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IT WAS THE FIRST STRIKE OF BLOGGERS EVER:¹ AN EXAMINATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS ITALIAN BLOGGERS TAKE A STAND AGAINST THE ALFANO DECREE

INTRODUCTION

On July 15, 2009, Italian bloggers went on strike to protest against a proposed law that would strictly regulate information published on the internet.² Wearing white bandages covering their mouths, hundreds of bloggers gathered in the Piazza Navona in Rome, Italy and imposed a day of silence during which they did not publish anything on their blogs, inviting Italian newspapers and television networks to remain silent as well.³ The protested bill, called the “Alfano Decree” after its creator, Angelino Alfano, Italy’s Minister of Justice, entitles anyone that believes her reputation has been damaged by posts containing factual errors to request that the author rectify the offending post.⁴ The bill applies to posts that are published anywhere on the internet, including blogs, message boards, a status update on Facebook or MySpace, or even a tweet on Twitter.⁵ The author has forty-eight hours to comply with the demand or face a maximum statutory fine of €10,000 (approximately \$14,000 as of February 2011) and possible civil damages.⁶ The

¹ Press Release, Alessandro Gilioli, Guido Scorza & Enzo di Frenna, *It Will Be the First Strike of Bloggers Ever* (July 12, 2009) (on file with author).

² E.g., Arthur Bright, *Italian Bloggers On Strike!*, CITIZEN MEDIA L. PROJECT (Aug. 21, 2009, 1:07 PM), <http://www.citmedialaw.org/blog/2009/italian-bloggers-strike>; Francesco Federico, *Italian Bloggers Strike Against Government*, EUR. JOURNALISM CENTRE (Aug. 24, 2009), http://www.ejc.net/magazine/article/italian_bloggers_strike_against_government; David Reid, *Italian Bloggers’ Silent Protest*, BBC NEWS (Aug. 14, 2009, 10:37 AM), http://news.bbc.co.uk/2/hi/programmes/click_online/8197639.stm.

³ Press Release, Gilioli, Scorza & di Frenna, *supra* note 1; *see also* Fulvio Paolucci, *Italian Bloggers Strike*, GLOBAL POST (July 16, 2009, 7:07 PM), <http://www.globalpost.com/dispatch/italy/090716/italian-bloggers-strike>.

⁴ Legge 30 giugno 2008, n. 1415 (It.) [hereinafter the Alfano Decree]. This entitlement is called the “right of reply.” Bright, *supra* note 2; Federico, *supra* note 2; Reid, *supra* note 2. “Anyone” includes individuals, companies, etc. Federico, *supra* note 2.

⁵ Federico, *supra* note 2. *See, e.g.*, Horizon Grp. Mgmt. v. Bonnen, No. 2009L008675 (Ill. Cir. Ct. dismissed Jan. 20, 2010) (describing a suit in which plaintiff realty company sued defendant tenant for tweeting that it found moldy apartments acceptable).

⁶ Alfano Decree, *supra* note 4, at 29–30; Federico, *supra* note 2.

bill was approved by the Chamber of Deputies on June 11, 2009, and is pending approval by the Senate.⁷

Although the mainstream media overlooked the strike,⁸ Alessandro Gilioli, a blogger who organized the strike, continues to criticize the bill in the press, stating that the Italian government is “discouraging the use of the Internet.”⁹ The Alfano Decree raises important issues regarding freedom of speech rights¹⁰ that apply to anyone who regularly posts on the internet, whether in Italy or in any other country. As a founding member of the Council of Europe (“CoE”),¹¹ Italy is a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention on Human Rights,” or the “Convention”).¹² Article 10(1) of the Convention provides that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”¹³ On its surface, the Alfano Decree appears to infringe upon this fundamental freedom.¹⁴ However, Article 10 of the Convention also delineates limitations to the freedom of expression. Under Article 10(2):

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in

⁷ *Double Act: 1415*, CAMERA DEI DEPUTATI, <http://nuovo.camera.it/126?PDL=1415&leg=16&tab=1&stralcio=&navette=> (last visited Jan. 25, 2011). As of January 25, 2011, the bill has received preliminary approval after being amended by the Senate; final approval is still pending. *See id.*

⁸ Federico, *supra* note 2.

⁹ Reid, *supra* note 2.

¹⁰ *See* Bright, *supra* note 2.

¹¹ *47 Countries, One Europe*, COUNCIL OF EUR., <http://www.coe.int/aboutcoe/index.asp?page=47pays1europe> (last visited Jan. 25, 2011). The relationship between the CoE and the European Union (“EU”) should be differentiated. Although EU members must also hold membership in the CoE and ratify the European Convention on Human Rights, the EU and the CoE are separate systems of law with separate courts: the European Court of Justice (“ECJ”) and the European Court of Human Rights (“ECHR”), respectively. *Introduction*, EU CHARTER OF FUNDAMENTAL RTS., http://www.eucharter.org/home.php?page_id=66 (last visited Jan. 25, 2011). The ECJ addresses issues related to EU law, while the ECHR addresses issues related to human rights law (essentially the Convention). *Id.* Therefore, this Comment focuses exclusively on ECHR law.

¹² *Convention for the Protection of Human Rights and Fundamental Freedoms: CETS No.: 005*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=12/10/2009&CL=ENG> (last visited Jan. 25, 2011).

¹³ *Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1)*, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter *Convention*].

¹⁴ Bright, *supra* note 2.

a democratic society, [1] in the interests of national security, territorial integrity or public safety, [2] for the prevention of disorder or crime, [3] for the protection of health or morals, [4] for the protection of the reputation or rights of others, [5] for preventing the disclosure of information received in confidence, or [6] for maintaining the authority and impartiality of the judiciary.¹⁵

If approved by the Senate, and subsequently challenged in court on the grounds that the law infringes upon the freedom of expression, one or more of these limitations may render it either a legitimate or illegitimate piece of legislation. Moreover, even if the law is held to be illegitimate under the Convention, the margin of appreciation doctrine, which permits states to use their own discretion when “resolving the inherent conflicts between individual rights and national interests,”¹⁶ might provide adequate justification for the Italian government’s effort to muzzle the internet.¹⁷

This Comment addresses the human rights issues presented by the Alfano Decree in the age of the internet as a medium to publish ideas and information for public consumption. Specifically, what constitutes an infringement of the fundamental human right of freedom of expression, as recognized in Article 10(1) of the Convention?¹⁸ If an infringement exists, what constitutes a legitimate interference of this freedom, as recognized in Article 10(2)?¹⁹ If the infringement does not fall within one of these limitations, does it warrant an application of the margin of appreciation doctrine?²⁰ Part I provides an overview of the rise of the blog and the blogger as a citizen journalist as well as a discussion of the relevant provisions of the Alfano Decree and the Italian Prime Minister’s influence on the media in the country. Part II begins by summarizing the Convention and the European Court of Human Rights (“ECHR”). Part II then utilizes the freedom of speech issue presented by the Alfano Decree to analyze ECHR case law for its interpretation of Article 10. Finally, Part III advocates against the approval of the Alfano Decree.

¹⁵ Convention, *supra* note 13, art. 10(2).

¹⁶ Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 843–44 (1999).

¹⁷ Bright, *supra* note 2. See Part II.D, *infra*, for a discussion on the margin of appreciation doctrine.

¹⁸ See Bright, *supra* note 2.

¹⁹ See *id.*

²⁰ See *id.*

I. BACKGROUND

A. *The Rise of the Blog and the Blogger as a Citizen Journalist*

The rise of the blogosphere began in 1997 when specialty websites known as “weblogs” began to emerge on the internet.²¹ A weblog, or blog, is a type of website “usually maintained by an individual [or “blogger”] with regular entries of commentary, descriptions of events, or other material such as graphics or video.”²² Today, there are over 155 million identified blogs on the internet.²³ Many individuals use their blogs as personal online diaries, while other bloggers use them to provide commentary or news on subjects ranging from sports and entertainment to politics.²⁴ Consequently, blogging has started to blend with traditional media; bloggers, acting as citizen journalists, are reporting on the news without the objective filter imposed by press laws and media corporations.²⁵ However, bloggers have been exposed to a range of legal liability due to this lack of filtering, especially to claims of defamation and libel.²⁶ Furthermore, this lack of filtering exposes bloggers to government regimes that strive to censor and even criminally punish them for criticisms published on their blogs.²⁷ Such is the case in Italy.

B. *The Alfano Decree and Berlusconi’s Influence Over the Italian Media*

The aim of the Alfano Decree is akin to the concept of a “right of reply.” The right of reply is defined in a recommendation made by the CoE’s Committee of Ministers to its member states as “offering a possibility to react to any information in the media presenting inaccurate facts about him or her

²¹ Rebecca Blood, *Weblogs: A History and Perspective*, REBECCA’S POCKET (Sept. 7, 2000), http://www.rebeccablood.net/essays/weblog_history.html.

²² *FAQs*, BLOGPULSE, <http://www.blogpulse.com/about.html> (last visited Oct. 16, 2009). Blogs are also maintained by groups and corporations. See Stephen Baker, *The Inside Story on Company Blogs*, BUSINESSWEEK (Feb. 14, 2006), http://www.businessweek.com/technology/content/feb2006/tc20060214_402499.htm.

²³ *BlogPulse Statistics*, BLOGPULSE, <http://www.blogpulse.com> (last visited Jan. 25, 2011).

²⁴ Blood, *supra* note 21; *BlogPulse Live*, BLOGPULSE, http://www.blogpulse.com/bplive_full.html (last visited May 1, 2011).

²⁵ See Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 530–32 (2007).

²⁶ See M.P. McQueen, *Bloggers, Beware: What You Write Can Get You Sued*, WALL ST. J., May 21, 2009, at D1.

²⁷ See, e.g., *Egypt Blogger Jailed for ‘Insult,’* BBC NEWS (Feb. 22, 2007, 2:48 PM), http://news.bbc.co.uk/2/hi/middle_east/6385849.stm; *Sudan Expels U.N. Envoy for Blog*, CNN (Oct. 22, 2006, 1:44 PM), <http://www.cnn.com/2006/WORLD/africa/10/22/sudan.darfur.un/index.html>; *Burma Blogger Jailed for 20 Years*, BBC NEWS (Nov. 11, 2008, 5:15 PM), <http://news.bbc.co.uk/2/hi/asia-pacific/7721271.stm>.

and which affect his/her personal rights”²⁸ by compelling the media to publish the offended party’s response.²⁹ Although the United States repudiates a right of reply on First Amendment grounds, international law has embraced it.³⁰ Some countries, including Italy, even recognize it as a statutory right.³¹ In amending the CoE’s 1974 right of reply resolution to reflect technological developments in the media such as the internet, the Committee of Ministers’ recommendation establishes eight “minimum principles” that reference the (1) scope, (2) promptness, (3) prominence, (4) monetary costs, (5) exceptions, (6) safeguards, (7) electronic archives, and (8) settlement of disputes as required for an individual to be granted a right of reply.³²

First, individuals, regardless of nationality or domicile, who are mentioned in and “affected” by inaccurate information in the media, have standing to bring a right of reply claim.³³ It is unnecessary that these factual inaccuracies—not opinions—actually “affect” or violate an individual’s personal rights.³⁴ Second, the request for rectification must be made within a short period of time from the initial publication of the offending material and, upon receipt, the medium³⁵ must publish the reply “without undue delay.”³⁶ Third, the reply must be published with “the same prominence as was given to the contested information in order for it to reach the same public and with the same impact.”³⁷ For example, it can be published, or a link can be provided, next to the contested information for the same length of time the information

²⁸ Council of Eur., Comm. of Ministers, *Recommendation Rec(2004)16 of the Committee of Ministers to Member States on the Right of Reply in the New Media Environment*, 909th Sess. (Dec. 15, 2004) [hereinafter CoE Recommendation].

²⁹ Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017, 1017 n.1 (2008).

³⁰ *Id.* at 1018–19, 1033 n.104.

³¹ *Id.* at 1033 n.104.

³² CoE Recommendation, *supra* note 28. Recommendations made by the Committee of Ministers are not binding on CoE members, but, under Article 15(b) of the Statute of the CoE, the Committee of Ministers is authorized to request that member states inform it of actions taken to abide by the recommendations. *About the Committee of Ministers*, COUNCIL OF EUR., http://www.coe.int/t/cm/aboutCM_en.asp (last visited Jan. 29, 2010).

³³ *See* CoE Recommendation, *supra* note 28, princ. 1.

³⁴ *See id.* princ. 1.

³⁵ The CoE Recommendation defines “medium” as “any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.” *Id.* princ. 2.

³⁶ *Id.*

³⁷ *Id.* princ. 3.

was available to the public.³⁸ Fourth, the medium should not request payment to publish the offended party's reply.³⁹

Fifth, the Committee of Ministers' recommendation provides seven scenarios in which a medium can refuse to publish the reply:

[1] if the length of the reply exceeds what is necessary to correct the contested information; [2] if the reply is not limited to a correction of the facts challenged [for example, if it contains offensive or false statements]; [3] if its publication would involve a punishable act, would render the content provider liable to civil law proceedings or would transgress standards of public decency; [4] if it is considered contrary to the legally protected interests of a third party [such as a copyright violation]; [5] if the individual concerned cannot show the existence of a legitimate interest; [6] if the reply is in a language different from that in which the contested information was made public; [or] [7] if the contested information is a part of a truthful report on public sessions of the public authorities or the courts.⁴⁰

Under the fifth exception, an illegitimate interest depends on whether the contested information is a trivial concern (such as a misspelled name), is political satire, or was already rectified by the medium; and whether the reply contains racist or xenophobic propaganda or the objective of the offended party in requesting the reply is to "silence critical voices."⁴¹ Sixth, the medium must publish its contact information so that individuals know to whom requests for a reply can be sent.⁴² Seventh, a direct link should be published connecting any contested information that has been electronically archived with the reply.⁴³ Finally, if the medium refuses to publish the reply or if the publication is unsatisfactory to the offended party, the party may bring the dispute before a court to order satisfactory publication.⁴⁴

Essentially, the Alfano Decree's substantive and procedural elements subscribe to these principles of the right of reply. The Alfano Decree provides

³⁸ Council of Eur., Steering Committee on the Mass Media, *Explanatory Memorandum to the Draft Recommendation on the Right of Reply in the New Media Environment*, paras. 18–19 (Dec. 15, 2004), [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM\(2004\)206&Language=lanEnglish&Ver=add&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM(2004)206&Language=lanEnglish&Ver=add&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

³⁹ CoE Recommendation, *supra* note 28, princ. 4.

⁴⁰ *Id.* princ. 5.

⁴¹ *Explanatory Memorandum to the Draft Recommendation on the Right of Reply in the New Media Environment*, *supra* note 38, para. 26.

⁴² CoE Recommendation, *supra* note 28, princ. 6.

⁴³ *Id.* princ. 7.

⁴⁴ *Id.* princ. 8.

several reasons for its creation, including ensuring adequate protection of privacy rights and, ironically, the freedom of expression, in accordance with the European Convention on Human Rights.⁴⁵ Most notably, the bill introduces several amendments to Italian press law, providing the procedural rules to rectify a statement published in a newspaper or reported during a radio or television broadcast that an individual deems false or damaging.⁴⁶ Upon receipt of the request for correction, the offending party has forty-eight hours to publish a retraction or face a maximum fine of €10,000.⁴⁷ The Alfano Decree explicitly adds websites to the list of parties potentially liable under the law.⁴⁸ However, Francesco Pizzetti, the president of Italy's Data Protection Authority, believes that the bill will not affect bloggers specifically.⁴⁹ He states,

I believe [the bill codifies] norms [that] are acceptable. . . . [I]f [someone] write[s] something false about me on a website, I have the right to see my opinion published and my request for a correction published. . . .

I don't believe [the bill] create[s] a new obligation, so I don't believe [it] concern[s] bloggers. It concerns the websites of newspapers and of the press generally.⁵⁰

However, the organizers of the blogger strike contend the following:

The fact is that bloggers are already entirely liable, from a penal standpoint, in the event of crimes such as insults, defamation, etc: there is no need to introduce unbearable penalties for "citizen-journalists" who do not intend to submit themselves to the bureaucracy and the burdens contemplated in the Alfano Decree. . . . The Alfano Decree is an attack to the freedom of all media, from the major newspapers to the smallest blog.⁵¹

The Alfano Decree suggests that the Italian government's position regarding blogging and the internet significantly differs from the stance of governments in other Western countries.⁵² A 2009 press release issued by

⁴⁵ Alfano Decree, *supra* note 4, at 1.

⁴⁶ Legge 8 febbraio 1948, n. 47 art. 8 (It.).

⁴⁷ Federico, *supra* note 2.

⁴⁸ Alfano Decree, *supra* note 4, at 7, 29–30.

⁴⁹ Reid, *supra* note 2.

⁵⁰ *Id.*

⁵¹ Press Release, Gilioli, Scorza & di Frenna, *supra* note 1.

⁵² Reid, *supra* note 2.

Freedom House⁵³ reported that Italy's rating declined from "Free" to "Partly Free" as a result of "free speech limited by courts and libel laws, increased intimidation of journalists by organized crime and far-right groups, and concerns over the concentration of media ownership."⁵⁴ The concern over the concentration of media ownership is due in large part to Italy's Prime Minister, Silvio Berlusconi, who controls the majority of the country's media.⁵⁵ Of seven national television channels, Berlusconi privately owns three channels and, as Prime Minister, he indirectly controls three of the public channels.⁵⁶ In addition, Berlusconi controls several of Italy's major newspapers.⁵⁷ Almost fifty percent of Italy's population has no internet access⁵⁸ and, for those individuals who do have access, their use averages merely two hours per week.⁵⁹ In comparison, over seventy-seven percent of the U.S. population has internet access⁶⁰ with an average use of almost seven hours per week (or twenty-seven hours per month).⁶¹ Furthermore, in Italy, identification is required to access the internet at wi-fi locations and it has been proposed that bloggers may have to register with the government in an effort to prohibit anonymity on the internet.⁶² These figures demonstrate that the Alfano Decree's new restrictions would severely limit Italian bloggers' ability to freely express themselves through the internet—a medium to which they have restricted access in the first place. Given Berlusconi's past and recent

⁵³ "Freedom House, an independent nongovernmental organization, supports the expansion of freedom in the world . . . [and] is widely recognized as the definitive source of information on the state of freedom around the globe." *About Us*, FREEDOM HOUSE, <http://www.freedomhouse.org/template.cfm?page=2> (last visited Jan. 25, 2011).

⁵⁴ Press Release, Freedom House, *New Study: Global Press Freedom Declines in Every Region for First Time; Israel, Italy and Hong Kong Lose Free Status* (May 1, 2009), *available at* <http://www.freedomhouse.org/template.cfm?page=70&release=811>.

⁵⁵ Reid, *supra* note 2.

⁵⁶ Cory Doctorow, *Italian Bloggers Call for Support from Around the World to Fight Blogger-licensing in Italy*, BOINGBOING (Mar. 11, 2009, 5:40 AM), <http://www.boingboing.net/2009/03/11/italian-bloggers-cal.html>; *Italy Country Profile*, BBC NEWS (Dec. 14, 2010, 3:30 PM), http://news.bbc.co.uk/2/hi/europe/country_profiles/1065345.stm; *see also* Alessandra Rizzo, *Thousands Rally in Rome to Defend Press Freedom; Berlusconi Dismisses as a "Joke,"* HUFFINGTON POST (Oct. 3, 2009, 1:42 PM), http://www.huffingtonpost.com/2009/10/03/thousands-rally-in-rome-t_n_308721.html?view=screen.

⁵⁷ *Italy Country Profile*, *supra* note 56; *see* Doctorow, *supra* note 56.

⁵⁸ Reid, *supra* note 2; *Italy Internet Usage and Telecommunications Report*, INTERNET WORLD STATS, <http://www.internetworldstats.com/eu/it.htm> (last visited Jan. 25, 2011).

⁵⁹ Reid, *supra* note 2.

⁶⁰ *United States Internet Usage, Broadband and Telecommunications Reports: Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/am/us.htm> (last visited Jan. 25, 2011).

⁶¹ Press Release, Nielsen Co., *Americans Can't Get Enough of Their Screen Time 1–2* (Nov. 24, 2008), *available at* http://blog.nielsen.com/nielsenwire/wp-content/uploads/2008/11/nielsen_three_screen_report_3q08.pdf.

⁶² Reid, *supra* note 2.

controversies regarding fraud, embezzlement, and even a sex scandal,⁶³ the Alfano Decree seems to be one method of silencing the voices of those who have criticized him and his leadership.⁶⁴ Investigative journalist Marco Lillo views Italian bloggers as vital for maintaining a semblance of freedom of speech in the heavily restricted country:

The fact is these bloggers and the internet are the only escape valve for this information that is free from the control of the big industrial groups who own the newspapers.

They have commercial interests and often have to obtain authorisation and concessions from the government. This means the web is the only place where the editor or journalist is independent. *The blogger is his own man.*⁶⁵

Thus, if Italian bloggers desire to retain their independence and their ability to express themselves freely, they must be ready to challenge the proposed law in the courts of Europe upon approval by the Senate.⁶⁶

II. ANALYSIS

“The European Convention on Human Rights is undoubtedly the most concrete expression by the member States of the [CoE] of their profound belief in the values of democracy, peace and justice and, through them, respect for the rights and fundamental freedoms of persons living in [these societies].”⁶⁷ This Part explores the ECHR’s interpretation of the fundamental freedom of expression as expressed in the Convention. Part II.A provides a brief overview of the Convention and the process of bringing a claim before the ECHR. Part II.B discusses the freedoms protected by Article 10 of the Convention, while Part II.C outlines the various situations in which a state may legitimately interfere with these freedoms. Finally, Part II.D considers the margin of appreciation doctrine and its effect on protections afforded to the freedom of expression.

⁶³ *Profile: Silvio Berlusconi*, BBC NEWS (Feb. 15, 2011, 6:07 AM), <http://www.bbc.co.uk/news/world-europe-11981754>.

⁶⁴ See Rizzo, *supra* note 56.

⁶⁵ Reid, *supra* note 2 (emphasis added).

⁶⁶ Bright, *supra* note 2.

⁶⁷ COUNCIL OF EUR., EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 9 (1994).

A. *Overview of the European Convention on Human Rights and the European Court of Human Rights*

The European Convention on Human Rights was signed in Rome on November 4, 1950, and entered into force on September 3, 1953.⁶⁸ The Convention gave effect to the rights and freedoms promulgated in the Universal Declaration of Human Rights⁶⁹ and instituted the European Court of Human Rights to enforce these rights and freedoms among the states that ratified the Convention (“states parties”).⁷⁰ The states parties have incorporated the Convention into their national legislations and, therefore, the Convention is binding on their domestic courts.⁷¹

The Convention has evolved by the addition of protocols, which amend or add new rights, primarily through the ECHR’s interpretation of its provisions.⁷² The ECHR’s interpretation of the Convention’s provisions “is dynamic and evolutive, making the Convention a living instrument which must be interpreted in the light of the present day conditions,”⁷³ including conditions presented by the rapidly changing technological and social media climate.

A state party’s failure to comply with the Convention subjects the state to review by the ECHR.⁷⁴ However, before a state party arrives at this stage of review, an individual⁷⁵ personally and directly affected by the state party’s alleged violation must first invoke her claim in her national court system and exhaust all domestic remedies.⁷⁶ If the national court does not grant relief, then that individual has six months to file an application with the ECHR, which is passed to the European Committee of Human Rights (“Committee”) in order to determine its admissibility.⁷⁷ If the Committee concludes that the application is

⁶⁸ PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 5 (2010), available at http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf [hereinafter ECHR QUESTIONS].

⁶⁹ *Id.*

⁷⁰ *Id.* The rights and freedoms granted in the Universal Declaration of Human Rights and given effect in the Convention include “the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion and the protection of property.” *Id.*

⁷¹ *Id.* See generally *Costituzione* [Cost.] (It.).

⁷² ECHR QUESTIONS, *supra* note 68, at 5. “To date, 14 additional protocols have been adopted.” *Id.*

⁷³ MONICA MACOVEI, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5–6 (2004).

⁷⁴ ECHR QUESTIONS, *supra* note 68, at 5.

⁷⁵ “[A]ny person, group of individuals, company or NGO [and any state] having a complaint about a violation of their rights” under the Convention may bring a case to the ECHR. *Id.* at 7.

⁷⁶ *Id.* at 9.

⁷⁷ *Id.* at 8–9.

inadmissible, the claim is dismissed.⁷⁸ If the Committee concludes that the application is admissible, it encourages the parties to settle the case out of court before submitting it to the ECHR to determine the merits of the application.⁷⁹ Under Article 46(1) of the Convention, the states parties are obligated to act in accordance with the ECHR's final judgment.⁸⁰ Therefore, if the ECHR rules in favor of an applicant, the state party "must take measures in favour of the [applicant] to put an end to violations and, as far as possible, erase their consequences (*restitutio in integrum*), and, on the other hand, they must take the measures needed to prevent new, similar violations."⁸¹ These measures, enforced by the Committee of Ministers,⁸² include pecuniary and non-pecuniary damages, costs and fees, "individual measures in favour of the applicant," or "general measures—such as a review of legislation, rules and regulations or judicial practice."⁸³

Any blogger willing to challenge the Alfano Decree, if fined pursuant to the law, would have to first comply with the requirements set out by the ECHR.⁸⁴ If admissible, the ECHR would determine whether a violation of Article 10 of the Convention had occurred and, in this determination, the ECHR would have to interpret the provision in light of the development, or lack thereof, of the internet and blogging in Italy.⁸⁵ Furthermore, since it is a matter of principle that the protections provided by Article 10 "[extend] to any expression notwithstanding its content, disseminated by any individual, group

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 10. Since Italy is a member state of the EU, Italian bloggers may also have the option of getting their claim into the European Court of Justice. *Id.* at 7. EU law incorporates the rights and freedoms granted in the European Convention of Human Rights in addition to other rights, such as economic, social, and cultural rights. See Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 21 [hereinafter EU Charter]. Therefore, it can be argued that a violation of the rights and freedoms granted by the Convention would also violate those granted under EU law. Pursuant to Article 234 of the Treaty Establishing the European Community ("EC Treaty"), if the blogger's case reaches the highest national court, that court must refer the case to the ECJ. Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 28, 2006, 2006 O.J. (C 321) 147. Alternatively, Italian bloggers may have an independent claim under EU law that the Alfano Decree would obstruct the free movement of goods and would not be covered by the margin of appreciation. See EU Charter, *supra*, at 8.

⁸⁰ Convention, *supra* note 13, art. 46.

⁸¹ *Execution of Judgments of the European Court of Human Rights: About Execution*, COUNCIL OF EUR., http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp (last visited Jan. 20, 2011).

⁸² ECHR QUESTIONS, *supra* note 68, at 11.

⁸³ *Execution of Judgments of the European Court of Human Rights*, *supra* note 81; see Convention, *supra* note 13, art. 41.

⁸⁴ See MACOVEI, *supra* note 73, at 18–19. This proposition is working under the assumption that the Italian Senate approves the Alfano Decree.

⁸⁵ See MACOVEI, *supra* note 73, at 5–6

or type of media,”⁸⁶ states must justify any interference of the freedom of expression:

In order to decide the extent to which a particular form of expression should be protected, the [ECHR] examines the type of expression (political, commercial, artistic, etc.), the means by which the expression is disseminated (personal, written media, television, etc.), and its audience (adults, children, the entire public, a particular group). Even the “truth” of the expression has a different significance according to these criteria.⁸⁷

Accordingly, this Comment examines ECHR interpretations of Article 10 of the European Convention on Human Rights. Though there is a lack of case law involving claims brought to the ECHR specifically by bloggers convicted of defamation, this examination includes the ECHR’s interpretation of the freedom of expression with respect to the media and the press in general—particularly because the Alfano Decree aims to put bloggers on the same level as professional journalists.⁸⁸

*B. What Constitutes an Interference of the Freedom of Expression as Recognized in Article 10(1) of the Convention?*⁸⁹

The first provision of Article 10 defines the freedoms protected by the European Convention on Human Rights:⁹⁰ the freedom to hold opinions,⁹¹ the

⁸⁶ *Id.* at 7.

⁸⁷ *Id.* “The only content-based restriction applied by the Commission has dealt with the dissemination of ideas promoting racism and the Nazi ideology, and inciting to hatred and racial discrimination.” *Id.*

⁸⁸ *Id.* at 11. (“Although Article 10 does not explicitly mention the freedom of the press, the [ECHR] has developed extensive case-law providing a body of principles and rules granting the press a special status in the enjoyment of the freedoms contained in Article 10. . . . [Because,] to a large extent, the victims of the infringement of the right to freedom of expression by public authorities are journalists rather than other individuals.”).

⁸⁹ This analysis only addresses the first two lines of Article 10(1) of the Convention. The last line of the Article—“This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”—does not appear to directly implicate the Alfano Decree. Convention, *supra* note 13, art. 10(1). However, it may implicate the legislative proposal to require internet users to register with the government in an effort to prohibit anonymity on the internet, which is beyond the scope of this Comment. Reid, *supra* note 2. The literal text of the licensing provision does not expressly recognize the internet as an “enterprise” that would require authorization for its use. Although it has been argued that “the State’s right to license the media companies received a new sense and purpose [under this provision], namely the guarantee of liberty and pluralism of information in order to fulfill public demand,” in Italy, there is a lack of plurality of information due to Berlusconi’s control of the media and the government’s effort to also regulate the internet through the Alfano Decree. MACOVEI, *supra* note 73, at 14; RIZZO, *supra* note 56.

⁹⁰ Convention, *supra* note 13, art. 10(1); MACOVEI, *supra* note 73, at 7.

freedom to impart information and ideas,⁹² and the freedom to receive information and ideas.⁹³ Collectively, these freedoms constitute “the essential foundations of a democratic society [and] one of the basic conditions for its progress and for each individual’s self-fulfillment,”⁹⁴ and they protect expression in its substance and various forms.

The protection afforded by the freedom of expression “is not limited to words, written or spoken, but it extends to pictures, images and actions intended to express an idea or to present information.”⁹⁵ In finding for *Cumpănă* in *Cumpănă v. Romania*,⁹⁶ the ECHR stated that Romania’s conviction of a journalist and an editor for publishing a newspaper article and satirical cartoon, both of which depicted a mayor and a judge as engaging in fraudulent practices within their official capacities, was disproportionate interference with the journalist’s and editor’s freedom of expression.⁹⁷ Based on *Cumpănă*, if an Italian court sanctioned a blogger pursuant to the Alfano Decree because, for instance, she posted pictures of a public figure on her blog featuring salacious captions or scribbled comments about that individual’s appearance, career, or personal life,⁹⁸ then the ECHR would likely find that this sanction interfered with her freedom of satirical expression since this protection extends to pictures and images.⁹⁹

The freedom of expression also protects the form in which a journalist expresses information and ideas, including “printed documents, radio broadcasts, [and, notably,] electronic information systems”¹⁰⁰ such as the

⁹¹ See MACOVEI, *supra* note 73, at 8 (“[This freedom] almost enjoys an absolute protection” and “the promotion of one-sided information by the State [such as Berlusconi’s monopoly of the Italian media] may constitute a serious and unacceptable obstacle to the freedom to hold opinions.”).

⁹² *Id.* at 9. This freedom permits free criticism of the government, as upheld by the ECHR, and, with respect to the media, the ECHR “has held that states may not intervene between the transmitter and the receiver, as they have the right to get into direct contact with each other according to their will.” *Id.*

⁹³ *Id.* at 10. This freedom “includes the right to gather information and to seek information through all possible lawful sources” and “the right of the public to be adequately informed, in particular on matters of public interest.” *Id.* at 10–11.

⁹⁴ *Id.* at 6 (citations omitted).

⁹⁵ *Id.* at 15 (citations omitted).

⁹⁶ *Cumpănă v. Romania*, 2004–XI Eur. Ct. H.R. 63.

⁹⁷ *Id.* at 71–73, 96.

⁹⁸ See PEREZHILTON.COM, <http://www.perezhilton.com> (last visited Jan. 23, 2011), for an example of a blog that is well-known for its salacious coverage of celebrities.

⁹⁹ See MACOVEI, *supra* note 73, at 15; Committee of Ministers, *Declaration on Freedom of Political Debate in the Media*, COUNCIL OF EUR., <https://wcd.coe.int/wcd/ViewDoc.jsp?id=118995&Lang=en> (last visited Jan. 23, 2011).

¹⁰⁰ MACOVEI, *supra* note 73, at 15.

internet. The ECHR commonly grants newspapers this protection, as demonstrated by the court repeatedly finding or accepting as conceded that states parties' convictions of journalists who published critical articles in their local newspapers interfered with the exercise of the journalists' rights to freedom of expression.¹⁰¹

In addition, in the *Handyside Case*,¹⁰² which involved the United Kingdom's criminal conviction of a publisher for a book's allegedly obscene content, seizure of hundreds of copies of the book, and destruction of the expression contained within the book, such acts were considered interferences under Article 10 of the Convention.¹⁰³ Furthermore, in *Groppera Radio AG v. Switzerland*,¹⁰⁴ a Swiss court failed to grant relief to a radio journalist, preventing cable subscribers from receiving broadcasts from that journalist.¹⁰⁵ The ECHR found that this interfered with the journalist's freedom of expression because it "amounted in effect to a ban on those programmes, which was . . . serious [because only] two-thirds of the population can receive broadcasts by cable, and the mountainous terrain often makes reception over the air difficult and sometimes even impossible."¹⁰⁶

The internet has, arguably, become the preferred source for news and information, and blogging, as discussed previously, is rapidly becoming a popular means of sharing this news and information as well as one's thoughts about it.¹⁰⁷ As "citizen journalists,"¹⁰⁸ bloggers essentially manage their own newspapers on their blogs, and the ECHR would feasibly consider any efforts to silence the publications an interference of the freedom of expression. For

¹⁰¹ See *Dichand v. Austria*, Eur. Ct. H.R. at 7, 15 (2002), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Dichand" in the "Case Title" box and "Austria" in the "Respondent State" box) (noting that both parties conceded there was an interference with the journalist's right to the freedom of expression, and holding there was a violation of Article 10 of the Convention); *Thoma v. Luxembourg*, Eur. Ct. H.R. at 19 (2001), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Thoma" in the "Case Title" box and "Luxembourg" in the "Respondent State" box) (finding that there was an interference with the journalist's freedom of expression that infringed Article 10); *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) at 30 (1991) (noting that it was undisputed that the journalist's conviction constituted an interference with his freedom of expression and a violation of Article 10).

¹⁰² *Handyside v. United Kingdom (Handyside Case)*, 24 Eur. Ct. H.R. (ser. A) (1976).

¹⁰³ *Id.* at 23–24. Ultimately, however, the court decided this interference was justified. *Id.* at 28.

¹⁰⁴ *Groppera Radio AG v. Switzerland*, 173 Eur. Ct. H.R. (ser. A) (1990).

¹⁰⁵ *Id.* at 22, 29.

¹⁰⁶ *Id.* However, the ECHR regarded this inaction as a legitimate interference under Article 10(2) and held there was thus no breach of Article 10. *Id.* at 28.

¹⁰⁷ See Blood, *supra* note 21.

¹⁰⁸ See Papandrea, *supra* note 25, at 520; Press Release, Gilioli, Scorza & di Frenna, *supra* note 1.

instance, if a blogger were compelled to comply with a request to rectify or remove any alleged defaming material published on her blog pursuant to the Alfano Decree, this could amount to a seizure of the blog post and the destruction of that blogger's expression under *Handyside*, and would be a violation of Article 10(1) of the Convention, even if legitimate.¹⁰⁹ Moreover, as contended by the strike organizers, the Alfano Decree would discourage the use of the internet in a country where it is already immensely difficult to access it in the first place.¹¹⁰ Under *Groppera Radio AG*, this deterrence for bloggers would be the equivalent of banning the internet as a means of communication among the public and, thus, an interference of the freedom of expression, regardless of whether the interference is legitimately aimed at protecting the interests given in Article 10(2) of the Convention.¹¹¹

The freedom of expression protects the dissemination of information regarding matters that are of public concern, political and otherwise.¹¹² In a seminal case, *Lingens v. Austria*,¹¹³ the ECHR established the role of the press as a "public watchdog," such that Austria's conviction of a journalist who published an article questioning a politician's credentials constituted an interference with the freedom of expression, which "[i]n the context of political debate . . . would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community."¹¹⁴ This journalistic contribution "affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention."¹¹⁵

The ECHR emphasized this principle in later cases involving the press acting as a political watchdog. For example, a court's imposition of a fine and an order to rectify a newspaper article written about a governor's deceptive election practices was recognized by both parties and the ECHR as an

¹⁰⁹ See *Handyside v. United Kingdom (Handyside Case)*, 24 Eur. Ct. H.R. (ser. A) at 21 (1976).

¹¹⁰ Reid, *supra* note 2.

¹¹¹ See *Groppera Radio*, 173 Eur. Ct. H.R. (ser. A) at 22.

¹¹² MACOVEI, *supra* note 73, at 11–13 (describing the *Lingens* and the *Thorgeirson* cases).

¹¹³ *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 11 (1986).

¹¹⁴ *Id.* at 26. The ECHR held that this interference was unnecessary and disproportionate to the legitimate aim pursued by the Austrian court and, therefore, was a violation of the Article 10. *Id.* at 21.

¹¹⁵ *Id.* at 26.

interference with the journalist's ability to fulfill his role as the facilitator of political debates.¹¹⁶

The ECHR employed similar reasoning when an applicant was convicted for publishing a political brochure questioning the members of an electoral commission.¹¹⁷ In *Salov v. Ukraine*,¹¹⁸ the government convicted a lawyer for publishing false information that a presidential candidate had died immediately before elections.¹¹⁹ The ECHR stated:

Article 10 of the Convention does not as such prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.¹²⁰

Furthermore, the ECHR also stressed that the protection of issues that are a matter of public debate was not limited to politics. For instance, a court's conviction of a journalist for publishing articles that documented a number of incidents of police brutality in Iceland was considered to be an interference under Article 10(1) of the Convention.¹²¹ The ECHR stated that, "having regard to [the news articles'] purpose and the impact which they were designed to have" among the public, its references to the Icelandic police as "beasts in uniform," and its use of other critical language, was not excessive or defamatory.¹²² Similarly, the publication of articles concerning racial¹²³ and

¹¹⁶ *Grinberg v. Russia*, Eur. Ct. H.R. 33–40 (2005), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Grinberg" in the "Case Title" box and "Russia" in the "Respondent State" box). The ECHR ruled that the fine and right-of-reply court order violated Article 10 of the Convention. *Id.* ¶ 35.

¹¹⁷ *Sokolowski v. Poland*, Eur. Ct. H.R. 6–7 (2005), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Sokolowski" in the "Case Title" box and "Poland" in the "Respondent State" box).

¹¹⁸ *Salov v. Ukraine*, 2005-VII Eur. Ct. H.R. 143.

¹¹⁹ *Id.* at 176–78. Both parties conceded that the lawyer's conviction was an interference of his freedom of expression under Article 10(1). *Id.* at 176.

¹²⁰ *Id.* at 180.

¹²¹ *Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) at 8–10, 24–25 (1992).

¹²² *Id.* at 28.

¹²³ *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 20–21, 23–24 (1994). It was undisputed between the parties that the journalist's conviction and sentence for aiding and abetting the dissemination of racial commentary was an interference with his freedom of expression. *Id.* at 20. The ECHR concluded that this interference by the Danish court breached Article 10 of the Convention. *Id.* at 26.

housing discrimination,¹²⁴ intoxicated surgeons operating on patients,¹²⁵ and a book criticizing a minister's controversial statements about his involvement in a *coup d'état*,¹²⁶ were all considered matters of public interest worthy of protection under the Convention's grant of the right to freedom of expression.

Although the majority of bloggers use their sites as personal online diaries, many choose to use their blogs to share information that is of interest to them and to the general public, whether it concerns politics, entertainment, or other subject matters.¹²⁷ In turn, these bloggers have contributed to and supplement the traditional press role as public watchdogs. While "the mainstream media organizations have substantially eroded their own credibility with the Jayson Blair, Steven Glass, and Dan Rather scandals . . . bloggers have been breaking stories and driving the national conversation."¹²⁸ The passage of the Alfano Decree, particularly in the midst of the extensive coverage of Berlusconi's many scandals and controversies,¹²⁹ would interfere with Italian bloggers' right to impart information and ideas, and, conversely, the public's right to receive this information and these ideas from alternative sources that are not controlled by the government.¹³⁰

Most importantly, the freedom of expression protects not only the "information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also [the commentary of individuals or groups] that offend, shock or disturb the State or any sector of the population."¹³¹ In the 2005 case, *İ.A. v. Turkey*,¹³² the ECHR acknowledged that a publisher's two-year prison sentence and sixteen-dollar fine for publishing a book that was considered to be blasphemous towards Muslims

¹²⁴ Maronek v. Slovakia, Eur. Ct. H.R. 10 (2001), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Maronek" in the "Case Title" box and "Slovakia" in the "Respondent State" box).

¹²⁵ Selistö v. Finland, Eur. Ct. H.R. 21 (2004), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Selistö" in the "Case Title" box and "Finland" in the "Respondent State" box).

¹²⁶ Turhan v. Turkey, Eur. Ct. H.R. 6 (2005), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Turhan" in the "Case Title" box and "Turkey" in the "Respondent State" box).

¹²⁷ See *FAQs: Profiles*, BLOGPULSE, http://www.blogpulse.com/about.html#profiles_4 (last visited Apr. 7, 2011).

¹²⁸ Papandrea, *supra* note 25, at 573–74. See generally Mark Memmott, *Scoops and Skepticism: How the Story Unfolded*, USA TODAY, Sept. 21, 2004, at A4.

¹²⁹ *Profile: Silvio Berlusconi*, *supra* note 63.

¹³⁰ Reid, *supra* note 2.

¹³¹ Handyside v. United Kingdom (*Handyside Case*), 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

¹³² *İ.A. v. Turkey*, 2005-VIII Eur. Ct. H.R. 249.

was an interference of the freedom of expression.¹³³ The ECHR reasoned, “[t]hose who choose to exercise the freedom to manifest their religion . . . cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.”¹³⁴

In commenting on Moldova’s interference with a journalist’s freedom of expression for publishing an article that accused a civil servant of drunkenness and sexual harassment, the ECHR declined to follow the general principle “that it may be necessary to protect public servants from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold.”¹³⁵ The court stated that “it would go too far to extend the . . . principle to all persons who are employed by the State or by State-owned companies.”¹³⁶ Similarly, the ECHR expanded the scope of this principle to include public figures by finding Article 10 violations when journalists published articles declaring a judge a fascist,¹³⁷ the wife of a well-known right-wing politician a “closet Nazi,”¹³⁸ and a panel of judges biased for awarding child custody to a defendant accused of incest and child abuse.¹³⁹

The ECHR recognized the unique position of public figures despite finding an interference of the freedom of expression in *Éditions Plon v. France*.¹⁴⁰ When a publisher was enjoined from further distribution of a book describing the cancer-stricken French President’s attempts to hide his illness before succumbing to it, the ECHR concluded that the publisher “certainly aroused strong emotions among politicians and the public, so that the damage caused by the book to the deceased’s reputation was particularly serious in the

¹³³ *Id.* at 256. The ECHR endorsed the parties’ assessment that there was an interference of the publisher’s freedom of expression, even though it ultimately concluded that the interference was legitimate. *Id.* at 256, 258.

¹³⁴ *Id.* at 258.

¹³⁵ *Busuioc v. Moldova*, Eur. Ct. H.R. 51, 64 (2005), http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Busuioc” in the “Case Title” box and “Moldova” in the “Respondent State” box).

¹³⁶ *Id.* at 64.

¹³⁷ *Hrico v. Slovakia*, Eur. Ct. H.R. 46 (2004), http://www.echr.coe.int/echr/homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Hrico” in the “Case Title” box and “Slovakia” in the “Respondent State” box).

¹³⁸ *Scharsach v. Austria*, 2003-XI Eur. Ct. H.R. 123, 137.

¹³⁹ *De Haes v. Belgium* (No. 30), 1997-I Eur. Ct. H.R. 198, 213, 240.

¹⁴⁰ *Éditions Plon v. France*, 2004-IV Eur. Ct. H.R. 39. This interference with the publisher’s freedom of expression was not disputed between the parties. *Id.* at 58.

circumstances” and excessive, despite this freedom to disseminate information that may be disturbing to the public.¹⁴¹

Many bloggers have made names for themselves by posting commentary considered to be offensive by the general public and especially to the individuals about whom they post.¹⁴² However, the protection afforded by the freedom of expression to offensive information is necessary in order to meet “the demands of . . . pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”¹⁴³ The Alfano Decree does not appear to embrace this concept of democracy because it obliges bloggers to rectify any statements that are regarded as offensive and damaging to an individual’s reputation¹⁴⁴ but, nevertheless, are well within the bloggers’ fundamental rights.¹⁴⁵ If, for example, an Italian blogger is fined in accordance with the Alfano Decree for opining about the salaciousness of Berlusconi’s sexual affair or for proclaiming that he is a “scoundrel,”¹⁴⁶ under the cases discussed above, the ECHR would find, or the parties would have to concede, that the conviction is an interference of the blogger’s freedom of expression.¹⁴⁷ The government would then need to justify the interference as necessary under Article 10(2) of the European Convention on Human Rights.¹⁴⁸ As a public figure, Berlusconi waived his right of privacy, to an extent, and the ability to take action against those critical of him.¹⁴⁹ Arguably, any criticisms can be viewed as negative influences on Berlusconi’s performance and the public’s

¹⁴¹ *Id.* at 70.

¹⁴² See PEREZHILTON.COM, *supra* note 98, for an example of a well-known celebrity gossip blog that has attracted lawsuits by the subjects of its critical commentary, as well as BOSSIP, <http://bossip.com> (last visited Apr. 30, 2011). See, e.g., *Lawsuit Over Topless Aniston Photo*, SMOKING GUN (Feb. 21, 2007), <http://www.thesmokinggun.com/documents/crime/lawsuit-over-topless-aniston-photo>.

¹⁴³ *Handyside v. United Kingdom (Handyside Case)*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

¹⁴⁴ See Alfano Decree, *supra* note 4, at 7, 29–30.

¹⁴⁵ See *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) at 23.

¹⁴⁶ Rizzo, *supra* note 56.

¹⁴⁷ See *İ.A. v. Turkey*, 2005-VIII Eur. Ct. H.R. 249, 256; *Busuioc v. Moldova*, Eur. Ct. H.R. 51, 64 (2005); *Hrico v. Slovakia*, Eur. Ct. H.R. 46 (2004); *Scharsach*, 2003-XI Eur. Ct. H.R. 123, 137; *De Haes*, 1997-I Eur. Ct. H.R. 198, 206, 249; *Éditions Plon*, 2004-IV Eur. Ct. H.R. 39, 70.

¹⁴⁸ See, e.g., *İ.A.*, 2005-VII Eur. Ct. H.R. 249, 256; *Scharsach v. Austria*, 2003-XI Eur. Ct. H.R. 123, 137; *De Haes v. Belgium* (No. 30), 1997-I Eur. Ct. H.R. 198, 206, 249; *Éditions Plon v. France*, 2004-IV Eur. Ct. H.R. 39, 70.

¹⁴⁹ See *Éditions Plon*, 2004-IV Eur. Ct. H.R. 70. Despite this “waiver,” Berlusconi has taken legal action against multiple newspapers because of their coverage of his recent sex scandal. Duncan Kennedy, *Berlusconi Sues Media for Libel*, BBC NEWS (Aug. 28, 2009, 6:33 PM), <http://news.bbc.co.uk/2/hi/8227785.stm>. In addition, former Italian Prime Minister Massimo D’Alema took legal action in 1999 against a cartoonist for suggesting that D’Alema’s associates were KGB spies, but the \$2.4 million lawsuit was later dropped. Rizzo, *supra* note 56.

confidence in him as the Italian Prime Minister.¹⁵⁰ But, even without any critical voices, his controversial conduct while acting in his official capacity¹⁵¹ would affect his performance and the public's perception of him just the same, albeit this information would reach the public at a lesser degree due to his control of the Italian media.¹⁵² In a similar vein, this principle would be applicable even if a blogger posted offensive comments about an individual who is not a public figure.

As this case analysis demonstrates, upon a state party's conviction of an individual for exercising her right to hold an opinion or to impart ideas, parties typically concede—and the ECHR subsequently finds—that an interference of the freedom of expression as granted under Article 10(1) of the European Convention on Human Rights has occurred. According to the ECHR in the cases discussed above, the ability to freely express oneself is at the very core of the European Convention on Human Rights.¹⁵³ To deprive individuals of this right pursuant to the Alfano Decree would render paragraph one worthless:

The tolerance of individual points of view is an important component of the democratic political system [and] “if all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.”¹⁵⁴

In this respect, the most significant step in addressing the legitimacy of an infringement of the fundamental freedom of expression is analyzing the various justifications for the interference.

C. What Constitutes a Legitimate Interference of the Freedom of Expression as Recognized in Article 10(2) of the Convention?

The second paragraph of Article 10 delineates the situations in which a state party may legitimately interfere with an individual's freedom of expression:¹⁵⁵

[States] are not required to interfere with the exercise of freedom of expression every time one of the grounds enumerated by [Article

¹⁵⁰ See *Busuioac*, Eur. Ct. H.R. 51, 64.

¹⁵¹ See *Profile: Silvio Berlusconi*, *supra* note 63.

¹⁵² Reid, *supra* note 2.

¹⁵³ *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986).

¹⁵⁴ MACOVEI, *supra* note 73, at 15–16 (quoting JOHN STUART MILL, ON LIBERTY 33 (1859)).

¹⁵⁵ Convention, *supra* note 13, art. 10; MACOVEI, *supra* note 73, at 7.

10(2)] is at stake, as this would lead to a limitation of the content of this right. For instance, damaging one's reputation or honour must not be seen as criminal and/or requiring civil redress in all cases.¹⁵⁶

The ECHR, in interpreting the provision that “the exercise of these freedoms [in Article 10(1)] carries with it duties and responsibilities,”¹⁵⁷ argues that “the fact that a person belongs to a particular category is a basis for limiting rather than increasing the public authorities’ powers to restrict the exercise of that persons’ rights.”¹⁵⁸ This category would include editors and journalists, and, by implication of the Alfano Decree, bloggers and their valuable contributions to the field of journalism. There are three requirements for legitimate interference with the freedom of expression that are strictly interpreted by the ECHR, and the burden is on the state to prove the legitimacy of its action.¹⁵⁹ Each of these conditions, and the standards required to satisfy them, are summarized and analyzed below.

1. *The Interference Is Prescribed by Law*

The first condition under Article 10(2) requires that any interference with the freedom of expression be prescribed by law; this means that the formality, condition, restriction, or penalty “must have a basis in the national law. As a rule, this would mean a written and public law adopted by the Parliament,” such as the crime of defamation.¹⁶⁰ The ECHR defined and placed great emphasis on the “public” aspect of this rule in *Sunday Times v. United Kingdom*, in which an injunction was issued against a newspaper for publishing articles that criticized settlements between a distiller whose drugs caused pregnant women to give birth to children with severe deformities and the injured women.¹⁶¹ In the ECHR’s opinion, two of the requirements that flow from the expression “prescribed by law” are as follows:

¹⁵⁶ MACOVEI, *supra* note 73, at 20. Article 17 provides that the limitation of the content of this, and any, right given in the Convention “may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” Convention, *supra* note 13, art. 17.

¹⁵⁷ Convention, *supra* note 13, art. 10(2).

¹⁵⁸ MACOVEI, *supra* note 73, at 23.

¹⁵⁹ Convention, *supra* note 13, art. 10(2); MACOVEI, *supra* note 73, at 29 (citing *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 62 (1979)).

¹⁶⁰ MACOVEI, *supra* note 73, at 30.

¹⁶¹ *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 8–14 (1979).

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.¹⁶²

The ECHR also emphasized:

[The rule] covers not only statute but also unwritten law It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not “prescribed by law” on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 ¶ 2 and strike at the very roots of that State’s legal system.¹⁶³

Applying this interpretation of the prescription requirement, the ECHR held that the newspaper’s conviction pursuant to the U.K. common law of contempt was an interference prescribed by law.¹⁶⁴ The ECHR also applied this interpretation in later cases, observing that the conviction of a radio journalist pursuant to international communications law was adequate under this requirement.¹⁶⁵ However, a Polish court’s dismissal of a journalist’s request to register the title of his publication pursuant to the common law of the press was not sufficiently accessible and foreseeable to satisfy the

¹⁶² *Id.* at 31.

¹⁶³ *Id.* at 30. However, the drafters’ intention regarding the scope of this rule is limited:

Although one should not exclude that rules of common law or customary law may restrict freedom of expression, this should rather be a rare exception. Freedom of expression is such an important value that its restriction should always receive the democratic legitimacy which is only given by the parliamentary debates and vote.

MACOVEI, *supra* note 73, at 31.

¹⁶⁴ *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 33.

¹⁶⁵ *Groppera Radio AG v. Switzerland*, 173 Eur. Ct. H.R. (ser. A) at 26 (1990).

requirement that the interference of the journalist's freedom of expression was prescribed by law.¹⁶⁶

To date, the Alfano Decree has been approved by the Italian Chamber of Deputies and is pending approval by the Senate.¹⁶⁷ If the Senate adopts the bill, it is indisputable that it would have a written foundation in national law.¹⁶⁸ However, it is questionable whether it would fulfill the requirement that it is accessible to Italian citizens.¹⁶⁹ Clearly, Italian bloggers are on notice of the existence and implications of the Alfano Decree if they are found to be in violation of its rules.¹⁷⁰ Conversely, the Alfano Decree is virtually unknown¹⁷¹ and the vague language of its provisions appears to be applicable even to those typical internet users that simply browse the web and occasionally participate in message board, Facebook, or Twitter discussions.¹⁷² Given the widespread assumption that everyone possesses the freedom of expression, as predicated on texts such as the Universal Declaration of Human Rights¹⁷³ and the European Convention on Human Rights,¹⁷⁴ it would be out of step with the rapidly changing means of communication that a typical internet user could be fined under this law for posting commentary on the internet. Accordingly:

Where national courts face contradictory legislation, such as between laws or other regulations passed by local authorities and the federal laws and/or the Constitution, judges must apply the legal provisions which best ensure the unrestricted enjoyment of freedom of expression. Moreover, all pieces of national law must be interpreted and applied in accordance with the Court's jurisprudence and principles and, where clear contradictions exist, European law should prevail.¹⁷⁵

2. *The Interference Protects One or More of the Enumerated Interests*

The second condition requires that any interference with the freedom of expression must protect one or more of the given interests listed in Article

¹⁶⁶ Gawęda v. Poland, 2002-II Eur. Ct. H.R. 105, 118.

¹⁶⁷ *Double Act: 1415*, *supra* note 7.

¹⁶⁸ See *MACOVEL*, *supra* note 73, at 30.

¹⁶⁹ *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.

¹⁷⁰ See Press Release, Gilioli, Scorza & Frenna, *supra* note 1.

¹⁷¹ See Federico, *supra* note 2.

¹⁷² See Alfano Decree, *supra* note 4, at 7, 29–30.

¹⁷³ Universal Declaration of Human Rights art. 19, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹⁷⁴ See Convention, *supra* note 13, art. 10.

¹⁷⁵ *MACOVEL*, *supra* note 73, at 33–34.

10(2) of the European Convention on Human Rights.¹⁷⁶ In its enforcement of the European Convention on Human Rights, the ECHR is strictly limited to the interests and values listed in this provision.¹⁷⁷ In turn, national courts “must ensure that the interest to be protected is real, and not a mere and uncertain possibility,” in justifying that there was a legitimate interference of the freedom of expression.¹⁷⁸

a. *“In the Interests of National Security, Territorial Integrity or Public Safety”*

A regulation is justified as a legitimate interference of the freedom of expression if it is “in the interests of national security, territorial integrity or public safety.”¹⁷⁹ For example, an injunction was issued against two newspapers to prevent them from publishing classified information that was contained in a yet-unpublished book, and the ECHR considered it a legitimate interference in order to protect national security from the threat of revealing the illegal activities of the British Security Service.¹⁸⁰ However, the injunction was only legitimate prior to the publication of the book; upon publication, the continuation of the injunction constituted a violation of Article 10 because “news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest” to the public.¹⁸¹ Similarly, in *Vereniging Weekblad Bluf! v. Netherlands*,¹⁸² a magazine with an article detailing confidential information regarding the Dutch internal security service was seized prior to publication but then reprinted by the publisher and distributed to the community.¹⁸³ The ECHR observed that the search-and-seizure was a legitimate interference in the interest of national security, but it still constituted a violation of Article 10¹⁸⁴ because “the information in question was made accessible to a large number of people, who were able in their turn to communicate it to others. Furthermore, the events were commented on by the media.”¹⁸⁵

¹⁷⁶ Convention, *supra* note 13, art. 10(2).

¹⁷⁷ MACOVEI, *supra* note 73, at 34.

¹⁷⁸ *Id.*

¹⁷⁹ Convention, *supra* note 13, art. 10(2).

¹⁸⁰ *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 28–29 (1991).

¹⁸¹ *Id.* at 30–35.

¹⁸² *Vereniging Weekblad Bluf! v. Netherlands*, 306 Eur. Ct. H.R. 1 (1995).

¹⁸³ *Id.* at 15.

¹⁸⁴ *Id.* at 14.

¹⁸⁵ *Id.* at 16.

Admittedly, the issue of national security is one that should not be taken lightly, and if a blogger publishes information that may be considered a threat to the security of her nation, action may be taken to prevent this disclosure. Such action would be a legitimate interference of the freedom of expression. However, this situation is highly unlikely, as bloggers that report on the news often obtain their information from other sources that have already published the same information in some form—whether in a newspaper or on the television, radio, or internet.¹⁸⁶ Under the cases discussed above, if action is taken against an Italian blogger pursuant to the Alfano Decree after the widespread publication of information concerning national security, the retraction request and the imposition of a fine against that blogger would be unjust because that information is ubiquitous, or inevitably will be, among the press.¹⁸⁷

b. “For the Prevention of Disorder or Crime”

A regulation is justified as a legitimate interference of the freedom of expression if it aims to prevent disorder or crime in a state.¹⁸⁸ In a series of cases addressing this condition, the ECHR differentiated between severe criticism and remarks intended to incite disorder or crime among the community. In *Castells v. Spain*,¹⁸⁹ when a senator was sentenced to one year in prison for publishing an article in which he accused the government of being complicit in a series of murders, the ECHR acknowledged the Spanish government’s argument that the aim of the conviction was to prevent disorder in the country because the article appeared to constitute a threat to the legitimacy of the government.¹⁹⁰ However, the ECHR held that there was a violation of Article 10:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.

¹⁸⁶ See Papandrea, *supra* note 25, at 523. *But cf.* DRUDGE REP., <http://www.drudgereport.com> (last visited Jan. 26, 2011) (authoring its own news stories based on tips submitted by readers in addition to links to news stories published by other media sources).

¹⁸⁷ See *Vereniging Weekblad Bluf!*, 306 Eur. Ct. H.R. at 16; *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 34–35 (1991).

¹⁸⁸ Convention, *supra* note 13, art. 10(2).

¹⁸⁹ *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) (1992).

¹⁹⁰ *Id.* at 21–22.

Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.¹⁹¹

Similarly, in *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria*,¹⁹² the ECHR found that the injunction against a magazine that published articles critical of military life, with the purported aim to preserve order within the army, was illegitimate because issues of the magazine did not “recommend disobedience or violence, or even question the usefulness of the army. Admittedly, most of the issues set out complaints, put forward proposals for reforms or encourage[d] the readers to institute legal complaints or appeals proceedings.”¹⁹³ Despite the court’s consideration of these actions, “it does not appear that [the magazine] overstepped the bounds of what is permissible” in exercising its right to the freedom of expression.¹⁹⁴ In contrast, in *Sürek v. Turkey*,¹⁹⁵ the ECHR held that a \$56 million fine against a publisher was a legitimate interference of the freedom of expression because the article was considered separatist propaganda and “must be seen as capable of inciting . . . further violence in [southeast Turkey]. Indeed the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.”¹⁹⁶ Therefore, the fine was not in violation of Article 10 of the Convention in the interests of preventing crime and disorder.¹⁹⁷

The dichotomy between a call to action through criticism and the incitement to violence is an important line to draw because, if drawn incorrectly, it can result in illegitimate interference with an individual’s freedom of expression and the general plurality of opinions in society. For instance, the Italian blogger strike was a peaceful call to action although highly critical of the Italian government and the Alfano Decree. Under the cases discussed above, this disparagement of the Italian government does not

¹⁹¹ *Id.* at 23–24.

¹⁹² *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria*, 302 Eur. Ct. H.R. (ser. A) (1994).

¹⁹³ *Id.* at 17.

¹⁹⁴ *Id.*

¹⁹⁵ *Sürek v. Turkey* (No. 3), Eur. Ct. H.R. (1999), http://www.echr.coe.int/ECHR/homepage_en (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Sürek” in the “Case Title” box and “Turkey” in the “Respondent State” box).

¹⁹⁶ *Id.* at 40.

¹⁹⁷ *Id.* at 43.

overstep what is considered permissible by crossing the line to incite disorder because of the negative consequences of the proposed law.¹⁹⁸ On another note, private citizens are afforded a narrower scope of what is considered permissible criticism under *Castells* and, arguably, may justify the Alfano Decree's imposition of a right of reply obligation for bloggers who post damaging commentary.¹⁹⁹ However, a private citizen also has the means to respond to these offensive publications by posting her own response addressing the issue on the blog or message board itself, thereby rendering the Alfano Decree moot.²⁰⁰

c. “*For the Protection of Health or Morals*”

A regulation is justified as a legitimate interference of the freedom of expression if it aims to protect the health or morals of a community.²⁰¹ For instance, in the *Handyside Case*, the seizure of a schoolbook considered obscene because of its description of sexual matters was considered a legitimate interference in order to protect the morals of young children and did not violate Article 10 of the Convention.²⁰² “In principle, in such cases, the [ECHR] leaves the national authorities a wider margin of appreciation [which will be discussed in detail in Part III.D, *infra*] justified by the specificity of the ‘morals’ in each member state or even in the different regions within the same country.”²⁰³ This indicates that the ECHR will generally show deference to a state party's decision to convict an individual for conduct that compromises the health or morals of its country as a legitimate interference under Article 10(2) of the Convention. The ECHR reasons that national courts are “in a better position than the international judge” to decide on issues of “morals,” because of the former's direct contact with the reality in their respective countries.²⁰⁴ For example, where conservative ideals are upheld in a country, such as the United Kingdom, the confiscation of a sexually obscene schoolbook would be justifiable.²⁰⁵ In contrast, the Italian media is engaged in regular discussion about the scandalous and immoral dealings of its Prime Minister.²⁰⁶ For

¹⁹⁸ See *Sürek*, Eur. Ct. H.R. at 40–43; *Vereinigung Demokratischer Soldaten Österreichs und Gubi*, 302 Eur. Ct. H.R. (ser. A) at 17–18; *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) at 21–24 (1992).

¹⁹⁹ See *Castells*, 236 Eur. Ct. H.R. (ser. A) at 21–24.

²⁰⁰ Bright, *supra* note 2.

²⁰¹ Convention, *supra* note 13, art. 10(2).

²⁰² *Handyside v. United Kingdom (Handyside Case)*, 24 Eur. Ct. H.R. (ser. A) at 20–28 (1976).

²⁰³ MACOVEI, *supra* note 73, at 47.

²⁰⁴ *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) at 22.

²⁰⁵ See *id.* at 21–28.

²⁰⁶ See *Profile: Silvio Berlusconi*, *supra* note 63.

example, explicit nude photographs of Berlusconi and former Czech Prime Minister Mirek Topolánek cavorting with several young women at an Italian villa were published in the daily newspaper *La Repubblica* (one of the few newspapers not under Berlusconi's control) and on several newspaper websites.²⁰⁷ While Topolánek was forced to resign when he lost a no-confidence vote by the Czech parliament for reasons unrelated to the photos, Berlusconi maintained his position as Italian Prime Minister.²⁰⁸ Thus, under the guise of protecting the morals of the Italian community, the conviction of a blogger for merely contributing to that discussion would be an unjustified exercise of Article 10(2) of the Convention.

d. "For the Protection of the Reputation or Rights of Others"

A regulation is justified as a legitimate interference of the freedom of expression if it aims to protect the reputation or rights of others.²⁰⁹ This aim is the most frequent justification used by national courts to legitimize their interference with the freedom of expression.²¹⁰ Under this condition, the ECHR "has developed a large jurisprudence, demonstrating the high protection afforded to freedom of expression, in particular to the press."²¹¹ As a result, it "has accepted severe and harsh criticism as well as coloured expressions" as permissible forms of the right to the freedom of expression by the press.²¹² This is especially true among cases concerning "politicians and in general all high officials (such as the president, the prime minister, ministers, members of the Parliament, etc.)" in which the ECHR concluded that the aim of any special or high penalties protecting the reputation of public figures was incompatible with Article 10's grant of the freedom of expression.²¹³ For example, in the

²⁰⁷ Richard Owen, Graham Keeley & David Charter, *Photographs Show 'Naked' Czech Ex-PM at Berlusconi's Villa*, *TIMES* (London), June 6, 2009, at 42.

²⁰⁸ *Id.* A no-confidence vote has been defined as follows:

A no confidence vote is a motion brought forward in a legislative body by the opposition party. It is usually used as a tool to undermine the majority party, and can also be used to remove people from office, depending on the system of government. A no confidence motion is a very serious political event, as it suggests a lack of faith in the current government and a desire to change it before the next scheduled election.

S.E. Smith, *What Is a No Confidence Vote?*, WISEGEEK, <http://www.wisegeek.com/what-is-a-no-confidence-vote.htm> (last visited Jan. 26, 2011).

²⁰⁹ Convention, *supra* note 13, art. 10(2).

²¹⁰ MACOVEL, *supra* note 73, at 49.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 52.

landmark *Lingens* case, an Austrian court convicted a journalist for publishing an article characterizing a politician's behavior as "immoral" and "undignified"²¹⁴ under the justification that it was protecting that politician's reputation.²¹⁵ However, the ECHR determined that the interference was unjustified:

The limits of acceptable criticism are accordingly wider as regards [to] a politician . . . [because he] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.²¹⁶

Although private individuals are accorded more protection under this Article 10(2) exception, the ECHR has still found violations of the freedom of expression. For instance, in *Jersild v. Denmark*,²¹⁷ a Danish court convicted a television journalist for broadcasting an interview sharing the racist statements of an extremist youth group under the justification that it was protecting the reputations and rights of the target group insulted by the statements.²¹⁸ The ECHR concluded that the interference was unjustified because the broadcast was a serious news piece used to educate viewers on the issue of racism.²¹⁹ Furthermore:

the methods of objective and balanced reporting may vary considerably, depending . . . on the media in question. It is not for this Court, nor for the national courts . . . to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.²²⁰

In contrast, in *Tammer v. Estonia*,²²¹ an Estonian court convicted a journalist for referring to the wife of a politician as a mistress and "an unfit and careless mother deserting her child"²²² under the justification of protecting her reputation.²²³ The ECHR found that the interference was legitimate because

²¹⁴ *Id.* at 49–50.

²¹⁵ *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986).

²¹⁶ *Id.* at 26.

²¹⁷ *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 1 (1994).

²¹⁸ *Id.* at 10, 15, 21–22.

²¹⁹ *Id.* at 24–26.

²²⁰ *Id.* at 23.

²²¹ *Tammer v. Estonia*, 2001-I Eur. Ct. H.R. 263 (2001).

²²² *Id.* at 269.

²²³ *Id.* at 271–73.

she was still a private individual despite being married to a politician and “the use of the impugned terms in relation to [her] private life was [not] justified by considerations of public concern or that they bore on a matter of general importance.”²²⁴

The condition that an interference with an individual’s freedom of expression is justified in order to protect the reputation or rights of others would most likely be the primary justification for the Alfano Decree if the bill were challenged in the ECHR.²²⁵ The Italian blogger-strike organizers contend that the bill “aims to discourage bloggers from commenting on politicians and other public figures,”²²⁶ especially when it arrived on the heels of Berlusconi’s negative press coverage. Particularly, Berlusconi and other Italian elected representatives have not shown the tolerance required in their positions as public figures; they have filed lawsuits against and vocally denounced the critical press.²²⁷ Granted, the protection of the reputation or rights of private individuals is a noteworthy objective of the Alfano Decree, and certainly the right of reply would be an effective method in ensuring this protection. However, the ECHR suggests in *Jersild* that the views expressed in a blog post should not be superseded by the views of a national court via regulation such as the Alfano Decree.²²⁸ Moreover, the ECHR implies in *Tammer* that the objective of the Alfano Decree could just as easily be accomplished by going through Italy’s right of privacy or defamation laws rather than implicating Article 10 of the European Convention on Human Rights.²²⁹ Therefore, the Alfano Decree, by essentially creating a new criminal law that would protect an individual’s reputation, would do so at the cost of restricting Italian bloggers’ freedom of expression.

e. “*For Preventing the Disclosure of Information Received in Confidence*”

A regulation is justified as a legitimate interference of the freedom of expression if it aims to prevent “the disclosure of information received in confidence”²³⁰ or, with respect to the press, aims to provide “protection of

²²⁴ *Id.* at 281.

²²⁵ See MACOVEI, *supra* note 73, at 35.

²²⁶ Paolocci, *supra* note 3.

²²⁷ See Rizzo, *supra* note 56 (describing Berlusconi’s lawsuit against two leftist newspapers over their coverage of a sex scandal “that has been engulfing him”).

²²⁸ See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 23 (1994).

²²⁹ See *Tammer*, 2001-I Eur. Ct. H.R. at 281.

²³⁰ Convention, *supra* note 13, art. 10(2).

journalistic sources.”²³¹ In the case of *Goodwin v. United Kingdom*,²³² the ECHR attempted to balance the two interests of the freedom of expression and the protection of sources by granting an injunction against a journalist aiming to publish an article on a company’s refinancing negotiations using information obtained from an anonymous source.²³³ A fine of almost \$7500 was also levied against the journalist for refusing to reveal the identity of his source pursuant to the British court order.²³⁴ In its balancing test, the ECHR held that the conviction was not a legitimate interference:

[The company’s] interests in eliminating . . . the residual threat of damage through dissemination of the confidential information . . . in obtaining compensation and in unmasking a disloyal employee or collaborator were . . . [not] sufficient to outweigh the vital public interest in the protection of the applicant journalist’s source . . . when measured against the standards imposed by the Convention.²³⁵

The ECHR in *Goodwin* reiterated:

[The] [p]rotection of journalistic sources is one of the basic press freedom[s] Without such protection, sources may be deterred from assisting the press [T]he vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.²³⁶

As citizen journalists, bloggers often obtain their information from various sources,²³⁷ including those who desire to remain anonymous out of fear of retribution.²³⁸ Because the Alfano Decree creates an obligation to rectify such information and any commentary on it,²³⁹ the bill would undercut the blogger’s voice in the public arena. For instance, without the strike organizers acting as uncompromised sources to educate and enlist the help of Italian bloggers to spread the word about the existence and consequences of the Alfano Decree,

²³¹ *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 484, 500.

²³² *Id.* at 484.

²³³ *Id.* at 488–91.

²³⁴ *Id.* at 494.

²³⁵ *Id.* at 502.

²³⁶ *Id.* at 500.

²³⁷ See Papandrea, *supra* note 25, at 523–32.

²³⁸ See *id.* at 536.

²³⁹ Alfano Decree, *supra* note 4, at 29–30.

many Italians would remain uninformed or mistakenly rely on a government authority's statement that the bill does not apply to bloggers.²⁴⁰

f. "For Maintaining the Authority and Impartiality of the Judiciary"

A regulation is justified as a legitimate interference of the freedom of expression if it maintains the authority and impartiality of the judicial branch of the government.²⁴¹ In *Sunday Times*, an injunction was issued against a newspaper for publishing an article that criticized the modest award of damages paid by the drug distiller of thalidomide which caused severe birth defects in children of women who had taken the drug.²⁴² The ECHR accepted the British government's argument that the injunctive relief was justified by the interest in maintaining the authority and impartiality of the judiciary because the article would have interfered with the administration of the law and prejudiced the drug distiller while the cases were still pending in court.²⁴³ However, the ECHR, in holding that there was still a violation of the Article 10 under the third prong of this analysis, stated:

There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.²⁴⁴

Increasingly, bloggers have played a significant role in breaking and scooping news stories from more established media sources.²⁴⁵ Recently, the entertainment news blog, TMZ.com, was the first to publish a police photograph showing the aftermath of an assault between singers Rihanna and

²⁴⁰ See Reid, *supra* note 2. Francisco Pizzetti, the president of Italy's Data Protection Authority, has said the Alfano Decree does not apply to bloggers. *Id.*

²⁴¹ Convention, *supra* note 13, art. 10(2).

²⁴² *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 8–12 (1979).

²⁴³ *Id.* at 39–42.

²⁴⁴ *Id.* at 40.

²⁴⁵ Papandrea, *supra* note 25, at 574.

Chris Brown.²⁴⁶ However, the leaked photo risked the prosecution's case against Brown because "[t]he leaks can form the basis for a motion to dismiss the case in regards to outrageous governmental misconduct" since its widespread publication could bias potential jurors during a trial.²⁴⁷ Moreover, in the high-profile Italian case against American student Amanda Knox for the murder of British exchange student Meredith Kercher, the Italian justice system and Italian prosecutor Giuliano Mignini were the targets of severe criticism by the media.²⁴⁸ In particular, Mignini was said to be "mentally unstable" and exploiting the case "to improve his dicey reputation and further his career" because of the concurrent prosecution against him (and subsequent conviction) for abuse of office.²⁴⁹ Mignini retaliated by threatening to file defamation lawsuits against several newspapers that published these and other statements.²⁵⁰ After Knox was found guilty of the murder,²⁵¹ one critic asserted:

Mignini's use of legal process against those who question him provides fodder for the mainstream press to raise the sound bite cry of unfair treatment of college kid Knox. What could have been a "clean" case, win or lose, may end up being beside the point. The lens that should have been focused on what Knox did or not do, has been trained on something far different. Mignini has brought it upon himself. He has furnished the classic "red herring" to divert attention from the real questions in the rape and murder of innocent Meredith Kercher. The portrait will no longer be of Knox, but the frame will surround Signore Mignini.²⁵²

In other words, Mignini's own actions facilitated the impairment of the authority and impartiality of the Knox proceeding, and the media should not be accosted for imparting its ideas about his actions or the case; essentially,

²⁴⁶ George Rush & Nancy Dillon, *TMZ Posts Rihanna Photo Showing Star's Bruised Face After Alleged Chris Brown Beating*, NY DAILY NEWS (Feb. 20, 2009, 10:28 AM), http://www.nydailynews.com/gossip/2009/02/19/2009-02-19_tmz_posts_rihanna_photo_showing_stars_br.html.

²⁴⁷ Gina Serpe & Whitney English, *Rihanna's Leaked Photo May Plug Up Chris Brown Case*, E! ONLINE (Apr. 29, 2009, 1:52 PM), http://www.eonline.com/uberblog/b121216_rihannas_leaked_photo_may_plug_up_chris.html.

²⁴⁸ Bill Edelblute, *Questionable Mignini Tactics Could Taint Knox Result*, EXAMINER (Jan. 2, 2010, 9:03 AM), <http://www.examiner.com/x-32288-Spokane-Elections-2010-Examiner~y2010m1d2-Questions-mount-as-to-Prosecutor-Migninis-tactics-may-taint-Knox-result>.

²⁴⁹ *Id.*; Ray Turner, *Giuliano Mignini Is a Convicted Criminal*, KNOX ARCHIVES (Jan. 22, 2010, 1:52 PM), <http://knoxarchives.blogspot.com/2010/01/giuliano-mignini-is-criminal.html>.

²⁵⁰ Edelblute, *supra* note 248.

²⁵¹ *Id.*

²⁵² *Id.*

“[p]unishing for murder is one thing. Punishing freedom of speech is another.”²⁵³ In general, these examples demonstrate that the ECHR’s interpretation of Article 10(2) suggests, as long as a blogger does not intentionally aim to obstruct or prejudice the judicial process in her blog coverage of judicial proceedings, any sanctions levied against her, such as those under the Alfano Decree, would not be a legitimate interference of her freedom of expression.

3. *The Interference Is Necessary in a Democratic Society*

The third condition under Article 10(2) requires that any interference with the freedom of expression must be “necessary in a democratic society.”²⁵⁴ In order to satisfy this requirement, national courts and the ECHR “must apply the principle of proportionality, answering the question: ‘Was the aim proportional with the means used to reach that aim?’ In this equation, the ‘aim’ is one or more of the values and interests provided by [Article 10(2)],” while “[t]he ‘means’ is the interference itself.”²⁵⁵ Furthermore, the national courts and the ECHR “must be satisfied that a ‘pressing social need’, requiring that particular limitation on the exercise of freedom of expression, did exist.”²⁵⁶

In *Observer v. United Kingdom*,²⁵⁷ the ECHR applied this principle of proportionality to determine whether an injunction preventing two newspapers from publishing classified information that was contained in an unpublished book was a necessary interference.²⁵⁸ Specifically, the court applied the principle to determine whether the aim of protecting national security was proportional with the means of injunctive relief used to reach that aim. The ECHR’s analysis examined the necessity of the action concerning two different time periods: before and after publication of the book.²⁵⁹ Before the book’s publication, the injunction was necessary and satisfied a pressing social need because it was not intended to be a “blanket prohibition” that unduly harmed the newspaper’s role in disseminating information of public concern.²⁶⁰ However, after publication of the book in the United States, the permanency of

²⁵³ *Id.*

²⁵⁴ Convention, *supra* note 13, art. 10(2).

²⁵⁵ MACOVEL, *supra* note 73, at 35.

²⁵⁶ *Id.*

²⁵⁷ *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 4 (1991).

²⁵⁸ *Id.* at 29–35.

²⁵⁹ *Id.* at 31–35.

²⁶⁰ *Id.* at 32.

the injunction was unnecessary and did not satisfy a pressing social need because it “prevented newspapers from exercising their right and duty to purvey information, *already available*, on a matter of legitimate public concern.”²⁶¹

With some exceptions, bloggers who maintain news-based blogs obtain their information from other media sources and then add their own commentary to the specific news item.²⁶² In this scenario, a maximum fine of approximately \$20,000 for failing to publish a retraction as provided under the Alfano Decree would be excessive,²⁶³ and thus disproportional with the aim of the sanction. The pressing social need to interfere with the blogger’s expression would no longer exist if these news items were already publicly available.²⁶⁴ Arguably, an offended individual’s request for a reply would be a proportional means to protect her reputation because publishing the response alongside the original, contested material would not work as a blanket prohibition on that expression. However, it begs the question of whether a pressing social need exists to publish the reply since there are other means to contest the material, such as the offended individual creating her own blog or responding in the comments section of the offending blog post.²⁶⁵ Although the reply would not unduly harm the practice of blogging, it would certainly harm the blogger’s right to freely express herself without interference.

4. *An Additional Consideration*

Although it is not expressly mentioned in Article 10 of the European Convention on Human Rights, in recent cases, the ECHR has regarded the “imposition of excessively punitive [monetary damages and sentences] to censure the exercise of freedom of expression . . . as disproportionate in the balancing exercise” required under this provision and has found violations where, otherwise, there would be no violation.²⁶⁶ For example, even though the

²⁶¹ *Id.* at 35 (emphasis added).

²⁶² See Papandrea, *supra* note 25, at 523–32. Cf. DRUDGE REP., *supra* note 186.

²⁶³ See Reid, *supra* note 2 (“Critics say a summary fine in the thousands will not guarantee balance but silence.”); Jay Cables, *Angelino Alfano Proposal: Italian Bloggers Protest Gag Law*, DRIVE-BY TIMES (Jul. 19, 2009, 10:29 AM), <http://aidanmaconachyblog.blogspot.com/2009/07/angelino-alfano-italian-bloggers.html> (“The average blogger simply can’t afford to come up with this kind of money, and the government knows it. The effect will be to mute blog content, particularly criticism of government and public figures.”).

²⁶⁴ See *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 34–35 (1991).

²⁶⁵ See Bright, *supra* note 2.

²⁶⁶ Press Release, Eur. Court of Human Rights, Short Survey of Cases Examined by the Court in 2004 19 (2004), available at <http://www.echr.coe.int/NR/rdonlyres/94484030-2547-4FFC-9F91-8E96A87C7D74/0/2004analysisofcaselaw.pdf>.

ECHR found that the interference in *Cumpănă* was justified, it unanimously held that there was a violation of Article 10 upon consideration of the severity of the sanctions imposed, which included an approximately \$3000 fine, a seven-month prison sentence, and a prohibition from working in journalism for one year after serving the prison sentence.²⁶⁷

Furthermore, after taking into account the limited circulation of an article written by a lawyer which contained a false statement that a presidential candidate had died, the ECHR held there was a violation of Article 10 (despite finding the interference with the freedom of expression was justified) because the five-year prison sentence, the fine of approximately \$50, and the annulment of the lawyer's license to practice law were unreasonably excessive.²⁶⁸ Similarly, the ECHR found that the imposition of approximately \$12,000 in fines and the award of about \$44,000 in damages against a journalist for publishing an article about a police officer's drunken conduct was a disproportionate balancing of the interests granted under Article 10 of the Convention.²⁶⁹ In contrast, the ECHR found that the imposition of \$1600 in fines and the order to pay approximately \$20,000 in compensation against television journalists for broadcasting a program that implied the police had concealed evidence in a murder investigation was proportionate, and therefore not a violation of Article 10 of the Convention by the Danish government.²⁷⁰

An important element of Italian bloggers' strong opposition of the Alfano Decree is its imposition of a maximum fine of \$20,000 for a blogger's failure to publish a retraction within forty-eight hours of receiving an individual's request for the correction of a statement published on that blogger's site.²⁷¹ Upon balancing the freedom of expression with the interests listed in Article 10(2) of the Convention, this penalty seems excessive in comparison with the cases discussed above. According to Gilioli, the Alfano Decree means "that if a teenager stays two days away from the computer and he doesn't rectify his opinion, he is going to pay [a maximum fine of about \$20,000]. That's stupid and that's incredible and overall that's discouraging people to use the internet," and, as a result, interfering with a means for individuals to freely express

²⁶⁷ *Cumpănă v. Romania*, 2004-XI Eur. Ct. H.R. 75–76, 94–96.

²⁶⁸ *Salov v. Ukraine*, 2005-VII Eur. Ct. H.R. 179–80.

²⁶⁹ *Karhuvaara v. Finland*, 2004-X Eur. Ct. H.R. 260, 277.

²⁷⁰ *Pedersen v. Denmark*, 2004-XI Eur. Ct. H.R. 105, 143–44.

²⁷¹ L. n. 47/1948 (It.).

themselves, especially in an activity that usually does not provide an economic benefit for the blogger.²⁷²

D. The Margin of Appreciation Doctrine

An additional factor in deciding whether a regulation is a legitimate interference of an individual's freedom of expression is the margin of appreciation doctrine.²⁷³

The judicial output of the ECHR . . . [which] carries the promise of setting universal standards for the protection and promotion of human rights . . . [is], to a large extent, compromised by the doctrine of margin of appreciation. This doctrine, which permeates the jurisprudence of the ECHR, is based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions.²⁷⁴

However, "the degree of discretion allowed to the states [under the doctrine] varies according to the context . . . [T]he discretion is reduced almost to [a] vanishing point in certain areas, such as the protection of freedom of expression."²⁷⁵ In *Scharsach*,²⁷⁶ the ECHR concluded that the Austrian court overstepped its "narrow" margin of appreciation by convicting a journalist for publishing an article opining that the wife of a well-known right-wing politician was a "closet Nazi."²⁷⁷ The ECHR reasoned that the journalist "published what may be considered to have been [his] fair comment, namely [his] . . . personal political analysis of the Austrian political scene. Therefore his opinion was a value judgment on an important matter of public interest" and the Austrian court's conviction was an illegitimate interference with his freedom of expression.²⁷⁸ In contrast, the ECHR found that the Turkish court in *I.A.* did not overstep its margin of appreciation by convicting a publisher for publishing an allegedly blasphemous book about Muslims.²⁷⁹ The ECHR reasoned that the book not only contained "comments that offend or shock, or

²⁷² Reid, *supra* note 2.

²⁷³ Benvenisti, *supra* note 16, at 843.

²⁷⁴ *Id.* at 843–44.

²⁷⁵ MACOVEI, *supra* note 73, at 6.

²⁷⁶ *Scharsach v. Austria*, 2003-XI Eur. Ct. H.R. 123.

²⁷⁷ *Id.* at 137–38.

²⁷⁸ *Id.* at 137.

²⁷⁹ *I.A. v. Turkey*, 2005-VIII Eur. Ct. H.R. 256–58.

a ‘provocative’ opinion, but also an abusive attack on the Prophet of Islam,”²⁸⁰ especially when Muslims comprised the majority of the country’s population.²⁸¹

Under the margin of appreciation doctrine, the ECHR may allow the Italian government limited discretion to determine for itself whether the Alfano Decree is a legitimate interference with a blogger’s freedom of expression.²⁸² The moment when a blogger’s criticism of an individual becomes an abusive attack of that individual is a critical point in determining the legitimacy of an Article 10 interference. The joint dissenting opinion in *Otto-Preminger-Institut v. Austria*²⁸³ proposed the following standard to establish this critical point:

The need for repressive action amounting to complete prevention of the . . . freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom . . . of others, [it] forfeit[s] for itself the right to be tolerated by society.²⁸⁴

In *Cumpănă*, the conviction of a journalist and a newspaper editor for publishing an allegedly offensive article and satirical cartoon fell outside the margin of appreciation, particularly because of the Romanian court’s sentence that included prison time and prohibited them from working in journalism for one year.²⁸⁵ Similarly, in *Salov*, a lawyer’s disbarment for disseminating an article containing false information about a presidential candidate also fell outside the Ukrainian court’s margin of appreciation.²⁸⁶

These rulings not only violated the journalists’ freedom of expression, but also denied them the freedom to earn a living—a universal right promoted by the Universal Declaration of Human Rights, the same text that provides the foundation for the European Convention on Human Rights.²⁸⁷ More significantly, five-year,²⁸⁸ one-year,²⁸⁹ and seven-month²⁹⁰ prison sentences

²⁸⁰ *Id.* at 258.

²⁸¹ *Id.* at 256.

²⁸² Bright, *supra* note 2.

²⁸³ *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. 1 (1994).

²⁸⁴ *Id.* at 24 (Palm, Pekkan, Makarczyk, Js., dissenting).

²⁸⁵ *Cumpănă v. Romania*, 2004-XI Eur. Ct. H.R. 74–76, 94–96.

²⁸⁶ *Salov v. Ukraine*, 2005-VII Eur. Ct. H.R. 180–81.

²⁸⁷ Universal Declaration of Human Rights, *supra* note 173; see ECHR QUESTIONS, *supra* note 68, at 5.

²⁸⁸ *Salov*, 2005-VIII Eur. Ct. H.R. at 180.

²⁸⁹ *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) at 21–27 (1992).

²⁹⁰ *Cumpănă*, 2004-XI Eur. Ct. H.R. at 75–76.

imposed on convicted journalists were not only violations of their freedom of expression, but a complete denial of their physical liberty under Article 5 of the Convention.²⁹¹ These particular cases suggest that violations by European courts of two (or more) fundamental freedoms would satisfy the standard set out above²⁹² for forfeiting an application of the margin of appreciation doctrine. Thus, an abuse of the discretion permitted under the doctrine in order to silence bloggers that use their blogs, not to attack, but to criticize or “expose the Italian Parliament’s inability to act on crucial issues such as conflict of interest, corruption and the environment,”²⁹³ would not be tolerated by the mechanisms put in place by the ECHR to protect the freedom of expression.

CONCLUSION

When Italian bloggers from all walks of life gathered in the Piazza Navona to protest against the Alfano Decree,²⁹⁴ it had great potential of being a significant moment in history in the resistance of an attack against the fundamental right of the freedom of expression.²⁹⁵ The proposed law that creates liability for bloggers who fail to comply with its provisions threatens the plurality of ideas and opinions that are the essence of any democratic society,²⁹⁶ and, in combination with Silvio Berlusconi’s strong-arming of the Italian media,²⁹⁷ the Alfano Decree jeopardizes the country’s status as a democracy by establishing (arguably) a dictatorship instead.²⁹⁸ The consequences of the Alfano Decree in light of both the European Convention on Human Rights’ objectives and the ECHR case law discussion in this Comment are too great and should be denied by the Italian Senate and, if not, should be ruled a violation of Article 10 when it is inevitably challenged in the courts of Europe.

The Alfano Decree is commendable in the pursuit of its inherent goal—to discipline those individuals, including bloggers, who take advantage of the anonymity provided by the internet by publishing offensive comments about others without concern or remorse while hiding behind a computer screen.

²⁹¹ See Convention, *supra* note 13, art. 5.

²⁹² See *Salov*, 2005-VIII Eur. Ct. H.R. at 180; *Castells*, (No. 236) Eur. Ct. H.R. at 21–27; *Cumpănă*, 2004-XI Eur. Ct. H.R. at 75–76, 94–96.

²⁹³ Paolucci, *supra* note 3.

²⁹⁴ E.g., Bright, *supra* note 2; Federico, *supra* note 2; Reid, *supra* note 2.

²⁹⁵ Bright, *supra* note 2.

²⁹⁶ See *Handyside v. United Kingdom (Handyside Case)*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

²⁹⁷ Reid, *supra* note 2; *Italy Country Profile*, *supra* note 56; Doctorow, *supra* note 56.

²⁹⁸ See Doctorow, *supra* note 56.

However, the means by which the bill intends to meet this goal are unreasonably excessive. The \$20,000 fine sanctions bloggers who may be unaware of the regulation or may lack the ability to make the necessary retraction within forty-eight hours.²⁹⁹ Given the unreliability of internet access in Italy,³⁰⁰ this penalty is too harsh. It is especially harsh for those individuals who use blogging as a pastime rather than as a source of revenue and do not have the money to pay such an exorbitant fine. Alternatively, another means by which to achieve this goal would be to continue to hold bloggers liable under the current privacy or defamation laws in Italy.³⁰¹ In a country where the development of the internet lags greatly behind other democratic nations,³⁰² the Italian government should focus its efforts on encouraging the use of the internet so that its citizens can freely express themselves without the threat of penalties, but are still held accountable for the content of their commentary. This solution would render Article 15 of the Alfano Decree unnecessary and would restore faith among Italian nationals that their right to exercise the freedom of expression is still intact and that the blogger is still “his own man.”³⁰³

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²⁹⁹ See Alfano Decree, *supra* note 4, at 29–30.

³⁰⁰ Reid, *supra* note 2.

³⁰¹ See Press Release, Gilioli, Scorza & di Frenna, *supra* note 1.

³⁰² See Reid, *supra* note 2.

³⁰³ See *id.*

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