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Packingham v North Carolina: A Constitutional Right to Social Media?

Edoardo Celeste

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Dear Editor,

In North Carolina, a statute prevented registered sex-offenders who committed abuses on minors to use social media after their conviction. On 19th June 2017, in the case *Packingham v North Carolina*,[1] the US Supreme Court unanimously held that this statute was unconstitutional. The key argument of the court was to identify social networking websites as 'places where [all citizens] can speak and listen, and then, after reflection, speak and listen once more.'[2] Even if the protection of minors was considered a valid governmental interest, the 'unprecedented' restriction of the scope of First Amendment speech engendered by the prohibition of the use of social media was deemed unacceptable.[3]

As stated by Justice Kennedy, who wrote the opinion of the majority, 'this case is one of the first [the] court has taken to address the relationship between the First Amendment and the *modern* Internet.'[4] Interestingly, this decision occurred exactly twenty years after the well-known judgment in *Reno v American Civil Liberties Union*.[5] In *Reno,* the Supreme Court ruled for the first time on the constitutionality of a federal statute limiting free speech on the Internet. Two decades later, the Supreme Court not only affirmed – echoing *Reno* – that social media allow anyone with an Internet connection to become a modern 'town crier',[6] but also that they represent 'what for many are the *principal* sources for knowing current events' as well as 'the most powerful mechanisms available to a private citizen to make his or her voice heard.'[7]

Can we consequently affirm, as some journalists did,[8] that the Supreme Court recognised a constitutional right to use social media? This contribution will examine the veracity of this affirmation and will eventually reflect on the different approach that a European court would have taken in a similar case.

Firstly, it is possible to exclude that the Supreme Court affirmed a *social* right to use social media, or, in other words, a right to claim access to social media from the state. From a practical point of view, this would imply the right of citizens to claim a series of services from the state, such as the possibility to have an Internet connection, or to obtain the necessary hardware to access social media.

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[1] *Packingham v North Carolina* 582 US____ (2017).
[2] ibid 1 (emphasis added).
[3] ibid 8.
[4] ibid 6 (emphasis added).
[5] *Reno v American Civil Liberties Union* 521 US 844 (1997).
[6] ibid 8.
[7] ibid (emphasis added).
[8] David Kravets, 'There's a Constitutional Right to use Social Media, Supreme Court says' (*Ars Technica*, 19 June 2017) <https://arstechnica.com/tech-policy/2017/06/sex-offenders-cannot-be-excluded-from-social-media-supreme-court-says/> accessed 6 February 2018, Issie Lapowski, 'Is posting on Facebook a Fundamental Right?' (*Wired*, 28 February 2017) <https://www.wired.com/2017/02/supreme-court-soon-decide-right-facebook/> accessed 6 February 2018.

Secondly, it is also evident that the court did not impose on social media platforms any obligations to grant citizens access to their websites. By excluding this far reaching interpretation, it follows that the court did not craft any *positive* right to social media access. Indeed, a positive right to social media would mean that people should have the possibility to exchange information through these websites. However, such a positive right would necessarily imply both a social right to use social media, and an imposition of obligations on social media platforms, which are precisely the two options that have just been excluded.

The final option to consider is that the court upheld a *negative* right protecting citizens from potential restrictions on their possibility to access and use social media. This interpretation best fits the words of the Supreme Court in *Packingham,* as well as the letter of the US Constitution. The court avoided general statements about an alleged people's right to social media, rather focusing its attention on the legal fallacies of the North Carolina statute. The US Constitution frames itself the principle of freedom of speech as a negative right.

However, Justice Alito in his opinion, reproached the Court for not having 'heeded its own admonition of caution' in applying free speech precedents to social media.[9] In particular, he considered it imprudent to draw an analogy between social media and public places that traditionally enjoy First Amendment's protection. According to Justice Alito, this equation would erect a robust protection wall around the vast territory of cyberspace, and would risk, for example, limiting states' ability to restrict access by registered sex-offenders to dating sites for teenagers.

The black and white interpretation suggested by Justice Alito, equating an important context for the exercise of freedom of expression to an almost untouchable environment, offers us the opportunity to reflect on the different approach that an Irish or a European court would have taken in a similar case. The basic difference between the American and the European conception of freedom of expression is already apparent at a formal level. The First Amendment is formulated in absolute terms, while, taking as an example the European Convention of Human Rights, article 10(2) subjects the freedom of expression to a series of qualifications.[10] Consequently, in the European context, considering cyberspace and in particular social media, as a context deserving constitutional protection would not have impinged on the possibility of restricting its use for legitimate aims.[11]

In light of these considerations, in a similar case, would a European court have reached a different conclusion? Probably not. Notwithstanding their differences, the American and the European approaches seem to de facto converge when coming to assess the proportionality of a restriction of freedom of expression. North Carolina's ban would have looked disproportionate also from a European perspective.

In conclusion, social media have become an integral part of the architecture of contemporary society. They represent an unprecedented enabler of fundamental rights, but at the same time, a threat against which, at the moment, many states are reacting.[12] *Packingham* is a good example to remind legislators

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[9] ibid (n 1) concurring opinon,11.

[10] Frederick Schauer, 'Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture' (KSG Working Paper No. RWP05-019 2005) <https://ssrn.com/abstract=668523> accessed 6 February 2018.

[11] Sionaidh Douglas-Scott, 'The Hatefulness of Protected Speech: A Comparison of the American and European Approaches' (1999) 7(2) William & Mary Bill of Rights Journal 305.

[12] See, in Germany the 'Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken' BGBl. I S.3352, so-called Facebook Act, entered into force on 1st October 2017.

that, when striking a balance between competing rights and interests, ‘proportionality’ will be the keyword to take into consideration.

Is mise le meas,

Edoardo Celeste