

Freedom of the press and the constitution

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“Far from being a violation of article 21 of the Italian constitution, the current limitations of freedom of the press in Italy are a direct consequence of it”

This week's Economist informs us that “in Freedom House’s 2009 survey of media independence, Italy was downgraded to “partly free” and placed 73rd in a list of 195 countries (only just above Bulgaria)”¹. Even though, regarding media independence and therefore freedom of expression, the particular case of Italy is extreme, at least by Western standards, it highlights a more general and structural problem which is common also in other non-common-law countries and also regarding fundamental values other than

¹http://www.economist.com/world/europe/displaystory.cfm?story_id=14560942

freedom of expression: this problem involves the constitution, and more specifically its nature and its relation with the law.

It is interesting to notice that Freedom House's downgrading happened *without* the Italian constitution having been formally affected or called into question. In other words, even though the article 21 of the Italian constitution guarantees freedom of the press and of expression, Italy lost its status of a country where information and expression are free, without this involving a violation of the constitution.

Given the nature of the Italian constitution and its relation with the law, this is hardly surprising. The problem (in Italy as well as in many other countries, especially non-common-law countries) is that the constitution is seen as the *origin* of the law. In other words, in Italy constitutional law is seen as a law higher in rank as compared to “ordinary law”. The constitution and the law have often the same functions (say, to protect freedom of expression); however, the constitution performs this function, e.g. fixes the norm, at the highest level of abstraction, *leaving to the law the definition of the “details”*. The problem is that *these “details” are precisely those on which freedom of expression depends*.

Now, if by law one intends the arbitrary decision of the authority (say of the representative majority), then, freedom of expression can be significantly limited by this authority acting on the “details”, as it is happening now in Italy, without the constitution being violated.

However, there is a different idea of law (the original idea of law) which implies a different form of constitution, that is a constitution having different functions and a different relation with the law.

According to this different, original idea, the law is not every properly approved command or decision of a representative authority, but precisely the abstract principle that limits that command and the authority's power to make that decision. This original idea implies that the law exists *before* legislation and authority, and quite independently from it: the authority does not have the power to “make” the law. According to this idea (which we can label “negative” as it implies absence of arbitrary decision), the law is the result of a spontaneous process of selection of successful uses, conventions and institutions (“successful” in the sense that their use demonstrated to contribute to enhance the chances of survival of the group); in time, these uses and conventions developed into abstract, general, moral principles (and therefore also necessarily reciprocal principles) which the authority should have the power to *discover* and *protect*, but cannot “make” (as a tree cannot be made). Because it is based on abstract principles, this idea of law is exclusively concerned with what is believed to be just or unjust, not with what is believed to be expedient or not expedient.

Even with this extremely incomplete summary of some of the distinguishing aspects of negative law, it should be already clear that, unlike the positive one, this negative idea of law makes it impossible for someone who controls a political majority to make a crime legal because he is accused of it (as it is happening today in Italy), for it should be demonstrated that that crime is based on a principle which in time was spontaneously selected as just, which is clearly impossible.

Now, this original idea of law implies a different form of constitution (which for reasons of symmetry can be labeled “negative constitution”): in particular, a constitution that arranges the institutional structure for the law to be discovered and applied, and in such a way that the political powers are sufficiently separated so that none of them has the power to jeopardize the law. In other words, unlike what happens for positive law, the constitution implied by negative law is *not* one which deals with principles and fixes them at the highest level of abstraction, leaving the “details” to the law: a law *is* a principle at its highest level of abstraction. In other words, this negative idea of law implies an idea of constitution according to which this is like a house, with different rooms, inside of which a family (the law) has to live, and not one according to which the constitution is like a master of that house, with the law being a servant: “To the rules which we are in the habit of calling 'law' but which are rules of organization and not rules of just conduct belong in the first instance all those rules of the allocation and limitation of the powers of government comprised in the law of the constitution. They are commonly regarded as the 'highest' kind of law to which a special dignity attaches, or to which more reverence is due than to other law. But, although there are historical reasons which explain this, it would be more appropriate to regard them as a superstructure erected to secure the maintenance of *the law*, rather than, as they are usually represented, as the source of all other law” [Hayek, F.A., 1998, *Law, Legislation, and Liberty* (Routledge, London), Vol. 1, p. 134].

Therefore, while in the case of positive law (and consequently of “positive constitution” – the constitution master of the house), freedom of expression and of the press can be violated without violating the constitution, in the case of negative law (and consequently of negative constitution), they cannot be violated without violating the law. As Professor Friedrich von Hayek says, “none of the traditional Rights of Man, such as freedom of speech, of the press, of religion, of assembly and association, or of the inviolability of the home or of letters, etc., can be, or ever have been, absolute rights that may not be limited by general rules of law. Freedom of speech does of course not mean that we are free to slander, libel, deceive, incite to crime or cause a panic by false alarm, etc. etc. All these rights are either tacitly or explicitly protected against restriction only 'save in accordance with the law'. But this limitation, as has become only too clear in modern times, is meaningful and does not deprive the protection of those rights of all efficacy against the 'legislature', only if by 'law' is not meant every properly passed resolution of a representative assembly but only such rules as can be described as laws in the narrow sense here defined”

i.e. in the sense of negative law [Hayek, F.A., 1998, *Law, Legislation, and Liberty* (Routledge, London), Vol. 3, p. 110].

Anthony de Jasey, by referring to the fact that a constitution could be changed by a representative assembly (provided it had a sufficiently strong majority in parliament) said that the constitution is a chastity belt of which the bearer has the keys. If by “law” one intends positive law, and therefore by “constitution” positive constitution, as it happens today in Italy for example, we can in fact say that the constitution *is* the key of that belt. Far from being a violation of article 21 of the Italian constitution, the current limitations of freedom of the press in Italy are a direct consequence of it. In particular, they are a direct consequence of the idea of law that that constitution adopts; and they are a consequence of its fixing the principle of freedom of expression and of the press at the highest level of abstraction, and therefore of its leaving to the “law”, that is to every properly passed, arbitrary resolution of a representative assembly, the “details” of the limitation of such principle.