on the Press. This is by virtue of a special mechanism: the act in question is not considered a crime in itself, but an aggravation of the offence under Article 595 of the Penal Code, which makes it an element of balance between circumstances which the court is called upon to perform. So, even if it finds only the recognition of extenuating circumstances, the court does not apply the aggravated defamation of Article 13 of the Law on the Press, but that provided by Article 595 of the Penal Code, which provides for the alternative penalty of imprisonment or a fine and typically imposes only the latter.

<sup>34</sup> Cf. <http://notiziario.ossigeno.info/2015/05/carcere-per-diffamazione-dal-2011-sedici-anni-di-carcere-a-20-giornalisti-57933/>

<sup>35</sup> Some cases are indeed unique: among the more recent, the judgment of the Court of Bologna of 21 May 2015, not yet published, which condemned under Article 57 of the Penal Code the editor of the local newspaper, guilty of deliberately failing to control the publication of a death notice which invoked the mercy of God to forgive “the ruthless barbarity, the great and cruel malice against weak people who could not defend themselves” which the deceased – father-in-law of the author – supposedly committed during his life.

<sup>36</sup> Cf. among many M. Castellaneta, *La libertà di stampa nel diritto internazionale ed europeo* (2012), M. Cuniberti, *Pene detentive per la diffamazione, responsabilità del direttore e insindacabilità delle opinioni del parlamentare: il “caso Belpietro” davanti alla Corte europea dei diritti dell’uomo*, in Oss. AIC (2014) and C. Melzi d’Eril, *La Corte europea condanna l’Italia per sanzione e risarcimento eccessivi in un caso di diffamazione. Dalla sentenza qualche indicazione per la magistratura, il legislatore e le parti*, in Dir. Pen. Cont. (2013).



freedom of information is not, in principle, compatible with freedom of expression, except in exceptional circumstances, in particular when other fundamental rights have been seriously attacked, as in the case of the dissemination of hate speech or an incitement to violence.

To adapt Italian law to European Court case law, the legislator is following the road of legislative reform: a bill passed by the House on 17 October 2013, by the Senate with amendments on 29 October 2014 and currently being examined in committee in the House<sup>37</sup>, intervenes *inter alia* on sentences: it eliminates the penalty of imprisonment for defamation, following in the footsteps of European case law which believes that such a punishment is intimidating and replaces it with a fine that ranges from 10,000 to 50,000 euros in the most severe case. On closer inspection, however, the set of sentences for libel and a failure to rectify and compensate, which has no limits placed on it, is perhaps an even more threatening arsenal against the freedom of information, also due to the absence of an effective block on reckless lawsuits<sup>38</sup>.

The Italian system has also responded to “pressures” from Strasbourg in ways that are perhaps not entirely usual and orthodox, almost anticipating the legislative reform through the “extreme” use of the canon of interpretation in conformity with the Convention.

Thus, in 2013 the Supreme Court<sup>39</sup> overthrew a sentence of six months in prison for aggravated defamation against a journalist (and a failure to check against the editor of the magazine), for the sole reason that the trial judge had opted for

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<sup>37</sup> XVII Legislature Bill C-925B: Amendments to Law no. 47 of 8 February 1948, the Penal Code, the Criminal Procedure Code and the Civil Procedure Code on defamation, defamation by the press or other means of communication, of insult and condemning the plaintiff as well as professional secrecy. Additional provisions for the protection of the person defamed.

<sup>38</sup> For a brief critical analysis of the texts adopted so far by the two chambers, please cf. G.E. Vigevari and C. Melzi d’Eril, *Niente carcere per diffamazione a mezzo stampa: la riforma è ora al Senato per essere completata*, in Guida dir., 2014, n. 2, pp. 14-17 and Id. *Diffamazione: il legislatore che voleva troppo*, in [www.medialaws.eu](http://www.medialaws.eu) (10 November 2014).

<sup>39</sup> Supreme Court Penal Section V, 11 December 2013, no. 12203; on this decision cf. S. Turchetti, *Cronaca giudiziaria: un primo passo della Corte di Cassazione verso l’abolizione della pena detentiva per la diffamazione*, in Dir. Pen. Cont. (2014).

imprisonment instead of a fine. The Supreme Court considers this to be incompatible with the case law of the European Court which, to use a custodial sentence, specifically requires the recurrence of exceptional circumstances: this on the grounds that, otherwise, the “watchdog” role of journalists would not be guaranteed, while their task is to communicate information on matters of general interest and, consequently, to ensure the public’s right to receive it.

The same logic seems to have moved the Public Prosecutor of Milan as well when, in October 2013, following the publication of the *Belpietro* judgment, he signalled in a statement to his deputies the orientation of European judges regarding sentences for libel and invited them to limit the application of custodial sanctions and to inform him of those “exceptional circumstances” that would render the request for a custodial sentence proportionate<sup>40</sup>.

These are obviously different episodes, which clearly demonstrate however the strength of European case law, capable of impacting not only on the criteria for the balance between freedom of speech and the right to reputation, but also on the normative situation, increasingly making an exception of what the Italian legislator had set as a rule, in the name of the ever- more dominant value of the free exchange of ideas.

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<sup>40</sup> The press release of the Prosecutor’s Office of 8 October 2013 can be found at [http://www.penalecontemporaneo.it/materia/-/-/-/2543-pena\\_detentiva\\_e\\_diffamazione\\_la\\_presa\\_di\\_posizione\\_del\\_procuratore\\_della\\_repubblica\\_di\\_milano/](http://www.penalecontemporaneo.it/materia/-/-/-/2543-pena_detentiva_e_diffamazione_la_presa_di_posizione_del_procuratore_della_repubblica_di_milano/) For a brief comment, cf. G.E. Vigevani & C. Melzi d’Eril, *Diffamazione: i diversi confini tra Italia ed Europa*, in *Il Sole 24 Ore*, 22 October 2013, p. 27.