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Hate speech between European Union and Italian legal system

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Abstract

The worrying increase in hate speech phenomena in cyber contexts was the driving force behind the writing of this thesis. The reasons for this social problem are to be found in the political and economic instability of the legal systems analysed, the Italian and European ones, violent political propaganda, and structural characteristics of the Web that affect the perception of the medium by users. The objective of this paper is to answer the question of whether the current national and European laws are sufficient to address this issue. Through a careful study and evaluation of the laws implemented, the case law decisions issued and the comments of the doctrine, it was concluded that fundamental human rights, such as dignity, equality, and non-discrimination, hold a significant position on the agenda of the institutions analysed, although these fundamental rights often have to be balanced with other protected freedoms, such as freedom of expression. Balancing is difficult to do, and this is demonstrated by a case-by-case approach. Finally, the possibility of considering the introduction of foreign legal remedies into the analysed systems was considered. The results obtained have important implications for future practice and research. Future investigations could focus on considering the importance of counter-hate speech campaigns and educational programmes to raise the awareness of users, as well as enhancing the cooperation between States and platforms for a combined action.

Keywords: hate speech, defamation, discrimination, freedom of thought, ISP liability.

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Introduction

One of the greatest technological inventions that revolutionised human life in an almost irreversible way was the advent of the Internet. Born during the Cold War for political and military reasons, it quickly spread to every sphere of common life: thanks to the Internet, one can get in touch with people geographically distant, carry out economic transactions, listen to music, read books, and answer any question. However, it should be remembered that in addition to these many advantages, dangers have also emerged: the advent of the Internet has witnessed an increase in certain types of criminal behaviour, including identity theft, threats, financial and consumer fraud, scams, hoaxes and pranks, hacking and, finally, episodes of hate speech, cyberbullying, hateful behaviour in general[1]. Although, there is no formal and straightforward definition on what constitutes illegal hate speech, it might be classified as targeting minority groups in a way that promotes violence or social disorder and hatred[2], and, because the Internet makes it easy to act and speak without self-identification, these acts are easy to carry out without fear of discovery[3]. As a matter of fact, research has shown that users are more likely to indulge in anti-social, malicious and immoral behaviour if protected by anonymity, or by the security of a non-face-to-face, screen-mediated interaction[4]. For this reason, it is of paramount importance the regulation of the cyberspace in order to prevent hateful behaviour amongst users, and to educate population to make better use of the instrument. The legal sphere is compelled to question the need for careful regulation of this social phenomenon and, in particular, of the way in which the relationship between the citizen/user and the social media is regulated so that it does not undermine certain fundamental rights[5].

The Internet has become a breeding ground for the proliferation of groups, chats, forums that glorify hatred and violence towards certain social groups (ethnic minorities,

[1] Delgado, R., & Stefancic, J. (2014), p. 320.
[2] Quintel, T., & Ullrich, C. (2019), p.1.
[3] Delgado, R., & Stefancic, J. (2014), p. 322.
[4] Rowland, D. (2006), p. 520.
[5] Passarelli, G. (2021), p.1196.

women, members of the LGBTQ+ community). It is not difficult to find on any social network groups that extol class superiority, pour their economic and social frustrations on targeted groups in order to find a scapegoat. Victims are often unaware of the hatred directed against them; others do not denounce such abuse due to a lack of trust in the judicial system. Those who decide to denounce do not always obtain justice because of the various discrepancies as to what is considered offensive. Recent social changes, political and economic instability, and the emergence of governments led by right-wing parties, which exploit propaganda to spread a certain class ideology aimed at marking a boundary between Us and Them, seems to have led people to feel legitimised to spread hate messages online. The relative ease with which it is possible to have access to the Internet, the speed and free dissemination of information globally creates a dangerous scenario for the spread of hate ideologies (racism, anti-Semitism, misogyny). The risk is that, if not stopped, these movements can materialise their words in the real world, posing a danger to public order. The Committee of Ministers of the Council of Europe recently emphasized the fact that information and communication technologies can have a "profound impact, both positive and negative" on many aspects of human rights […] and reiterated the mantra that "content which is legal off-line should also be legal on-line"[6].

One of the prerequisites for a society to grow and flourish is the establishment of and adherence to a set of social norms. In other words, the individual in order to live in society must fulfil social, cultural, personal constraints in order to ensure general interests and mutual cohesion. However, when communication occurs through an electronic device, it seems that a share of users tends to do not abide to social norms, showing little consideration for others. This kind of behaviour is enhanced by the fact that the Internet offers the possibility of hiding one's identity behind nicknames. In this state of deindividuation users may not care if they hurt other users because they have little sense that others are "real", little expectation that their bad behaviour has consequences for them and little expectation that they will have to interact with the other person in the future[7]. To be clear, the term "deindividuation" is to be understood as "the state of alienation, reduced inhibition and lack of self-awareness, which occurs when a personal

[6] Rowland, D. (2006), p. 536.
[7] *Ibidem,* p. 520.

sense of identity is overwhelmed by that of the group"[8]. The sense of alienation comes from the absence of communication with others; when one distances oneself from the rest of the world, one has the impression of being in a sort of bubble in which communication is ethereal, immaterial, offering a fertile breeding ground for racial vituperation and contempt[9], other than increased irritability, and an increased incidence of compulsive and reckless behaviour[10]. It must be noted, however, that anonymity on social networks has well-defined characteristics. Using a nickname is not anonymity: it just means that one has registered with a first and last name and then chosen to appear online with a nickname, but one is identifiable anyway. Fortunately, very few users can surf online in real anonymity. Every time a person connects with a device to the network, it generates an input address (IP) that allows us to know where and how that person connected. The real problem in the event of a crime being committed will be to prove that the certain device actually belonged to that person[11].

The risk of hateful behaviour lies in the quantitative scope of the Internet as a medium. Unlike newspapers or TV, the Internet has a worldwide reach, content goes viral and is stored permanently, unless users demand its removal. Consequently, the number of users who come into contact with content that could be considered harmful to them is considerably greater. For this reason, appropriate laws and regulations should be enacted and adopted conjunctly in order to protect the dignity and safety of all users online[12].

In the years immediately following the invention of the Web, a new belief started to arise known as "cyberlibertarianism", which began to assert the principles of freedom and autonomy of the individual in virtual space, allowing everyone to exercise "regulatory arbitrage" in opposition to the public and private powers that govern the real world. While in the real world one can determine who does what and where, in the virtual world one cannot[13]. In other words, the advocates of cyberlibertarianism intended to create a virtual space alien to the laws and norms of the real world. This would also imply that cyber-libertarians also support the fundamental right of freedom of expression, arguing against

[8] *Ibidem*, p. 531.
[9] Delgado, R., & Stefancic, J. (2014), p. 336.
[10] Rowland, D. (2006), p. 531.
[11] Trimarchi, R. (2021), p. 266.
[12] Rowland, D. (2006), p. 523.
[13] Smorto, G., & Quarta, A. (2020), p. 53.

the regulation and censorship of Internet content which could obstruct the free flow of knowledge, ideas and information[14]. However, a new branch of law dedicated to the digital sphere, cyberlaw, subsequently emerged. Regulation refers to all forms of social control that can influence the behaviour of citizens. The different forms of regulation (law, social norms, market, architecture) coexist and give rise to a system of rules. The digital sphere is also governed by a combination of these instruments[15]. For the purposes of this paper, only laws and netiquette will be explained: a. laws regulating e-commerce, intellectual property, freedom of expression and sanctioning possible violations through a court ruling; b. netiquette indicates those behaviours that are considered socially acceptable online[16] .

In conclusion, the Internet, and social networks in particular, has gone from being a pastime to a channel of information, confrontation and comparison, an essential tool for one's own sphere of personal interests. The Web has now surpassed the users and the level of involvement that traditional media had in past decades, with the additional difference compared to the latter that users have finally become “promoters of communication”. Users are free to create content and express their opinions as long as they respect the guidelines that each user passively subscribes to when registering on the various platforms. The aspect about the responsibility of Internet Service Providers will be discussed later. An increase in participation, however, does not necessarily coincide with a qualitative improvement in participation itself. The positive aspect of inclusiveness is sided by phenomena that degenerate its usefulness, realised in the manifestations of hatred and the propagation of disinformation on a large scale[17].

If there is no doubt that such conduct is detrimental to the dignity of individuals and social groups and represents an obstacle to civil coexistence in the community, there is equally no doubt that actions aimed at curbing communications that take place on the Internet may result in a limitation of the right to free expression. Therefore, the world of law must comply with the interests of all, although the difficulties are many. There is no

[14] Banks, J. (2010), p. 233.
[15] Smorto, G., & Quarta, A. (2020), p. 59-60.
[16] *Ibidem,* p. 60.
[17] Trimarchi, R. (2021), p. 261.

free zone on the Web: liability always has to be proven in the courts, defaming or insulting online is to be considered an aggravating circumstance[18].

The fight to eliminate hate speech messages is useful, but it is only a palliative remedy and does not prevent the formation of public opinion based on unhealthy ideas. The Web is often identified as the place where ideas of hate and dissent are formed, but the removal of the message does not eliminate the problem; rather, the retrograde mentality behind that message must be eliminated. In other words, online deletion does not solve a problem that also arises and expresses itself offline anyway. The phenomenon of online hatred should, therefore, be addressed not only according to the particularities of the medium through which it is externally expressed, but above all by analysing the underlying causes. The solution is not clear but, first and foremost, it would not be counterproductive to enhance the culture of legality, aimed at knowing and learning to respect one's neighbour and minorities[19].

As social networks became popular in the 2000s, documents regulating hate speech and hate crimes online are also quite recent. And not all EU Member States have already enacted them in their legislation. In this context, the present paper is new in its topic and in its significance, the more so that we often witness how today's society is exposed to episodes of xenophobia, sexism, homophobia, broadcast globally through the media, and often legitimized by politicians who sometimes resort to the support of the masses using hateful propaganda. In order to tackle these problems and achieve results common efforts are needed.

Before illustrating the content of the present dissertation, it may be useful to define the main topics, even though no common and universal definition is given.

Hate crimes are criminal offences which are motivated by bias or by prejudice against a defined group of people. The two essential elements to qualify a hate crime are the following: a. the act is a criminal offence under national law; b. the act was motivated by bias/prejudice. Therefore, any offence ranging from threat to murder to property damage may fall into the category if the offence was committed motivated by bias. Although bias or prejudice is defined as "preconceived negative opinions, stereotypical

[18] *Ibidem,* p. 266.
[19] *Ibidem,* p. 268.

assumptions, intolerance or hatred directed to a particular group that shares a common characteristic, such as race, ethnicity, language, religion, nationality, sexual orientation, gender or any other fundamental characteristic", if in the factual circumstances the victim is not part of the group is not an element that may shift the qualification[20].

The difference between hate crime and hate speech lies in the fact the hate speech lacks a criminal offence basis. However, where incitement to criminal offences occurs, and a bias motive exists, then the expression may be qualified as hate crime. Moreover, hate speech may constitute evidence of committed hate crime[21].

Discrimination refers to cases where a comparable situation results in a differentiated treatment of individuals (or groups) without an objective justification. The discrimination usually involves worse treatment and may be based on various grounds such as age, sex, race, ethnic origin, sexual orientation, etc. Many of these grounds overlap with those related to hate speech. Therefore, it may be possible that hate speech includes an incitement to discrimination against specific groups or individuals[22].

Defamation refers to cases where an individual presents or disseminates before a third party false facts harming the honour and reputation of another person with the intention of harming his/her honour and reputation while knowing or having been obliged to know that the facts are false. In this sense, defamation is based on the discredit the person may suffer in relation to society. Depending on the national legal framework, defamation can be a civil or criminal offence (or both) and can cover the honour and reputation not only of natural persons but also of legal entities and groups. Hate speech is also related to the harm caused to an individual's or a group's dignity under similar yet not completely overlapping grounds. However, in this case the content of the statement is based on the inherent identity characteristics of the victim and not on false or inaccurate facts[23].

The present dissertation aims at analysing the legal ways enacted to tackle the problem of Hate Speech online. The selected object of this research is EU regulations on

[20] Casarosa, F. et al. (2020), p. 23.
[21] *Ibidem,* p. 23.
[22] *Ibidem,* p. 23.
[23] *Ibidem,* p. 23.

hate speech online. To narrow down the object of the research I will analyse the general approach in the EU and its reflection in the legislation in Italy.

In order to achieve the aim, the following objectives were formulated:

1. To review available literature on hate speech so as to arrive at the most appropriate definition.
2. To discuss the legal implications of the regulations when it comes to digital contexts, where users feel protected and disinhibited by the sense of anonymity and communication through an electronic device.
3. To review regulations promoted at the Italian and European level, their importance, and reasons for their implementation.
4. To study how the EU regulation has been implemented in Italy and further developments fostered by Italian institutions.
5. To study the possible implementation of legal transplants, such as punitive damages and apologies, to foresee new legal perspectives.

The paper will consist of five parts. Firstly, the introduction displays a theoretical background (how hate speech manifests online, cyberbullying, the principles of defamation and anonymity, main points of EU regulations so far, liability of Internet Service Provider) and lists the most important points of this study (its subject, aim, research questions and hypothesis, the objectives that will be achieved). The second and the third section are dedicated to the legislation enacted both at a national and supranational level, accompanied by a case law review of some of the most relevant decisions to better explain the effects of laws and, finally, a conclusive comment based on the doctrine evaluations. The last chapter explains the implications that will follow after legal transplants from other jurisdictions, namely punitive damages from common law systems and apologies from Asian cultures to open new legal perspectives when managing hate speech court proceedings. Finally, the last part will summarise the outcomes of the paper.

Chapter 1

The Italian legal framework in matter of hate speech

Each Member State of the European Union conceptualizes hatred and harm differently; this has led each State to create its own body of laws alongside European ones.

The Italian legal system does not provide a definition of hate crime or hate speech. Nonetheless, it has several rules on the protection of inviolable human rights and on the principles of equal dignity and equality of all human beings[24]. As a matter of fact, the basic rule guiding modern democracies in the protection of human rights is the effective implementation of the principles of equality and non-discrimination[25]. The corollary of laws and decrees has helped to make discrimination criminally relevant[26].

1.1. Legislation

1.1.1. Constitutional law

In Italy, the first and foremost legal basis for defining the sources of law and methods for their interpretation is represented by the Constitution, enacted and promulgated in 1947. The prohibition of racial discrimination on ethnic, national, religious grounds is part of a broad constitutional and international regulatory framework.

1.1.1.1. Non-discrimination principle (Arts. 2-3 Const.)

In the field of domestic constitutional law, the principle of non-discrimination is fully recognised in Articles 2 and 3 of the Constitution, which enshrine the inviolable rights of people, as well as the principle of equality and its consequence of prohibition of discrimination on racial (as well as religious) grounds[27].

Art. 2 and 3 Const. state the right to equality for every citizen in the territory. In particular,

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[24] Chirico, S., Gori, L., Esposito, I. (2020), p. 13.

[25] Ministry of foreign affairs and international cooperation. Italy Contribution on the initial draft general recommendation No. 36 of the UN CERD Committee on preventing and combating racial profiling. https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/GC36/Italy.docx

[26] Puglisi, G. (2018), p. 1192.

[27] Goisis, L. (2021), p. 2456.

Art 2: “The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic, and social solidarity be fulfilled”[28].

Art. 3: “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic, and social organisation of the country”[29].

1.1.1.2. Freedom of communication (Art. 21 Const.)

Art. 21 Const. refers to the freedom of expression, admitting reservations in case of damaging content.

Art. 21: “Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. […] Publications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law”[30].

It is interpreted to mean that freedom of information (understood in the sense of the freedom to disseminate through the mass media news and commentary) must be balanced with respect for the individual rights of the person recognized by Article 2 of the Constitution. It follows that, the freedom of expression should be exercised without offense to the reputation and without injury to the image or privacy of others[31]. The Constitution, therefore, renounces to give freedom of expression the position of cornerstone of the system of rights and freedoms. If on one hand, the Article recognises the intrinsic value of the manifestation of freedom of thought, on the other hand, having been drafted under the influence of the concern to safeguard public morality and to consolidate the newly established democratic regime after the Fascist turmoil, it expressly

[28] Constitution of the Italian Republic
[29] *Ibidem*.
[30] *Ibidem*.
[31] Peron, S. (2019), p. 336.

outlines a strongly regulated and therefore limited freedom in order to avoid both the revival of fascism and harmful abuses to decency[32].

1.1.2. Criminal law

1.1.2.1. Law 645/1952, Scelba law

The first piece of legislation introduced in the Italian legal system, albeit accidentally, to deal with and stigmatize racial discrimination is Law No. 645/1952 ("Scelba Law"), approved by the Chamber of Deputies and the Senate of the Republic, which primarily forbids the re-organization, under any form whatsoever, of the dissolved fascist party, including racist propaganda among the ways in which the fascist party pursued its antidemocratic aims[33]. In other words, the accent on racial factor is only indirect, while the prominence is on the social tranquillity and the prevention of reorganisation of anti-democratic parties[34].

Art. 1: "reorganisation of the dissolved fascist party occurs when an association, a movement or in any case a group of not less than five persons pursues anti-democratic aims proper to the fascist party, by glorifying, threatening or using violence as a method of political struggle or advocating the suppression of the freedoms guaranteed by the Constitution or denigrating democracy its institutions and the values of the Resistance, or by carrying out racist propaganda, or by directing its activity to the glorification of exponents, principles, facts and methods peculiar to the aforementioned party, or by carrying out external manifestations of a fascist nature"[35] (*my translation*).

Anyone who promotes, organises, or directs the associations, movements or groups referred to in Article 1 (Art. 2), anyone who displays or pronounces customary gestures and words of the dissolved fascist party (Art. 5) shall be punished by imprisonment and/or the imposition of fines, after cognizance of the crimes by the Court (Art. 7). Important to emphasise is the increase of penalties if the offenders held one of the roles specified in

[32] Monti, S. (2021), pp. 246, 247.
[33] Chirico, S., Gori, L., Esposito, I. (2020), p. 14.
[34] Puglisi, G. (2018), p. 1191.
[35] Scelba Law, 20 June 1952 No. 645. https://www.gazzettaufficiale.it/eli/id/1952/06/23/052U0645/sg

Article 1 of Law No. 1453 of 23 December 1947[36], or for those who financed the association or movement or the press (Art. 6).

Finally, condoning fascism is an aggravated offence when fascist ideas or racist methods are publicly extolled, as stated in Art. 4[37]:

Art. 4: "Anyone who […] publicly extols exponents, principles, facts or methods of fascism or the anti-democratic aims of the fascist party shall be punished with imprisonment of up to two years and a fine of up to 500,000 lire. The penalty is increased if the offence is committed by means of the press or other means of dissemination or propaganda" (*my translation*).

1.1.2.2. Law 654/1975, Reale law

However, the first Italian criminal law provision specifically countering racism was introduced in the Italian criminal system by means of the Law No. 654/1975 (Reale Law)[38] by which Italy ratified the International Convention for the Elimination of Racial Discrimination (ICERD Convention, New York, 1965)[39] [40]. Specifically, Art. 3 of Law 654/1975 introduces in the domestic legal system various relevant offences, including incitement to hatred, discrimination on racial, ethnic, national, or religious grounds, and affiliations in movements that incite hatred or denialism[41].

Art. 3: "1. Unless the act constitutes a more serious offence, for the purposes of implementation of the provision of Article 4 of the Convention shall be punished by imprisonment from one to four years:

(a) whoever disseminates in any way ideas based on superiority or racial hatred;

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[36] Rules for the temporary restriction of the right to vote to leaders responsible for the fascist regime.
[37] Chirico, S., Gori, L., Esposito, I. (2020), p. 15.
[38] *Ibidem,* p. 14.
[39] Ministry of foreign affairs and international cooperation. Italy Contribution on the initial draft general recommendation No. 36 of the UN CERD Committee on preventing and combating racial profiling. https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/GC36/Italy.docx
[40] This piece of legislation was enacted by the UN General Assembly. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial
[41] Italy Contribution on the initial draft general recommendation No. 36 of the UN CERD Committee on preventing and combating racial profiling - Ministry of foreign affairs and international cooperation. https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/GC36/Italy.docx

(b) whoever incites in any way discrimination or incites to or commits acts of violence or provocation to violence against persons because they belong to a national, ethnic, or racial national, ethnic, or racial group.

2. Any organisation or association having as one of its purposes that of inciting racial hatred or discrimination is prohibited. Whoever participates in such organisations or associations, or help their activities, shall be punished for the sole fact of participation or assistance, with imprisonment from one to five years.

3. The penalties shall be increased for the leaders and promoters of such organisations or associations" (*my translation*)[42].

The above-mentioned article has been later amended by Article 13 of Law No. 85/2006[43]:

"1. In Article 3(1) of Law No 654 of 13 October 1975, the following amendments shall be made:

(a) clause (a) shall be replaced by the following:

(a) who propagates ideas based on superiority or racial or ethnic hatred, or incites to commit or commits acts of discrimination on racial, ethnic, national, or religious grounds [shall be punished] with imprisonment of up to one year and six months or with a fine up to EUR 6,000

(b) in clause (b), the word 'incites' shall be replaced by 'instigates'" (*my translation*).

1.1.2.3. Law 205/1993, Mancino Law

Reale Law has been later integrated and amended by Law No. 205/1993 (Mancino Law)[44], a full-fledged system to combat discrimination, hatred, or violence on racial, ethnic, national, or religious grounds[45].

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[42] Law No. 654 of 13 October 1975. Ratification and execution of the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature in New York on 7 March 1966. https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1975-12-23&atto.codiceRedazionale=075U0654&tipoDettaglio=originario&qId=&tabID=0.5513356093566428&title=Atto%20originario&bloccoAggiornamentoBreadCrumb=true

[43] Law No 85 of 24 February 2006. Amendments to the Criminal Code regarding crimes of opinion. https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006;85

[44] Law No. 205 of 25 June 1993. Conversion into law, with amendments, of Decree-Law No. 122 of 26 April 1993, containing urgent measures concerning racial, ethnic, and religious discrimination. https://www.gazzettaufficiale.it/eli/id/1993/06/26/093G0275/sg

[45] Chirico, S., Gori, L., Esposito, I. (2020), p. 15.

Art 1: "[…] shall be punished:

a) with imprisonment of up to three years whoever spreads in any way ideas based on racial or ethnic superiority or hatred or incites to commit or commits acts of discrimination on racial, ethnic, national, or religious grounds.

b) with imprisonment from six months to four years who, in any way incites to commit or commits violence or acts of provocation to violence for reasons of racial, ethnic, national, or religious grounds" (*my translation*).

Furthermore, Art. 1 imposes additional penalties for convicted persons.

Art. 2 punishes external manifestations and the display of fascist emblems and symbols (e.g., Roman salutes, racist chants) by means of imprisonment and/or the imposition of a fine, in addition to the prohibition to enter venues where sporting events take place:

Art. 2: "1. Anyone who, at public meetings, makes outward manifestations or displays emblems or symbols of the organisations, associations, movements, or groups referred to in Article 3 of Law No. 654 of 13 October 1975, shall be punished by imprisonment up to three years' imprisonment and a fine ranging from two hundred thousand to five hundred thousand lire.

2. Access to places where sport competitions are held is prohibited to persons who go there wearing emblems or symbols as set forth in subsection 1. The offender shall be punished with imprisonment from three months to one year" (*my translation*).

Art. 7 requires the precautionary suspension and the dissolution of racist associations/groups in case of reiterated behaviours:

Art. 7: "When proceedings are brought for an aggravated offence within the meaning of Article 3 or for one of the offences provided for in Article 3(1)(b) and (3) of Law No. 654 of 13 October 1975 or for one of the offences provided for in Law No. 962 of 9 October 1967, and there are concrete elements to believe that the activity of organisations, associations, movements or groups favours the commission of the same offences, the following may be ordered as a precautionary measure, pursuant to Article 3 of Law No. 17 of 25 January 1982, the suspension of all associative activities. The request is submitted to the judge to try the aforementioned offences. Appeals against the measure are admissible pursuant to the fifth paragraph of the same Article 3 of Law No. 17 of 1982.

2. The measure referred to in subsection 1 shall be revoked at any time when the conditions indicated in that subsection are no longer met.

3. When an irrevocable judgement is established that the activity of organisations, associations, movements, or groups has favoured the commission of any of the offences indicated in Article 5, paragraph 1, the Minister of the Interior, after deliberation by the Council of Ministers, shall issue a decree ordering the dissolution of the organisation, association, movement, or group and orders the confiscation of assets. The decree is published in the Official Gazette of the Italian Republic" (*my translation*).

In order to draw some initial conclusions and before explaining in greater details Art. 3 Mancino Law, it can be seen that anti-discrimination criminal law gravitates around three paradigms: instigatory, enunciative, and executive. The former includes the behaviours referred to in Art. 3(1)(a) and (b), and (3) Law no. 654/1975 (incitement to commit discrimination and violence, participation in, assistance to organisations whose aims include incitement to discrimination and violence); the second includes the offences referred to in Art. 3(1)(a) *sub specie* of supremacist or racist propaganda Law No. 654/1975, and Art. 2(1)(2) Law No. 205/1995 (display of racist emblems and symbols, access to venues where sporting events take place with such emblems); the third is represented by the action of committing acts of discrimination and violence referred to in Art. 3(1)(a) and (b) Law No. 654/1975. The focal points of charges are constituted by the concepts of discrimination and hatred, common to the aggravating circumstance referred to in Art. 3, Law No. 205/1993[46].

As a matter of fact, Art. 3 introduces a special aggravating circumstance (increase in the quantum of the penalty of up to half) for all crimes committed for racist motives or to facilitate the activities of racist associations/groups. Such an aggravating circumstance cannot be reduced with possibly concurring mitigating circumstances (except for when the offender is a minor)[47]. Thus, if any mitigating circumstances are present, the judge will have to apply the penalty increase and subsequently decide any reductions[48]. Most

[46] Puglisi, G. (2018), p. 1192.
[47] Chirico, S., Gori, L., Esposito, I. (2020), p. 15.
[48] Puglisi, G. (2018), p. 1192.

importantly, it is always sufficient for the offence to be prosecuted *ex officio (*Art. 6)[49]. Respectively,

Art. 3: "1. For offences punishable by a penalty other than life imprisonment committed for the purpose of discrimination or ethnic, national, racial, or religious hatred, or for the purpose of facilitating the activity of organisations, associations, movements, or groups having the same objectives among their purposes, the penalty is increased by up to half.

2. Extenuating circumstances, other than that provided for in Article 98 of the Penal Code competing with the aggravating circumstance referred to in paragraph 1, cannot be considered equivalent to or prevailing over the aggravating circumstance referred to in paragraph 1, and reductions in penalty shall be applied to the quantity of penalty resulting from the increase resulting from the afore-mentioned aggravating circumstance" (*my translation*).

Art 6: "1. For offences aggravated by the circumstance referred to in Article 3(1), proceedings shall in any case be taken case *ex officio*.

2. In cases of *flagrante delicto*, officers and agents of the judicial police are empowered to arrest for one of the offences provided for in the fourth and fifth paragraphs of Article 4 of Law No. 110, dated 18 April 1975, as well as, when the circumstance provided for in Article 3(1) of this Decree, for one of the offences provided for in the first and second paragraphs of the same Article 4 of Law No. 110 of 1975.

2-bis. In Article 380(2)(l) of the Code of Criminal Procedure the following words are added: 'of the organisations, associations, movements, or groups referred to Article 3(3), of Law No. 654 of 13 October 1975'.

3. For offences aggravated by the circumstance referred to in Art. 3(1), which do not fall within the jurisdiction of *Corte d'Assise*, the general court shall have jurisdiction.

4. The court shall also have jurisdiction for the offences provided for in Art. 3 Law No. 654 of 13 October 1975" (*my translation*).

For reasons of clarity, in the Convention the term "racial discrimination" shall mean any distinction, exclusion, restriction, or preference based on race, colour, descent, or

[49] Chirico, S., Gori, L., Esposito, I. (2020), p. 15.

national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life[50]. Henceforth, the objective is the recognition of equality, respect among parties, the right not to be excluded from society, not to be discriminated on the basis stereotypes which make the victim wrongly considered socially undesirable (skin colour, religion, political orientation, sexual orientation), in order to establish subaltern relationships between individuals[51].

1.1.2.4. Amendments to Reale-Mancino Law, Arts. 604-bis and 604-ter

In 2018, the Decree No. 21/2018, containing "Provisions implementing the principle of delegation of the rule of the organic law in criminal matters pursuant to Article 1, section. 85, letter q) of Act No. 103 of 23 June 2017")[52], introduced Article 604-bis "Propaganda and incitement to commit crime for discrimination on racial, ethnic and religious grounds"[53] and Article 604-ter "Aggravating circumstance"[54] [55] in the Criminal Code. The former repealed Article 3 of Law No. 654/1975, the latter repealed Article 3 of Law No. 205/1993 (Mancino aggravating circumstance)[56].

In more details, Art. 604-bis impose a punishment via imprisonment and/or imposition of fines for anyone who propagate ideas aimed at spreading hatred and racial superiority, for anyone who participates in, supports, or directs such groups that engage in such propaganda, and for anyone whose propaganda is considered to be a real danger to society for its denial of crimes against humanity.

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[50] International Convention on the Elimination of All Forms of Racial Discrimination. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial

[51] Puglisi, G. (2018), p. 1191.

[52] Legislative Decree No. 21 of 1 March 2018. Provisions implementing the delegation principle in criminal matters pursuant to Article 1(85)(q) of Law No. 103 of 23 June 2017. https://www.gazzettaufficiale.it/eli/id/2018/3/22/18G00046/sg

[53] *Ibidem*.

[54] *Ibidem*.

[55] See Art. 3 Law No. 205/1993.

[56] Ministry of foreign affairs and international cooperation. Italy Contribution on the initial draft general recommendation No. 36 of the UN CERD Committee on preventing and combating racial profiling. https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/GC36/Italy.docx

Article 604-bis: "Unless the act constitutes a more serious offence, it shall be punished:

a) with imprisonment of up to one year and six months or with a fine of up to EUR 6,000 who propagates ideas based on superiority or racial or ethnic hatred or incites to commit or commits acts of discrimination on racial, ethnic, national, or religious grounds.

b) With imprisonment from six months to four years who, in any way, incites to commit or commits violence or acts of provocation to violence on racial, ethnic, national, or religious grounds.

Any organization, association, movement, or group having as one of its purposes the incitement to discrimination or violence on racial, ethnic, national, or religious grounds is prohibited. Whoever participates in such organisations, associations, movements, or groups, or helps their activities, shall be punished, for the sole fact of the participation or assistance, with imprisonment from six month to four years. Those who promote or direct such organisations, associations, movements, or groups shall be punished, for this alone, by imprisonment of imprisonment from one to six years.

A term of imprisonment of two to six years shall apply if the propaganda or incitement and incitement, committed in such a way that concrete danger of dissemination arises, are based in whole or in part on the denial, gross trivialisation or on the apologia of the Shoah or of crimes of genocide, crimes against humanity and war crimes, as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court" (*my translation)*.

1.1.2.5. Judicial overlaps

In conclusion, the Scelba Law and Reale-Mancino Laws substantially coincide as to the legal interests they protect and are in a relationship of subsidiarity. In case of uncertainty as to which of the said provisions is applicable, the Scelba provisions shall apply in case the democratic institutions are at risk – that is, the conduct threatens the democratic order and its underlying values (see Cass. I 8108/2018, Cass. I 11038/2017[57]);

[57] The Roman salute, if made with commemorative and non-violent intent, is not criminally relevant, since the law does not punish "all the usual manifestations of the dissolved fascist party, but only those that can determine the danger of reconstituting fascist organisations" and, consequently, only "gestures capable of provoking adhesions and consensus. There is an offence of concrete danger in the case of "manifestations of fascist thought and ideology that may give rise to the danger of the reconstitution of fascist organisations, in relation to the time and the environment in which they are carried out, concretely jeopardising the maintenance of the democratic order and the values underlying it". https://www.giurisprudenzapenale.com/2018/02/21/sulla-rilevanza-penale-del-saluto-romano-non-e-reato-se-fatto-con-intento-commemorativo/. Moreover, the legislature "intended to prohibit and punish not

otherwise, the Reale-Mancino provisions shall apply (Cass. III 37390/2007[58])[59]. In case of racially motivated demonstrations, which can be attributed both to the offence of fascist demonstrations (Article 4, Law no. 645/1992) and to the corresponding case provided for by the Mancino Law (Article 3, Law no. 205/1993), the case law has emphasised the difference between the legal interests protected by the two laws, applying the offence of fascist demonstrations only in the presence of conduct liable to reconstitute the fascist party, leaving to Article 2, Law no. 205/1993 the cases in which the exhibition of emblems belonging to or customary to racist organisations are not liable to constitute a neo-fascist formation. This regulatory overlap should be overcome: it is not, in fact, easy to draw a concrete distinction between the two cases; the assessment of the suitability of a fascist manifestation for the reconstitution of the party is predominantly negative and, where it actually exists, it is accompanied by other elements that already denote the extremes of the case; profiles of unreasonableness are present in the sanctioning treatment provided for the two cases, since fascist demonstrations, enriched by the element of suitability for the reconstitution of the fascist party, are punished with a lower penalty than racist demonstrations. The jurisprudence has decreed the marginality of the Scelba Law with respect to the repressive dispositions concerning racism[60].

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just any manifestation of thought, protected by Article 21 of the Constitution, but those customary manifestations of the dissolved party that may lead to the danger that it was intended to avoid. The term 'fascist demonstrations' adopted by the 1952 law and the use of the adverb 'publicly' clearly imply that, although the act may be committed by a single person, it must find at the time and in the environment in which it is carried out such circumstances as to make it likely to provoke adhesions and consensus and to contribute to the dissemination of conceptions favourable to the reconstruction of fascist organisations". In other words, "apologia for fascism, in order to constitute criminal offence, must consist not in a eulogistic defence, but in an exaltation that could lead to the reorganisation of the fascist party". In *Diritto penale e processo 12/2017,* 1585-1587.

[58] "A person who, on the occasion of a football match, waves a tricolour flag bearing, in the white part, the emblem of the *fascio littorio*, does not give rise in the absence of the condition constituted by a danger to democratic institutions, to the configurability of any of the offences provided for by Law No. 645/1952 (...) but falls" within the provision of the rule that 'punishes criminally anyone who, at public meetings performs external manifestations or flaunts emblems or symbols proper or customary to the associations, movements and groups referred to in Article 3 of Law no. 654/1975, characterised, *inter alia* by the dissemination of ideas based on national and ethnic superiority or hatred". Ordine avvocati di Torino (2018). Discriminazione per razza ed etnia. https://www.ordineavvocatitorino.it/sites/default/files/documents/CPO/Discriminazione%20per%20razza%20ed%20etnia.pdf.

[59] Chirico, S., Gori, L., Esposito, I. (2020), p. 16.

[60] Pelissero, M. (2020), p. 1018.

1.1.2.6. Leg. D. 212/2015, Victims' Directive

As regards the criminal procedural law, the rights of crime victims, included hate crime victims, have been enshrined into Italian legislation, by Legislative Decree 212/2015 transposing Directive 2012/29/EU (so called "Victims' Directive"), which establishes minimum standards on the rights, support, and protection of victims of crime[61]. This has revolutionized the Italian criminal justice system as all victims are granted specific rights, implying corresponding obligations, which in brief give voice to their needs to receive information in a language they understand about the procedures for filing a complaint/report, their role in the investigations and trial, the status of the proceedings, the modalities to obtain translation/interpretation into their language of the procedural documents, the possibility to be granted legal counselling, aid, and to benefit of protection measures, the procedures to report violations of their rights and to obtain reimbursement of expenses. In other words, they are compelled to have an active role, be respected, protected, heard, helped in accessing justice, financially compensated and psychologically supported[62].

Art. 90-bis CPC[63]: "(Information to the offended person). - The offended person shall, from the first contact with the prosecuting authority, be provided, in a language he or she understands, with information concerning:

(a) the way they may file a complaint or a sue, the role they assume during the investigation and the trial, the right to be informed of the date and place of the trial and of the indictment and, if they constitute civil party, the right to be notified of the judgment, also in summary.

(b) the right to be notified of the state of the proceedings and of the inclusions referred to in Article 335(1)(2).

c) the right to be notified of the motion to dismiss.

d) the right to seek legal advice and legal aid.

(e) the right to have procedural documents interpretated and translated.

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[61] Legislative Decree No 212 of 15 December 2015. Implementing Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime and replacing Framework Decision 2001/220/JHA. https://www.gazzettaufficiale.it/eli/id/2016/01/05/15G00221/sg

[62] Chirico, S., Gori, L., Esposito, I. (2020), p. 8.

[63] Criminal Procedure Code.

(f) any protective measures that may be ordered in their favour.

(g) the rights granted to them by law if they reside in a Member State of the European Union other than that in which the offence was committed.

(h) the right to contest possible violations of their rights.

(i) the right to contact the authorities to obtain information about the proceedings.

(l) the right to obtain reimbursement of expenses of the criminal proceedings.

(m) the possibility of claiming compensation for damages resulting from the offence.

(n) the possibility for the proceedings to be settled by annulment of actions pursuant to Article 152 of the Penal Code, where possible, or through mediation.

o) the right of the defendant for the suspension of the proceedings with probation or proceedings in which the cause of exclusion of punishability on account of the particular tenuousness of the act is applicable.

p) the right to health facilities in the territory, family homes, anti-violence centres, and shelters" (*my translation*).

In case of criminal offences committed with violence against the person, victims can ask to be informed about the release of the accused or convicted person or the termination of pre-trial measures imposed on them and must be promptly informed about their escape from custody or from pre-trial detention measures[64].

Art. 90-ter CPC: "(Notifications of escape and release from prison). - Without prejudice to the provisions of Article 299, in proceedings for offences committed with violence to the person shall be immediately communicated to the offended person who so requests request, with the assistance of the judicial police, the orders of release and termination of the custodial security measure, and prompt notice shall also be given in the same manner of the escape of the defendant in pre-trial detention or of the convicted sentenced person, as well as the voluntary evasion of the inmate the execution of the custodial security measure, unless proves, also in the case referred to in Article 299, the concrete danger concrete danger of harm to the offender" (*my translation*).

Referring to victims of hate crimes, they belong to the category of "particularly vulnerable" victims, as set out by Art. 90-quater of Italian Criminal Procedure Code:

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[64] Chirico, S., Gori, L., Esposito, I. (2020), p. 8.

"(Condition of particular vulnerability). - For the purposes of the provisions of this Code, the condition of particular vulnerability of the offended person shall be inferred not only from the age and the state of infirmity or mental deficiency, but also from the type of offence, the manner, and the circumstances of the act for which proceedings are brought. For the assessment of the condition, account shall be taken of whether the act is committed with violence to the person or with racial hatred, whether it is related to organised crime or terrorism, including international terrorism, or trafficking in human beings, whether it is characterised by discrimination, and whether the offended person is affectively, psychologically, or economically dependent on the offender" (*my translation*).

The decisive turning point of this Decree is represented by the fact that its language, its wording (state of infirmity or deficiency of the victim, crime motivated by racial hate, or discrimination) permit to include among particularly vulnerable victims, people with disabilities, victims of ethnic and racial motivated crimes and, more in general, all victims of discrimination-based crimes (as, for example, those motivated by homophobia and transphobia), resulting in a strengthened protection of the victim and psychological support regardless of the age of the victim[65].

1.1.2.7. Aggravated defamation (Art. 595 Criminal Code)

Moving forward to the cyberspace dimension, in the Italian legal context, acts of online hatred may constitute the offence of aggravated defamation not only due to the means of communication used (Art. 595(3) of the Criminal Code), but also because of the aims of racial hatred, pursuant to Art. 3, Law No. 205/1993: those who have acted motivated by purposes of discrimination or ethnic, national, racial or religious hatred shall be punished, according to the law[66]. In other words, in case of publication of posts with defamatory content within social networks (e.g., Facebook), a particularly strict interpretation has been affirmed, according to which the use of the Internet integrates the aggravated hypothesis provided for in the third paragraph of Art. 595 of the Criminal Code (offence committed by any other means of communication), "since the particular diffusivity of the

[65] Chirico, S., Gori, L., Esposito, I. (2020), pp. 8-9.
[66] Buffagni. E. (2022), p. 3.

means used to propagate the offending message makes the agent deserving of more severe treatment for criminal offence"[67]:

Art. 595 Criminal Code: "Whoever […], by communicating with several persons, offends the reputation of others, shall be punished with imprisonment of up to one year or a fine of up to one thousand thirty-two EUR.

If the offence consists in the attribution of a specific fact, the punishment shall be imprisonment of up to two years or a fine of up to two thousand sixty-five EUR.

If the offence is committed by the press or by any other means of communication, or in a public speech, the penalty shall be imprisonment for a period between six months and three years or a fine of not less than five hundred and sixteen EUR.

If the offence is committed against a political, administrative, or judicial body, or against one of its representatives, or against an Authority, the penalties are increased" (*my translation*).

In order to integrate this offence, "the requirement of communication with several persons must be presumed where the defamatory message is posted on an Internet site, intended to be normally visited within a very short period of time by an indeterminate number of persons". In the field of criminal law, the Supreme Court of Cassation has addressed the issues related to defamatory messages posted on Facebook, and has come to state that: "a. for the purposes of the crime of defamation it is sufficient that the person whose reputation is harmed is identifiable by a limited number of persons irrespective of the fact that her/his name is indicated[68]; b. the offence of defamation does not require the specific intent, it is sufficient the awareness of uttering a sentence damaging the reputation of others and the intention that the sentence should come to the knowledge of several persons, even only two, for the existence of the subjective element of the offence[69]". The Supreme Court of Cassation has furthermore stated that "the dissemination of a message in the manner permitted by Facebook dashboard has potentially the capacity to reach an indeterminate number of persons, both because, in common experience, dashboards of that nature enclose an appreciable number of people (without whom the Facebook dashboard would make no sense) and because the use of

[67] Sirotti Gaudenzi, A. (2019), p. 138.
[68] Cass., Sect. I, 22/01/2014, No. 16712. https://www.penale.it/page.asp?mode=1&IDPag=1265
[69] *Ibidem.*

Facebook integrates one of the modalities by means of which groups of people socialise their respective life experiences, enhancing first and foremost the interpersonal relationship, which, precisely because of the medium used, takes on the profile of an interpersonal relationship extended to an indeterminate group of adherents for the purpose of constant socialisation. Therefore, if that comment is considered to be offensive, the relevant conduct falls within the codified typification described by the third paragraph of Article 595 of the Criminal Code", since it has the power of reaching an indefinite number of users and therefore the victim's reputation will suffer from it[70] [71].

1.1.2.8. ISP liability

If in the 1990s the provider was considered personally responsible even though the offence was committed by the recipient of their services, in 2000 the EU legislator decided to introduce a special regime for the liability of the access provider, the cache provider and the host provider for unlawful information and content generated by users, with the aim of harmonising the national laws of the Member States. The special regime was defined in the Legislative Decree 70/2003, which drew inspiration from Directive 2000/31/EC; it contains the conditions that must be fulfilled by the provider to benefit from an exemption from liability for an unlawful act caused by information and content transmitted or generated by recipients of information society services. "According to Articles 14, 15, 16, and 17, it is necessary that the provider performs the activities of access, cache, and host in a passive manner, i.e., it is not required to be aware of or control the content it transmits or stores at the will of the users[72]. However, if the Internet Service Provider has been notified and it did not take any action to eliminate the content and restore the initial situation, it will be considered liable, according to Art. 2043 Civil Code; the liability of the Internet Service Provider, therefore, takes the form of negligent liability in the case it is aware of suspicious material and refrains from ascertaining its

[70] Sirotti Gaudenzi, A. (2019), p. 139.

[71] Court of Livorno, 31/12/2012, No. 38912. https://onelegale.wolterskluwer.it/document/uff-indagini-preliminari-livorno-sent-31-12-2012-n-38912/10SE0001267464?searchId=2057766312&pathId=a34dd9466ae4e&offset=0&contentModuleContext=all

[72] Smorto, G., & Quarta, A. (2020), pp. 278-283.

unlawfulness and removing it, and intentional when it is also aware of the unlawfulness of the user's conduct and once again fails to take action[73] [74] [75].

1.1.3. Civil remedies

There is a widespread tendency for the allegedly defamed to prefer civil remedies for compensation for damages[76].

1.1.3.1. Italian tort law

The Italian Civil Code systematizes, first with broader rules, then with more particular provisions, the abstract rules on torts (articles 2043 et seq.)[77]. In particular, Art. 2043 C.C. states that:

"Any intentional or negligent act, which causes unjust damage to others, obliges the perpetrator to compensate the damage" (*my translation*).

The rule introduces the so-called non-contractual liability that arises, briefly, when a person suffers damage from the conduct of others and there is no obligatory relationship between them. The principle underpinning non-contractual liability is the *neminem laedere* principle, according to which each citizen is obliged to refrain from infringing

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[73] *Ibidem.*

[74] Sirotti Gaudenzi, A. (2019), p. 140.

[75] Court of Cassation, Sect. 1, 7708/2019, RTI v. Yahoo!, "The active hosting provider is the provider of information society services who performs an activity that goes beyond a merely technical, automatic and passive service, and instead engages in active conduct, participating with others in the wrongdoing, so that it remains exempt from the special regime set forth in Article 16, Legislative Decree No. 70 of 2003, since its civil liability must be governed by the common rules. In the context of information society services, the liability of the hosting provider, provided for in Legislative Decree No. 70 of April 9, 2003, Art. 16, applies to the service provider who has failed to immediately remove illegal content, as well as if it has continued to publish it, even if the following conditions are jointly met: (a) it has legal knowledge of the unlawfulness perpetrated by the recipient of the service, either through having been informed of it by the owner of the injured right or *aliunde*; (b) the unlawfulness of the conduct of others is reasonably ascertainable, so that it is in grave fault for not having positively ascertained it, in accordance with the degree of diligence that is reasonable to expect from a professional network operator at a given historical moment; (c) it has the possibility of taking useful action, since it has been made sufficiently specific aware of the unlawfully placed content to be removed. It remains entrusted to the judge to ascertain the fact whether, from the technical-informatics point of view, the identification of videos, disseminated in violation of the rights of others, is possible through the mere indication of the name or title of the broadcast from which they are taken, or, instead, it is indispensable, for this purpose, the communication of the URL address, in the light of the conditions existing at the time of the facts. https://onelegale.wolterskluwer.it/document/cass-civ-sez-i-19-03-2019-n-7708/44MA0002701498?searchId=848534685&pathId=b128aafa21cb7&offset=0&contentModuleContext=all

[76] Peron, S. (2019), p. 338.

[77] Brutti, N. (2019), p. 81

the legal sphere of others (Art. 2 of Constitution). Unfair damage refers to consequential damage, which indicates what the harmful consequences are, economically assessable, that, deriving from the lesion of the good, confer the right to compensation. A distinction is made between patrimonial damage, i.e., injury to the subject's economic assets, and non-patrimonial damage, which consists of injury to the person's interests not having economic significance.

1.1.3.2. Non-pecuniary damage

It comprises the biological damage, moral damage, and existential damage (Art. 2059 Civil Code)[78]. Art. 2059 of Civil Code states:

"Non-pecuniary damage must be compensated only in cases determined by law" (*my translation*).

Non-pecuniary damage identifies the prejudice that arises from injury to personal rights and has no economic significance. The categories of non-pecuniary damage consists of: a. moral damage, as a transitory disturbance of the state of mind; b. biological damage, i.e. the psycho-physical injury to the person, subject to medico-legal assessment, that affects his daily life and his relationships, but which is independent of his income capacity; c. existential damage, which, by damaging other constitutionally protected rights, compromises the possibility of performing the activities that make up the human person[79]. Therefore, the injury of the right to honour, reputation, image, personal identity, etc. gives the injured the right to receive compensation for the damage, regardless of whether the offence constitutes a crime. For the purposes of compensation, it is completely irrelevant whether the act was committed intentionally or negligently[80]. In other words, it deals with the violation of constitutionally protected rights, the breach of those constitutes an offence.

Zecchin proposes that non-pecuniary damage should be compensable only in the presence of an "injury to a subjective juridical situation of the person". However, the notion of subjective juridical situation is very broad and describes the position held by the subject in a given legal relationship. The concept of "inviolable right", referred to in

[78] Civil Code, Art. 2043. https://www.brocardi.it/codice-civile/libro-quarto/titolo-ix/art2043.html
[79] Civil Code, Art. 2059. https://www.brocardi.it/codice-civile/libro-quarto/titolo-ix/art2059.html
[80] Peron, S. (2019), p. 338.

Article 2 of the Constitution, is equivalent to fundamental rights and human rights. Fundamental rights and human rights do not coincide with any subjective position of the person (e.g., property) and therefore one can undoubtedly continue to rely on the selective capacity of the notion of "inviolable right" to act as a filter for the purposes of compensation for non-pecuniary damage, placing the person as the core. It would therefore seem that the correct filter to be included in Article 2059 of the Civil Code is precisely that of the injury of "an inviolable right of the person". This not only corresponds to the terminology adopted by jurisprudence, but also guarantees an effective limitation of the hypotheses in which non-pecuniary damage is indemnifiable in the extra-contractual sphere. The notion of inviolable right coincides with the notion of human rights and the latter encompasses the entire range of personal rights, thus embracing the totality of personality rights[81].

According to Art. 1226 of Civil Code, "If the precise amount of the damage cannot be proven, it shall be assessed by the court on an equitable basis" but, given the difficulty of liquidating that typology of damage, the Judicial Tables (first and foremost, Milan tables) were created to liquidate biological damage[82].

Non-pecuniary damages are mostly recognised "limited to subjective non-material damage, understood as inner suffering (disturbance, discomfort, embarrassment, even if transitory) following the dissemination of the defamatory writing". In this hypothesis, the proof of the damage, is "resolved in the demonstration of two conditions, consisting into the existence of a fact producing prejudicial consequences and the suitability of the same to generate a 'painful' repercussion in the personal sphere of the

[81] Christandl, G. (2020), pp. 248-249-250.
[82] https://www.brocardi.it/codice-civile/libro-quarto/titolo-ix/art2059.html

injured party". Moreover, this second condition can be proved by recourse to common knowledge and by simple presumptions (Art. 2729 C.C.)[83] [84].

1.1.3.3. Judicial Tables: parameters of damages liquidation

From the point of view of the civil liability, and in particular the reparation of non-pecuniary damage, the Judicial Tables (mostly Milan ones) appropriately emphasise that the measure of the *quantum* cannot be the same when the wrongful act is criminally irrelevant or when it constitutes a negligent offence, or when, on the other hand, the offence is intentional: the concrete case requires a remedial treatment consistent with the general sense of the remedy and with the specific sense of the compensation claim formulated by the victim[85].

The Observatory on Civil Justice in Milan analysed the parameters of liquidation of damages for defamation by means of the press used by the jurisprudence in order to verify the possibility of identifying guiding criteria for the equitable quantification of such damages. Among the parameters used by the case law collected for the liquidation of damages, we find a. notoriety of the defamer; b. institutional or professional role held by the defamed person; c. nature of the defamatory conduct (whether it affects the personal and/or professional sphere, whether it violates the truth and/or also the interdependence of lawsuits and relevance, whether it is circumstantial or generic, whether insulting,

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[83] Cass., sec. III, Oct. 26, 2017, No. 25420: "With regard to compensation for damage caused by defamation by means of the press, it is not necessary for the victim to be precisely and specifically named, provided that their identification takes place, in the absence of an explicit named indication, through all the elements of the concrete case (such as the objective and subjective circumstances narrated, the personal and temporal references), which may also be inferred from sources in the public domain at the time of the dissemination of the offending news other than the offence in question, if the factual situation is such as to enable the public to recognise with reasonable certainty the person to whom the news is referred". In: https://onelegale.wolterskluwer.it/document/cass-civ-sez-iii-ordinanza-26-10-2017-n-25420-rv-646634-04/44MA0002646888?searchId=2064365942&pathId=54d5ad5ddd267&offset=2&contentModuleContext=all

Cass., sec. III, May 25, 2017, No. 13153: "On the subject of compensation for damage caused by defamation by means of the press, the liquidation of non-pecuniary damage presupposes a necessarily equitable assessment, which is not open to censure in the Court of Cassation, provided that the criteria followed are set out in the grounds and are not manifestly inconsistent with the concrete case, or radically contradictory, or macroscopically contrary to data of common experience, or the result of their application is particularly disproportionate by excess or default". In: https://onelegale.wolterskluwer.it/document/cass-civ-sez-iii-ordinanza-25-05-2017-n-13153-rv-644406-01/44MA0002613198?searchId=2064366197&pathId=4d4679340afc1&offset=6&contentModuleContext=all

[84] Peron, S. (2019), p. 339.

[85] Grondona, M. (2021), p. 419.

denigrating or de-qualifying expressions are used, use of profanity, possible criminal relevance of the conduct); d. repeated conduct, press campaigns; e. placement of the article and headlines, space that the defamatory news occupies within the article/book/television or radio broadcast; f. intensity of the psychological element of the author of the defamation (whether there is *animus diffamandi*, whether it is intentional); g. means by which the defamation was perpetrated and its dissemination, including the online edition of the newspaper […]; h. media resonance aroused by the defamatory news attributable to the defamer (e.g., false scoop with the awareness of initiating defamatory press campaign, or news given to an agency such as ANSA that spreads it universally); i. nature and extent of the consequences on the professional activity and life of the defamed, whether concrete damages are highlighted or not; j. reputation already compromised (e.g. involvement in criminal proceedings); k. limited recognisability of the defamed person (e.g. photos of one's back, no name indication); l. large time lapse between the fact and lawsuit; m. later correction and/or space given to corrective statements by the defamed party or refusal of the same; n. publication of the sentence. Through these criteria, five kinds of defamation cases, based on the seriousness level, have been identified and the respective sums for the liquidation of the damages have been stated[86].

In short, in the area of compensation of damage for personal injury, where the problem of evaluating in monetary terms an interest that cannot be measured in money was to be addressed, Articles 1226 and 2056 of the Civil Code unequivocally attribute to the Judge the power/duty to fix the compensation level himself when the damage is certain but difficult to determine. Judges have therefore determined the "fair" compensation in accordance with the provisions of the system through the creation of an instrument capable of guaranteeing uniformity in the assessment of personal injury, in homage to the general principle of equality, proceeding to a constitutional interpretation of Article 2059 of the Civil Code between the constitutionally protected interest of the person and the existence of an inviolable right[87]. The categories of non-pecuniary

[86] Osservatorio sulla Giustizia civile di Milano (2021). Tabelle milanesi per la liquidazione del danno non patrimoniale – edizione 2021. https://www.ordineavvocatimilano.it/media/allegati/uffici_giudiziari/TABELLE_DANNO_NON_PATRIMONIALE_2021/OssGiustiziaCivileMI%20-%20Tabelle%20milanesi_Danno%20non%20patrimoniale_ed-%202021.pdf

[87] Ponzanelli, G. (2021), p. 401-402.

damage, previously referred to as "biological damage" and "moral damage/subjective suffering", are currently defined as "biological/dynamic-relational damage" and "damage from inner subjective suffering", consequent to the lesion of ascertained psychophysical integrity[88]. In the hypothesis of defamation, from it also derives a permanent impairment of psycho-physical integrity. In this case the compensation for biological damage will not be sufficient to compensate the damage since it is also necessary to liquidate the different damage separately and independently from injury to reputation[89].

1.1.3.4. The new Milan Tables

In 2020 the Supreme Court of Cassation[90] had intervened, considering that the way of liquidating the moral damage envisaged by the Tables themselves was no longer in conformity with the law: since moral damage cannot be ascertained at a medico-legal level, it cannot be predetermined at a tabular level. The new Milan Tables (10 March 2021) showed how the moral component of personal injury is considered in an autonomous manner, having been separated from the unitary item of non-pecuniary damage: by doing so, the Tables met the indications of the Supreme Court of Cassation[91]. The attempt is to reconcile the need for an equitable settlement of non-pecuniary damage relating to health that is adequate and congruous with respect to the individual case with the need for predictability and uniformity of judicial settlements on the national territory, also to facilitate the settlement of disputes. The novelty of the new Milan tables of 2021 consists, in the addition to the all-inclusive average values (basic table), of increase percentages for personalisation for the concrete case that presents distinctive characteristics to be attached and proved, even if only presumptively, related to both "anatomo-functional and relational aspects" and "aspects of subjective suffering" (e.g.,

[88] Ponzanelli, G. (2021), p. 405.

[89] Monateri, P. G. (2021), p. 422.

[90] Civil cassation, Sect. work, 29 March 2018, n. 7840. Biological damage, understood as damage to health, non-material damage, i.e., inner suffering, and dynamic-relational damage, defined as existential, thus constitute, according to the case law of this Court, the components of the unitary non-asset damage and give rise to a global and not an atomistic assessment of individual types. It follows that, in the case of failure to liquidate the so-called moral damage, it is necessary that the appellant, when appealing against the sentence, does not limit himself to insisting on the separate liquidation of this item of damage, but clearly articulates the grievance as an erroneous exclusion, from the total obtained by applying the so-called "Milan tables", of the components of damage other than that originally described as "biological damage", failing which the censure is inadmissible given the basically all-inclusive nature of the provisions of the above tables. (Cass. no. 20111/2014). *Giurisprudenza italiana,* 2018, 5, 1043.

[91] Ponzanelli, G. (2021), p. 403.

in the case of permanent impairment)[92]. It follows that the sanctioning value of the tables, although concealed by the assumption "it is undoubted that the intensity of the psychophysical suffering suffered by the primary or secondary victim is greater", remains present in the provision of an increase or decrease in the *quantum* liquidated in case "of a wilful crime", combining compensatory criteria with sanctioning criteria[93].

1.1.3.5. Punitive function of non-pecuniary damage

The nexus between reparatory and punitive damages is now discussed.

Biological damage is dynamic-relational damage and moral damage is damage from subjective inner suffering. An average presumable suffering, ordinarily consequent to the ascertained lesion of psychophysical integrity. This means that even what is exceptional, anomalous must find relief and redress. It follows then that existential damage in the logic of the effectiveness of the remedy, cannot be marginalised: the existential damage is an inner subjective suffering, and may well be the ordinary consequence of the damage to health. What can, even significantly, vary is the intensity of that suffering, hence the shift from ordinary to exceptional, in terms of consequential damage[94]. The biological damage is in turn both damaging event and consequential damage: damaging event is a constituent element of Article 2043 of the Civil Code and occurs in the presence of an injury to a subjective legal situation and unjust damage; on the other hand, consequential damage can be defined as the parameter for determining unjust damage[95]. If on the one hand, the "pure interior suffering" is in essence subject to the mere equitable discretion of the judge, on the other hand, the *pretium doloris*[96], the compensation for which was governed by Article 2059 of the Civil Code, had a clear punitive/restorative function. Therefore, non-pecuniary damages are poorly compatible with the compensatory function since it is impossible to restore the initial condition of the defamed[97].

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[92] Comandé, G. (2021), p. 405-406.
[93] Comandé. G. (2021), p. 406.
[94] Grondona, M. (2021), p. 419.
[95] Caruso, V. (2016), p. 1.
[96] The pecuniary compensation owed by the offender to the victim who has suffere0d, as a result of the crime, psycho-physical suffering (pain, anguish, anxiety) or social prejudice (discredit from defamation), i.e., in general, non-pecuniary but non-material damage. It is not intended to restore the victim's assets, but to give him/her satisfaction to compensate for the harm suffered. Sometimes, it may also apply to a legal person (e.g., a company subject to a defamatory campaign). https://dizionari.simone.it/3/pretium-doloris
[97] Pardolesi, R., Simone R. (2021), p. 429.

In conclusion, the Tables aim to ensure the effectiveness of the protection of the person, especially with respect to the hypothesis of injury to fundamental rights, which are open in number and, for historical and cultural reasons easily ascertainable even by the jurist, constantly expanding[98]. The sphere of moral damage cannot be circumscribed within the scope of damage resulting from only injury to health. In this specific case, moral damage takes on a determined attitude that, presumably, and by application of the equitable criterion, conforms to the gravity of the injury to health itself, since, and to the extent to which, it derives from it[99].

In Italy today, compensation for personal injury is liquidated to a large extent by the Milan Tables, the most reliable and complete system, so much so that in 2011 the Court of Cassation had given them a para-normative role. However, in a position of subalternity, and with a much more limited diffusion, the Rome and Triveneto Judicial Tables had been formed and spread, and still exist. It seems inconceivable that three possible ways of settling personal injuries could coexist within the Italian State and that the injured party would obtain different compensation for an identical injury depending on the place of the lawsuit[100]. It constitutes a dangerous *vulnus* of the primacy of jurisprudence. A divided jurisprudence is not an authoritative one, it becomes more attackable and cannot fail to attract the attention of the lawmaker. The plurality of Judicial Tables reveals that Italy does not recognise the same compensatory value for injuries suffered by injured persons in the various parts of the national territory. It also clashes with the general principle of equality (Article 29 of the Constitution). The same Judicial Offices that drew up the three Tables must realise that the presence of a plurality of Judicial Tables is not acceptable and that the existing differences on the monetary determination must be overcome[101].

1.1.4.Other initiatives: AGCOM

The Italian Regulatory Authority of Communication (AGCOM) "recognizes that the rise of online platforms and their impact on disinformation require a profound rethinking of the existing regulatory framework pursuing the objectives of fair competition, media

[98]Grondona, M. (2021), p. 417.
[99] Monateri, P. G. (2021), p. 421.
[100] Ponzanelli, G. (2021), p. 433.
[101] Ponzanelli, G. (2021), p. 402.

pluralism, and protection of fundamental rights of Internet users, and it is currently promoting voluntary approaches and cooperation with online platforms to safeguard pluralisms and fair information in the online news media system. In November 2017, by adopting its Decision 423/17/CONS, AGCOM established the *"Tavolo tecnico per la garanzia del pluralismo e della correttezza dell'informazione sulle piattaforme digitali"*[102], with the aim to create an institutional forum in order to encourage self-regulatory solutions and the exchange of good practices for identifying and contrasting online disinformation. At the meeting were present representatives of Google, Facebook, Wikipedia and of the major press and broadcasting.

Finally, the Resolution N. 157/19/CONS[103] (AGCOM Regulation) states that Providers of audio-visual and radio video services subject to Italian jurisdiction are called to ensure respect for human dignity and the principle of non-discrimination and contrast instigation to violence and hatred towards groups of people or members of such groups defined with reference to sex, racial or ethnic origin, religion, disability, age, or sexual orientation and any other characteristic or personal situation. The creation of Codes of conduct is promoted in order to denounce violations of standards and encourage forms of coregulation of platforms. As a matter of fact, audiovisual and radio media service providers are called to guarantee the fundamental principle of human dignity against all forms of discrimination and eliminate any reference which could lead to "incite, promote or justify" hate speeches, ideas, propaganda or, in extreme cases, to violence, disorder and crime against a person or groups of people. As stated throughout the entire paper, freedom of expression should be placed in the background when human dignity is at a critical stage. It will be task of the Authority to monitor compliance with the provisions of the Regulation in respect of the rights and freedom of expression and information.

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[102] https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/ContentRegulation/Italy.docx

[103] Ministry of foreign affairs and international cooperation - Inter-ministerial Committee for Human Rights. Italy's contribution and submission to the study on social media, search and freedom of expression. https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=15055471&_101_INSTANCE_FnOw5lVOIXoE_type=document

1.2. Case law

1.2.1. Criminal Cassation sec. I, 22/05/2015, no. 42727[104]

In the decision under comment, the Supreme Court upheld the legitimacy of the sentence of thirteen months' imprisonment (in addition to the accessory penalty and compensation in favour of the constituted civil parties), established by the Court of Appeals of Venice against Ms. V.D., for the crime referred to in Article 3(1)(b) of Law No. 654 of 1975, aggravated under Article 61(10) of Criminal Code, for having published on the social network Facebook profile the phrase "She should be raped so as to understand what the victim of this heinous crime may feel, shame" accompanied by a photo of the then Minister of Integration, Cecile Kyenge, thus inciting racially motivated violence against the latter[105].

Fact

1. With sentence dated 17.4.2014, the Court of Appeal of Venice confirmed the decision by which the Court of Padua sentenced V.D. to one year one month of imprisonment, in addition to the accessory penalty and to compensation in favour of the civil parties constituted for the crime referred to in Law no. 654 of 1975, Art. 3 (1)(b), aggravated pursuant to Art. 61 of the Criminal Code, no. 10, for having published on his social network Facebook profile the sentence "She should be raped so as to understand what the victim of this heinous crime may feel, shame" accompanied by a photograph of K. C., Minister for Integration, thus inciting to commit racially motivated violence against her, committing the act because of the public function exercised.

The territorial court noted that the defendant had not denied the fact, justifying her behaviour by saying that it was an impulsive gesture, as she was particularly shocked by the news of sexual violence committed by a foreigner since her daughter had been the

[104] Criminal Cassation sec. I, 22/05/2015, no. 42727. https://onelegale.wolterskluwer.it/document/cass-pen-sez-i-sent-data-ud-22-05-2015-23-10-2015-n-42727/10SE0001616882?searchId=2057773463&pathId=e53bb36282704&offset=0&contentModuleContext=all

[105] Siliberti, A. (2016). Il reato di istigazione alla violenza per motivi razziali. *Cassazione Penale (5),* 2019-2025.

victim of a similar act [by foreign citizens]; she had, however, denied malicious intent towards the minister.

2. V., through her lawyer, appealed against the above-mentioned judgement, denouncing the violation of the law in relation to the configurability of the offence referred to in Article 3 (1)(b) of Law no. 654 of 1975, with particular reference to the existence of racial motives and incitement to commit violence.

She also denounces the defective reasoning due to the obvious contradiction and illogicality of the contested sentence and claims the violation of Article 3 of the Constitution.

The defendant highlights that the crime in dispute requires specific intent and, in any case, racial motives are a constitutive element of the offence, whereas in the present case no certain proof of such element has been acquired, since in the sentence transmitted via social network there is no reference to the race or ethnicity or nationality of Minister K., given that the photograph of her was already present. The defendant at trial provided an adequate explanation of the reasons for the phrase used, which excludes the racist purpose, as confirmed by all the witnesses examined who stated that they had conferred with the defendant in the hours following the event; therefore, the racist prejudice was considered on the basis of mere presumption.

She excludes that incitement to violence can be considered configurable in the light of the meaning of the expression used, even taking into account the medium used and its widespread diffusion […]. Moreover, the intent of incitement, in the sense of the will to convince and persuade the public to commit acts of violence, has not been proved, since the fact that third parties had commented on the incriminated sentence could not be relevant for this purpose.

Moreover, the message sent by the defendant is an expression of the freedom of thought guaranteed by Article 21 of the Constitution and Article 10 of the ECHR. […]

Lastly, the defendant complains of the unequal treatment with reference to other proceedings concerning similar, indeed more serious, comments against the same minister, which ended with the dismissal of the case.

Considered in law

The judgement - read in conjunction with the first instance judgement, expressly referred to - correctly recognised in the overall conduct of Ms. V., who had posted the

message described in the indictment commenting on an article published on a website specialised in the publication of "immigrant crimes" in which an attempted rape of an Italian woman by an African man was mentioned, an act of objective incitement and provocation to violence that cannot be limited to the expression of regret for the episode commented on.

The case punishing incitement to violence committed on racial, ethnic, national, or religious grounds, outlined in Article 3(1)(b), as subsequently amended, configures a crime of danger with specific intent, where the agent acts with the consciousness and will to offend the dignity and safety of the victim on account of ethnic, religious or racial factors and is perfected regardless of whether the incitement is received by the recipients (Sect. 3, no. 7421 of 10/01/2002, Orrù, rv. 221689).

The concrete and intrinsic capacity of incitement to violence may take the forms of incitement, exaltation, persuasion and must be assessed with reference to the specific context in which it is performed.

In the present case, agreeing with the assessments of the first judge, the Court of Appeal excluded the congruity of the justifications put forward by the defendant in order to contradict the configurability of the case.

The first judge, in fact, correctly highlighted that there was instigation [...] where instigating means behaving in such a way as to cause others to take violent action. That the defendant's conduct had led to such a danger was considered taking into account the expressions and the medium used to publish them, which ensures widespread dissemination, and the context in which this occurred, characterised by a heated debate concerning an episode of sexual violence against an Italian woman by an African man. It was also reasonably assessed, even though it was irrelevant for the purposes of the configurability of the offence, that the incitement was received by the addressees, that the sentence published by V. could not be considered devoid of possible effects also in view of the content of the subsequent comments, provoked by the defendant's intervention.

In the same way, in the present case, the phrase disseminated, by its very tenor ("She should be raped"), cannot objectively represent an expression of freedom of thought, guaranteed by Article 21 of the Italian Constitution; moreover, it has been affirmed on several occasions that the freedom of thought ceases when it crosses over into incitement to discrimination and racist violence, not having absolute value and having to be

coordinated with other constitutional values of equal rank, such as those established by Article 3 of the Italian Constitution, and by Article 117(1) of the Constitution (Sec. 3, no. 37581 of 07/05/2008, Mereu, rv. 241071).

With regard to racial motives, the territorial Court considered it evident that the comment on the news of a sexual assault by a Somali in the presence of the photograph of Minister K. makes explicit the link between the perpetrator of the violence and the minister; thus, the content of the comment published can only express a racist prejudice under which the violence was desired. In fact, the judges of first instance acknowledged that the defendant was unable to give any other justification, recognising that following the episode commented on there had been no intervention by the minister that could justify the link. Therefore, with entirely logical reasoning anchored to the factual circumstances ascertained in the trial, the judges excluded any alternative interpretation of that explicit invitation to rape against the minister, deserving so much for the mere fact of sharing with the author of the event commented on the geographical origin and skin colour, i.e. race, the circumstance that the photograph of the minister had been published by a third party being totally irrelevant. And such would be the case even if it were to be held that the sentence referred to the minister as being responsible for working for the equality and integration of immigrants.

Therefore, since there is no doubt - as the judges rightly pointed out - that the appellant's conduct externalizes, in the context in which it took place, a perceptible feeling with reference to race, an invitation to violent action referable to a person's geographical origin or ethnic origin, the case in dispute was correctly configured.

Lastly, the appellant's objection as to the alleged unequal treatment with reference to other proceedings concerning similar comments against the same minister, which ended with the case being dismissed, is unspecific, as well as lacking self-sufficiency due to a lack of allegations.

It must be concluded that the appeal should be dismissed, and that the appellant should be ordered to pay the costs.

The offence of incitement to violence and acts of incitement committed for racial, ethnic, national or religious reasons, provided for by Article 3(1)(b) of Law no. 654 dated 13 October 1975, as amended, is a crime of danger that is committed regardless of

whether the incitement is accepted by the addressees, since it is nevertheless necessary to assess the concrete and intrinsic capacity of the conduct to determine others to commit a violent action with reference to the specific context and the manner in which the act was committed. (Applying this principle, the Court held that the contested judgement was not vitiated when it found that the crime of incitement to violence on racial grounds existed in view of the content of the expressions used, the means of communication employed - the noticeboard of a Facebook profile - and the social and political context in which the event took place)[106].

1.2.2.Criminal Cassation, Sec. I, 9/02/2022 (hearing 6/12/2021), no. 4534[107]

The likes on anti-Semitic posts published in social networks constitute a serious indication of the crime of incitement to racial hatred. Indeed, liking not only demonstrates, cross-referenced with other evidence, adherence to the group's virtual Nazi-fascist group, but contributes to the greater dissemination of a message, already in itself capable of reaching an indeterminate number of people[108].

Fact

Omissis. - By order passed on June 25, 2021, the Court of Rome, pursuant to Article 309 of the Code of Criminal Procedure, has confirmed the order in which the investigating judge had applied to G.R. the precautionary measure of the obligation to report to the judicial police in connection with the crime under Art. 604-bis (2) of Criminal Code., and the crime under Art. 604-bis and 604-ter of the Criminal Code, excluding the aggravating circumstance set forth in Art. 604-ter of the Criminal Code.

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[106] *Cassazione Penale (5)(2019).* https://dejure.it/#/ricerca/giurisprudenza_documento_massime?idDatabank=0&idDocMaster=5066438&idUnitaDoc=0&nVigUnitaDoc=1&docIdx=0&semantica=1&isPdf=false&fromSearch=true&isCorrelazioniSearch=false

[107] Criminal Cassation, Sec. I, 9/02/2022 (hearing 6/12/2021), no. 4534. https://onelegale.wolterskluwer.it/document/cass-pen-sez-i-sent-data-ud-06-12-2021-09-02-2022-n-4534/10SE0002486203?searchId=2057775087&pathId=ee279a044f0b1&offset=0&contentModuleContext=all

[108] Criminal Cassation, Sec. I, 9/02/2022 (hearing 6/12/2021), no. 4534. *Giurisprudenza italiana (2022)(6),* 1476-1477.

According to the judges, the investigative findings constitute a sufficient circumstantial basis, due to its gravity, to consider both crimes to exist and to ascribe them to G.

The monitoring of the interactions of three separate social platforms, not having a private nature, operating on Facebook, VKontacte and Whatsapp had unveiled not only the creation of a virtual community (omissis) characterized by extreme right-wing neo-Nazi ideology, having among its purposes propaganda and incitement to discrimination on racial, ethnic and religious grounds, but also the perpetration of multiple crimes of propaganda of online ideas based on anti-Semitism, denialism, affirmation of the superiority of the white race as well as incitement to violence for the same reasons.

From the same investigative activity as well as from some telephone conversations it had emerged that G. had joined the group (omissis), he met in person some of the main exponents (B.M.), and had repeatedly contacted the social platforms of the virtual community, through the use of accounts attributable to him, allowing, by the insertion of "likes," the relaunching of "posts" and related comments with negationist/denialist and anti-Semitic content. (omissis).

2.1. In its first plea, it alleges violation of the law in relation to Article 604-bis of the Criminal Code and failure to state reasons regarding the recurrence of the criminal case. The measure did not provide an incisive reply to the defence assessments on the lacunose and poor nature of the circumstantial compendium against G. He, in fact, continued to emphasize in an accusatory tone the physical contacts between the alleged adherents of the organization, despite the fact that they are completely totally irrelevant in light of the type of crimes charged, which exclusively sanction the propaganda of ideas on online and the dissemination of messages, as well as the posting of only "three likes", which constitute, at most, an expression of approval and are in no way demonstrative of either group membership or the sharing of illicit purposes. The content of the posts in which G. inserted the "like" never flows into anti-Semitism and does not cross the boundaries of freedom of thought. No message is capable of influencing the behaviour or psyche of a wide audience and to gather adherence in the terms required by the widely cited case law, which considers necessary for the integration of the crime the concrete danger of discriminatory behaviour.

2.2. By its second plea, it alleges violation of the law and failure to state reasons in relation to the alleged danger of recidivism and with regard to the adequacy of the precautionary measure applied.

The court found his clean criminal record irrelevant and the repentance not genuine without providing adequate justification; […]

The peculiarity of the position of G., who, in addition to being without a criminal record, is that he contributed in a very limited way to the perpetration of the crimes; this justified a different assessment in the pre-trial proceedings than the other suspects, who had a far more substantial circumstantial compendium.

(Omissis).

Both pleases do not pass the preliminary statement of eligibility.

1. *[…] The court logically inferred the membership of G. to the virtual community, having the purposes envisaged by the norm, not only from his frequent, physical and repeated relationships with other users, but also from his multiple manifestations of adherence to and sharing of the messages on Facebook, VKontacte and Whatsapp platforms dashboard with clear negationist, anti-Semitic and racially discriminatory content (identification of Jews as "the real enemy", reference to the Shoa as "the most egregious lie they could have inculcated", mockery of the victims of the extermination camps) and, for the purposes of both the propaganda and the identification in the incitement to hatred as the illicit purpose pursued by the group, it considered as concrete the danger of spreading the messages among an indeterminate number of people, considering the plurality of social networks used and the operating methods of one of these, Facebook, centred on an algorithm that also gives prominence to the "likes," expressed by the defendant.*

   In the latter regard, the judges highlighted that the spread of messages posted on Facebook dashboards, already potentially capable of reaching an indeterminate number of people, depends on the increased interaction with the pages concerned by the users. The "newsfeed" functionality, i.e., the continuous updating of news and activities developed by contacts of each user is, in fact, conditioned by the greater number of interactions that each individual message receives. It is the interactions that allow the visibility of the message to a greater number of users

who, in turn, have the ability to spread the content. The algorithm chosen by the social network to regulate such a system assigns, in fact, a greater value to posts that receive more comments or are marked by the "like".

Finally, the telephone conversations delineate the figure of G. as a member of the virtual community. He not only received pieces of advice to avoid the acquisition of compromising evidence against him (conversation with Bo.Gi. who, being already the subject of searches and seizures, urged him to take specific precautionary measures to avoid detection by deleting chats, address books, and other measures on his cell phone), but he was also the addressee of specific comments from another exponent, B., who had expressed his personal satisfaction at the convinced adherence to the group by G.

2. *The second plea, relating to precautionary requirements, is equally generic and, in any case, manifestly unfounded.*

   The danger of reiteration of the criminal conduct was inferred from concrete and current elements, specifically indicated, namely, from the very recent time of the perpetration of the crimes and the personality of G., who, despite his clean crime record and despite his profession, had not manifested, in the intercepted conversations, any form of critical reconsideration even after having learned of the searches carried out against the other suspects in 2019. On the contrary, he had continued, albeit more cautiously, to remain in the relational and ideological context of the movement.

It constitutes the crime referred to in Article 604-bis(2) of the Criminal Code, membership in a virtual community characterized by neo-Nazi ideological vocation, having among its purposes propaganda and incitement to discrimination and violence on racial, ethnic or religious grounds and sharing, on the dashboards of his/her social platforms, messages of clear negationist, anti-Semitic and racially discriminatory content through "liking" and relaunching "posts" and related comments, due to the high danger of spreading such ideological content among an indeterminate number of people resulting

from the social network algorithm, which increases the number of interactions among users[109].

1.2.3.Court of Turin, Sec. I, 21/04/2020, No. 1375[110]

In order to assess the proper exercise of the right of criticism, it is necessary to ascertain whether the truth has been respected, mitigated by the subjectivity of the critical opinion, of the civilised form of the statement of facts and their assessment, i.e., a form not exceeding the purpose to be achieved and such as to exclude a deliberate denigrating intent in the interest of the general public in the news or fact being criticised[111].

Fact

By means of a summons duly served on [the defendant], the Foundation of Egyptian antiquities museum, in the person of its legal representative pro tempore, sued to order him to pay compensation for the non-pecuniary damage suffered as a result of the damage to image and reputation, following the unlawful publication on the social network Facebook, on 17.1.2018, of a video protesting against the initiative "Lucky those who speak Arabic".

In particular […] at the beginning of December 2017, the Foundation launched, for the second consecutive year, the promotional campaign called "Lucky those who speak Arabic", valid until 31 March 2018 and aimed at offering Arab-speaking citizens the opportunity to visit the museum for two people for the price of a single ticket, with the aim of bringing the Arab community (more than 33,000 in the province of Turin alone) closer to its collections[…].

On 17.1.2018 (...) at the time head of the Young Padans Movement and assistant to the Honourable (...) posted on the Facebook social network (both on his personal and official profile) a video protesting against the aforementioned initiative accompanied by

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[109] https://www.foroplus.it/visualizza.php?pag=1&ndoc=2594370G&sha1=1d491adb13ffa9f1c961f5d54d4f1733313eeddc&ur=MjA4NDcxMQ==&id=massima-2594370G&w=Cassazione%20penale,%20Sez.%20I,%209%20febbraio%202022,%20n.%204534&corr_use

[110] https://onelegale.wolterskluwer.it/document/tribunale-torino-sez-iv-21-04-2020-n-1375/44MA0002764308?searchId=2057777857&pathId=c96bb9858eb77&offset=0&contentModuleContext=all

[111] *La nuova giurisprudenza civile commentata (2020) (6).* 1248-1254.

the post "At the Egyptian museum. free admissions for Arabs. And what about Italians? They pay", with the caption in large letters, "We share this shame" and "Let them hear what we think!".

In the video (...) he pretended to make a speakerphone call to the Egyptian museum to obtain information on possible benefits and, when the (fake) receptionist answered, he polemically criticised the promotion in favour of Arabs which would have realised a case of "reverse discrimination".

The video reached the threshold of one million views in a few days and triggered comments through posts, both on the defendant's dashboard and on the museum's Facebook page, of racist, polemical content and gratuitous attacks against the E.M, accused of "stealing Italians' money".

Between 18 and 20 January 2018, the Museum's booking office received more than 140 telephone calls of insults, threats and offences addressed to the Foundation, to the director and to the operators themselves for the initiative taken, fuelled by the video in question.

On 19 January 2018, the E.M. published on its website, as well as on its Facebook page, a message of warning to the public underlying the dubious authenticity of the video made by (...) who, heedless of the endemic and irreversible effects of his own malicious action, on the same day was interviewed by a journalist of the newspaper "La Stampa" in which he further denigrated the Museum, confirming the truthful nature of the video published, in total bad faith.

On 20 January 2018, the Foundation filed a complaint with the Turin Police Headquarters so that the judicial authorities could conduct the appropriate investigations to verify the authenticity of the published telephone interview and ascertain the existence of any criminal offences.

On behalf of the Foundation, Dr. (...) (researcher at the National Institute of Metrological Research) in a technical report dated 3 February 2018 categorically declared the inauthenticity of the telephone call contained in the video, confirming that it had been "staged" and had been artfully put in place by (...).

Therefore, the Foundation claimed the serious damage to the image, reputation and "brand" of the museum resulting from the defamation perpetrated by the defendant who, with obvious disregard for the boundaries of the right to criticism (truth, continence,

public interest), based his polemic on the artificial reconstruction of a fake telephone call, attributing to the Foundation statements never made by its representatives and falsely stating that it receives State contributions for the performance of its activities

It therefore requested, in addition to the payment of EUR 100,000.00 as compensation for damages, the removal of the video and text content in question from every profile attributable to him on Facebook or other social networks; the prohibition from continuing the unlawful conduct, imposing a reasonable penalty pursuant to Article 614-bis of the Code of Civil Procedure for each day of persistent breach of the removal and/or injunction order, and to pay the costs of the proceedings. (Omissis).

[...] In order to assess, therefore, the proper exercise of the right of criticism, it is necessary to ascertain whether the limits identified by the case law have been respected: truth (objective, or even only putative in the terms indicated above), civilised form of the statement of facts and their assessment, i.e. a form not exceeding the purpose to be achieved and such as to exclude a deliberate denigrating intent in the interest of the general public regarding the news or fact being criticised (see Cass. no. 2357/2018).

With specific regard to the form, the limit of moderation in the right of criticism is exceeded in the presence of expressions that, being seriously defamatory and unnecessarily humiliating, transcend into a mere verbal aggression of the person criticised (see Court of Cassation no. 15060/2011).

The right of criticism may also be exercised in a harsh manner, with open and pungent tones, but with the parameter of the proportion between the importance of the fact and the necessity of its exposition also in a critical key, and must not transcend into personal attacks and aggression aimed at striking, on an individual level, the moral figure of the person criticised (see Court of Cassation no. 17180/2007; no. 22527/2006).

There is no doubt, then, that social networks, although they do not have the informative function typical of newspapers or television news broadcasts, are instruments of mass communication and as such are potentially capable of conveying messages to a large number of people, so that those who use them, such as Facebook users, must be considered to be subject to the same obligations developed by jurisprudence for the exercise of journalistic activity, albeit in a mitigated form considering the type of news published, the person who publishes it and other possible factors. It follows that the publication of a message or video with content damaging the honour and reputation of a

person on the personal profile dashboard - in this case, Facebook - can certainly constitute the offence of defamation aggravated by the use of another means of communication referred to in Article 595 of the Criminal Code, paragraph 3, justifying the right to compensation for damages (cf. Criminal Court of Cassation no. 4873/2016; Criminal Court of Cassation no. 24431/2015 "even the dissemination of a message in the manner permitted by Facebook dashboard potentially has the capacity to reach an indefinite number of people, both because, in common experience, dashboards of such a nature reach an appreciable number of people (without whom the Facebook dashboard would make no sense), and also because Facebook integrates one of the ways in which groups of individuals socialise their life experiences, enhancing first and foremost the interpersonal relationship, which, precisely because of the medium used, [...] is extended to an indeterminate group of adherents for the purpose of constant socialisation. Identified in the aforementioned terms, the conduct of posting a comment on Facebook dashboard therefore achieves the dissemination of it, due to the suitability of the means to determine the circulation of the comment among an indefinite group of persons, so that, if such a comment is offensive, the relevant conduct falls within the Article 595 of the Code of Criminal Procedure, paragraph 3).

The aim and purpose of the initiative were openly misrepresented and distorted, in order to discredit the image of the Museum, urging and inciting the potential social network audience to spread hatred triggered by the fake telephone call and to protest in disproportionately aggressive tones against the discrimination. The damaging conduct adopted by (...) does not lie, in fact, in expressing its own assessment of the initiative launched by the Foundation, this being part of the legitimate exercise of the right to criticism as an expression of the constitutionally guaranteed right to freely express one's opinion (Article 21 of the Constitution), but rather in having "posted" a video with fake content making it appear as real and referable to the Museum and having used it with the declared aim of triggering and encouraging the public of potential viewers to call the Museum's reservation office and express in violent tones their protest against an entirely legitimate initiative, albeit agreeable or not and as such subject to possible criticism.

Nor can it be said to have complied with the requirement of moderation which requires that the opinions expressed regarding the facts exposed are instrumentally linked to the manifestation of a reasoned dissent from the targeted conduct and do not result in a

gratuitous and destructive aggression against the person concerned (see Court of Cassation no. 1434/2015; no. 4545/2012; no. 12420/2008).

[...] The damaging inflammatory conduct carried out by (...) also generated the publication, both on (...)'s Facebook profile and on the Museum's Facebook page, of thousands of posts with racist and gratuitously offensive content against the Museum, as follows (also with spelling mistakes), by way of example:

"Stop stealing money from Italians. ...";

"... the fact is that I, who am Italian, have to pay to enter an Italian museum, whereas a non-EU citizen does not",

"...more and more privileges for foreigners... what a shame that in our house we are treated like this... either we all pay or we don't all pay...",

"this is the most blatant demonstration of a form of racism against Italians",

"They can take the mummies back to Egypt, I won't give a single Euro to pay the salaries of racists against Italians",

"'I would set fire to E.M. with all the Egyptian Muslim Arabs inside",

"the director + all the employees of E.M., salaries would be paid by the Egyptian state + contributions to keep the museum open",

"'This is pure racism and injustice against Italians. Shame, shame and more shame",

"Just called. Call you too UNTIL you are exhausted! Don't just write comments! Pick up the phone, let off steam!!",

"it's a shame that Arabs only have to pay one ticket for two… let yourselves be financed by the Arab countries...you only deserve to close",

"You should only be ashamed of yourselves! ...I hope they take away every cent of Italian funding",

*"But why aren't you and the s***y Arabs ashamed of yourselves?",*

"If you disgust the Italians so much, you might as well give up your lavish salaries, since they come from the pockets of the citizens of this country...".

Incitement to hatred ("hate speech") is a phenomenon characterised by conduct intentionally aimed at inciting intolerance towards individuals, persons, or groups (often vulnerable to discrimination), in such a way as to propagate itself effectively.

[...] with the explicit incitement to call the Museum's offices to express the feeling of "shame", the viewers behave in a way that exceeds the boundaries of the legitimate

manifestation of thought and the right to criticism to become a media attack, in unjustifiably denigrating and aggressive tones, maliciously designed to trigger a wave of hatred.

[…] Ultimately, (...) is ordered to pay to the Foundation the sum of EUR 15,000.00, in addition to legal interests, and to remove the video in question from any profile traceable to him on Facebook or other social networks, and to prohibit its further dissemination and sharing.

The judgment in question upheld the claim for compensation for damages, as well as removal and injunction, made by the foundation 'Egyptian Antiquities Museum of Turin' against a Facebook user who had created and published a fake video accompanied by expressions of incitement to hatred in order to criticise an initiative of the institution that provided free admission for Arab-speaking citizens. According to the Court, the use and publication of a fake video showing a telephone call with an apparent museum operator and accompanied by expressions of incitement to hatred constitute conduct that exceeds the boundaries of the legitimate manifestation of thought, in particular the right to criticism, constituting a defamatory action, with unjustifiably denigrating and aggressive tones, maliciously designed to trigger hatred in the public[112]. In addition, in the defendant's conduct, there is another profile of unlawfulness characterized by the integration of the offence of defamation aggravated by the use of a means of communication pursuant to Article 595(3) of the Criminal Code[113].

1.3. Tentative conclusions on the comments of the doctrine

The peculiar political, cultural, and social dynamics, emphasized by the use of modern technologies, have given new life to the expression of potentially dangerous thoughts: both with reference to so-called hate speech that affects the dignity and equality of individuals, and with regard to politically motivated public speech offensive to the collective security used as political instrumentalisation.

[112] De Gregorio, G. (2020), p. 1255.
[113] Monti, S. (2021), p. 245-246.

1.3.1. Characteristics of the Web

The reasons for the recent proliferation - at least from a quantitative point of view - of forms of expression that are potentially dangerous to civil life are intimately linked to certain factors characteristic of the new digital tools and, above all, of social networks[114]: in short, permanence, itinerancy, anonymity, and cross-jurisdictional character[115].

1.3.2. Balancing conventionally protected freedoms and rights

In the face of such an increase, the regulatory response recorded in recent years is characterised by a tendency to criminalise such conduct on a broad spectrum. The question concerns the extent of the constitutional coverage of freedom of expression; in other words, whether it may be subject, in addition to the explicit one of morality, to further implicit limits that may justify such criminal figures[116]. When racism and discrimination are adopted as an element of public discourse, giving rise to the phenomenon of hate speech, they collide with the freedom of thought, that constitutes the guardian of democracy, as the Constitutional Court has recently reminded us (Constitutional Court, No. 132/2020[117]): on this point, the doctrine is divided between the

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[114] A UNESCO study published in 2015 on "Countering Online Hate Speech" highlighted how online hate speech is not inherently, or rather content-wise, different from offline hate speech. However, certain structural features of Cyberhate speech would endow it with a particular damaging potential. The main features identified by the UNESCO document are carved into the following four key concepts: permanence, itinerancy, anonymity and cross-jurisdictional character. In: Gasparini, I. (2017), p. 507.

[115] The term "permanence" denotes the circumstance that hate speech, or hate content in general, may remain on the Web for a long time after being posted, thus increasing and prolonging the seriousness of the offence. Itinerancy denotes the ability of the offending content to survive elsewhere on the Web even when removed from where it was originally posted. This significantly amplifies the damaging potential of online hatred, not only in time (permanence) but also in space. The ability of a message or content to escape definitive censorship, inserting itself in a "liquid" manner in the interstices of the Web and re-proposing itself in other sites and through other subjects or pseudonyms, even after it has been removed from its original habitat, makes the phenomenon difficult to contain. Moreover, anonymity or the possibility of using a pseudonym, contributes significantly to facilitating hate speech, eliminating or anaesthetising in the author the inhibitions placed to curb deviant conduct thanks to the reassuring perception of being exempt from sanctions or - in any case - stigmatising responses. Lastly, the cross-jurisdictional character, i.e., the transnational nature (in terms of operational headquarters, perimeter of their activities and location of the multiple levels of actors involved) of IT service intermediaries, which raises the need for international cooperation between different jurisdictions, contributes, according to UNESCO, to exacerbating the difficulties in combating the phenomenon. In: Gasparini, I. (2017), p. 508.

[116] Cirillo, P. (2019), p. 1294.

[117] Constitutional Court, Order, 26/06/2020, No. 132: "In order to allow the legislator to approve in the meantime a new regulation in line with the constitutional and conventional principles indicated in the order, the hearing on the issue of the constitutional legitimacy of Article 595, paragraph 3, of the Criminal Code and Article 13 of Law no. 47 of 8 February 1948, in the part in which they provide, alternatively or cumulatively, for a prison sentence for anyone found guilty of the offence of defamation aggravated by the use of the press consisting in the attribution of a specific fact, in reference to Articles 3, 21, 25, 27 and 117

more liberal positions that invoke the need for a public space for reflection and confrontation free from constraints (especially if criminal) and those who are more in favour of recognising the plausibility of criminal intervention with respect to hate speech; a position, the latter, that is also supported by the European Court of Human Rights, which considers hate speech a legitimate compression of conventionally protected freedom of expression[118].

The legislation on the matter, which arose in the wake of defascistization and the constitutionally oriented reinterpretation of the Civil Code, has rethought the nature of subjective rights[119]. The jurisprudence, and in particular the Italian constitutional court, is careful to make an accurate analysis between freedom of expression and injury to the dignity of others, although sometimes this dividing line is difficult to draw. It is considered that, for the purposes of incrimination, the mischievous conduct must be considered dangerous for significant public interests, directly or indirectly functional to the realisation of criminal activities. Otherwise, any interference with citizens' freedom of expression could not be permitted in a democratic and pluralistic society[120]. The same perspective has been adopted by the European Court of Human Rights, recognised by Art. 10 ECHR, which will be discussed later.

The profile of the offence becomes important not only to identify the correct legal classification, but also in order to verify the compatibility of the relative incrimination with the principle of freedom of expression (Article 21 of the Constitution and Article 10 of the European Convention on Human Rights), as a limit to the possibility for the legislator to punish behaviours consisting, in a broad sense, in the manifestation of a thought. On the one hand, in fact, the criminalistic compression of freedom of speech can be considered justified exclusively in function of the protection of other interests of constitutional relevance, resulting from a balance of judgment; on the other hand, the Constitutional jurisprudence has enhanced the value of the parameter of offensiveness in

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of the Italian Constitution, must be postponed". In: https://onelegale.wolterskluwer.it/document/corte-cost-ordinanza-26-06-2020-n-132/44MA0002793454?searchId=2064367640&pathId=e91ead8cf9f08&offset=1&contentModuleContext=all

[118] Pelissero, M. (2020), p. 1019.

[119] Brutti, N. (2019), p. 8.

[120] Cirillo, P. (2019), p. 1295.

concrete terms, making the legitimacy of crimes of opinion dependent on the fact that the manifestations of thought punished are actually capable of harming the legal asset protected by the legal system, thereby converting the original abstract danger cases into crimes of concrete danger[121]. "Freedom of expression of thought ceases when it transmutes into incitement to discrimination and violence of racist nature", "incitement to discrimination or violence on racial, ethnic, national or religious grounds has a factual content of incitement to conduct that achieves a *quid pluris* with respect to the mere expression of personal opinions"[122].

1.3.3. Case-by-case approach

However, the attitude of jurisprudence is not uniform. While it is true that the pronouncements show a general adherence to the paradigm of concrete danger, most do not seem to grasp it in its exact dimension, weakening its offensiveness profiles in order to cope with the various threats affecting society. In fact, what is formally defined as

[121] Costantini, A. (2020), pp. 223-224.

[122] Criminal Cass., Sec. III, 3 October 2008, no. 37581 https://onelegale.wolterskluwer.it/document/cass-pen-sez-iii-sentenza-07-05-2008-n-37581/44MA0002161529?searchId=2057780202&pathId=ee3b1031110f&offset=7&contentModuleContext=all; Criminal Cass., Sec. V, 24 August 2001, no. 31655 https://www.foroplus.it/visualizza.php?pag=1&ndoc=302587G&sha1=6136aea74b49ea1543ef0af756d4d30677efc1fe&ur=MjQwMTUzNA==&w=31655

concrete danger is not very far removed from presumed danger[123] [124]. Again, the anticipation of criminal intervention is also recorded with respect to inciting hypotheses placed to protect, not so much public order, as human dignity; in these cases, the downsizing of the need for the concreteness of the danger is explained by virtue of the particular relevance of the protected asset in the face of conduct which, although manifestations of thought, is a reprehensible expression of discrimination, intolerance and racial hatred[125]. It appears evident that the constitutional rulings are not able to guide ordinary justice to a more guaranteeing definition of punishable conduct. The transformation by interpretation of offences originally built on presumed danger clashes, in the case law, with the poor selective capacity of concrete danger. The ascertainment of this element is left to the discretion of the judges, who lack reliable criteria of

[123] Crimes of danger are those in which the protected legal asset is endangered but does not suffer actual injury. It is customary to distinguish between: crimes of abstract danger and crimes of concrete danger. The first, also called presumed danger, is based on the assessment of dangerousness by the lawmaker concerning a certain unlawful conduct. In this case, the danger represents the motive for incrimination, but not a constitutive element of the offence. The conduct is sanctioned without verifying the existence of a concrete danger, which is already presumed in the rule that has been violated. The danger is therefore presumed *'iuris et de iure'*, without admission of proof of its existence. The judge must therefore verify the existence of unlawful conduct and the offence will exist regardless of whether it actually caused a dangerous situation. While in the crime of abstract danger the unlawful conduct is punished even if the asset protected by law is not really put at risk, in the crime of concrete danger the protected interest - which may be public health, physical integrity, the environment - is actually put at risk by the agent's conduct. https://www.dequo.it/articoli/reato-pericolo-astratto-presunto-concreto-codice-penale.

If in the hypothesis of crimes of concrete danger their compliance with the principle of necessary offensiveness is unquestionable, greater are the doubts in relation to the crime of abstract danger. There are those who argue that it is necessary, in order to deem such crimes constitutionally compliant, to ascertain the concrete existence of endangerment of the legal asset. It has been observed, however, that doing so would effectively eliminate a category of crime that finds its raison d'être in the difficulty of ascertaining in the proceedings the actual injury to certain legal assets. Still others have referred to Article 49(2) of the Criminal Code, insofar as it allows the defendant to go free from punishment if he proves that the event is impossible due to the unsuitability of the action or the inexistence of the object. The jurisprudence of the Constitutional Court has often ruled on the point, stating that the court is prevented from declaring the criminal liability of the defendant for a crime of abstract danger if the inexistence of a possible situation of danger to the protected legal asset emerges. The legislature is allowed to penalize even the mere exposure of the legal asset to danger, even assuming from the fact the existence of such a situation, provided that this corresponds not to an arbitrary and irrational choice, but to *id quod plerumque accidit*. Regarding the level of offensiveness in concrete, the Constitutional Court has clarified that this principle also applies in crimes of presumed danger. The substantive difference with crimes of concrete danger is as follows: while in the latter the judge must ascertain the existence of a serious probability of the occurrence of harm, in crimes of abstract danger the judge must exclude punishability when any reasonable possibility of the production of harm is lacking. https://www.giuridicamente.com/l/il-principio-di-offensivita-nei-reati-di-pericolo-concreto-e-astratto/#:~:text=La%20differenza%20sostanziale%20con%20i,ogni%20ragionevole%20possibilit%C3%A0%20di%20produzione.

[124] Cirillo, P. (2019), pp. 1296-1297.

[125] *Ibidem,* p. 1297.

verifiability[126]. The proof of the passage from words to the danger of actions is, indeed, of complex identification. It is more likely to suppose that the characteristics of the concrete cases, and not the prior adherence to a defining model chosen in the abstract, influence the judicial definition of individual cases. It is precisely the ambiguous legislative typification of the conduct that allows the jurisprudence wide margins of hermeneutic-reconstructive elasticity with respect to the needs emerging in concrete terms[127].

It has been suggested that the vague notion of public order should be substituted with the concept of human dignity, which is directly linked to Articles 2 and 3 of the Constitution. The personalistic dimension of this value, which refers to deep and essential aspects of every human being, would constitute a valid legitimisation of criminal intervention. On the other hand, it has been pointed out that dignity and equality are also vague concepts and, above all, permeated with morality and the protection of collective emotions. Even the reference to the paradigm of concrete danger runs the risk of not being decisive, due to the absence of a proven (and demonstrable) causal relationship between racist manifestations and harm to individuals or society; the judgement is inevitably conditioned by the ideological and value premises of the judge and, in particular, by his assessment of the importance between the conflicting interests[128].

1.3.4. Pedagogical function of law

Law becomes an instrument of protection against forms of racism and discrimination that violate the dignity of others in interpersonal relations. Dignity here does not refer in terms of the subjective perception that each person has of his or her own dignity; it is intended to refer to the inter-subjective dimension that must be recognised for each individual, who must be ensured the means to be able to express his or her personality in inter-subjective relations and in the social formations in which it is placed [129]. Hence, the debate surrounding the draft law that seeks to extend the scope of Articles 604-bis and

[126] *Ibidem,* p. 1300.
[127] *Ibidem.*
[128] Costantini, A. (2020), pp. 224-225.
[129] Pelissero, M. (2020), p. 1020.

604-ter: gender, sexual orientation, and gender identity, like skin colour or ethnicity, are part of a person's identity, which cannot be changed[130].

In conclusion, if on the one hand, considering the overbearing emergence of discriminatory phenomena at a social level, it is difficult to deny the usefulness, even pedagogical and symbolic, of the incriminatory rules against fascist and racist demonstrations, insofar as they clearly reiterate the legal system's disapproval of ideologies that clearly contrast with the democratic spirit of the Constitution and the protection of fundamental human rights. On the other hand, however, without denying the importance of such a message, there remains the problem of justifying the provision of criminal limits to manifestations of thought, which, however deplorable, do not result in the infringement of individual or collective rights[131].

In short, from this framework emerges, as sharply underlined, the constitutional breadth and depth, also of international rank, as well as historical, cultural and philosophical, of the need to legally oppose any form of racial discrimination, understood in a broad sense, as such deserving to be pursued with repressive and punitive interventions of a penal nature - when necessary - as it constitutes a violation of a fundamental (or inviolable) human right, of primary rank. A clear and solid regulatory framework that indicates the need for punitive sanctions for the various forms of racial, ethnic, national and religious discrimination should be complemented by an indispensable work of prevention through education, awareness, study and social intervention, promoted at all levels[132].

[130] *Ibidem*, p. 1021.
[131] Costantini, A. (2020), p. 225.
[132] Goisis, L. (2021), p. 2457.

Chapter 2

The European legal framework in matter of hate speech

In recent times, the European Union (EU) has witnessed a sharp rise in hate speech and hate crime due to different reasons: economic and political instability, refugees' crisis, political propaganda, mainly from right-wing parties, aimed at spreading hate and fear among their electors. In addition, the fast and easy access to modern technologies, that is the Internet, has both revealed advantages and drawbacks. If, on one side, Internet fulfils the need of making communication and research easier, enables millions of people to shop, bank, market products, keep records, find information, and amuse themselves cheaply and efficiently[133], on the other side, it can be deleterious if used wrongly. Just to mention some examples, users can be victims of fraud, identity theft, blackmail, and illegal hate speech.

Even though freedom of expression is stated to be one of the pillars of a democratic and pluralist society[134], the European Union has always fought to defend its values. In other words, the European Union, faced with this emergency characterised by the spread of hatred towards variegated groups of people (women, ethnical minorities, LGBTQ+ members, people with disabilities…), had no choice but to act through regulation in the attempt to tackle and resolve the problematics. The EU has adopted several instruments concerning cooperation between law enforcement authorities and judicial ones in criminal matters of the Member States, of different nature and scope (regulations, directives, framework decisions) and which, as a consequence, have different effects[135] [136].

[133] Delgado, R., & Stefancic, J. (2014), p. 323.

[134] COM (2021) 777

[135] The acts of secondary legislation are divided into those that proceed to standardisation and which are productive of direct effect (regulations), those of harmonisation - at least potentially directly applicable (directives) and, finally, those that are ontologically incapable of producing direct effect (framework decisions). In: Ruotolo G.M. (2022), p. 1024.

[136] Ruotolo G.M. (2022), p. 1024.

2.1. Legislation

2.1.1. Universal Declaration of Human Rights (UDHR, 1948) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965)

For reason of clarity, according to the principle of *repetita iuvant*, the expression "online hatred" refers to expressions of hatred transmitted through the Web, ascribable to manifestations of hatred *tout court*, usually referred to as hate speech, and which include all manifestations of thought expressing hatred against categories or groups of individuals, defined on the basis of certain personal characteristics or beliefs, mostly relating to the political, ethnic, religious, gender or sexual orientation. However, it is complex to define the phenomenon, especially in light of the diverse regulatory sources, both soft law and hard law, present at international and regional level[137].

Before analysing the UE legislation on the matter, it seems useful to mention two pieces of legislation approved by the UN General Assembly: the Universal Declaration of Human Rights (UDHR, 1948) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965).

Approved and proclaimed by the UN General Assembly on 10 December 1948, the Universal Declaration of Human Rights, although it was not approved in the form of an international treaty and therefore does not constitute a legal instrument in the strict sense, on the other hand, in view of the matter, contains general principles of law which, due to their moral character, are recognised and therefore binding on all civilised nations. It is therefore deemed appropriate to quote this Declaration also in view of the fact that it is the basis for the stipulation of various international agreements, as is evident from the preambles to them[138].

The preamble, after recognizing the fundamental rights of humankind, that is dignity, equality, justice, freedom, peace, adequate standards of life, brotherhood, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all

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[137] Buffagni, E. (2022), p. 1.

[138] https://onelegale.wolterskluwer.it/normativa/dichiarazione-internazionale-10-12-1948/10LX0000130189ART2?searchId=2000115734&pathId=fdf2dffa88798&offset=0

peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction[139].

The UDHR stated at Articles 2, 7, 29(2), and 30 that hate speech is an abuse, and as such prohibited, of the freedom of expression, recognised in Article 19 (Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers) [140] [141].

Article 2, in fact, in enunciating the rights and freedoms due to every individual, defines distinctions, based on characteristics of the latter (so-called prohibited grounds) and which, if implemented, could lead to discrimination[142].

Art. 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty"[143].

Article 7, on the other hand, enshrines the right of everyone to receive adequate protection against any discrimination and any incitement to such discrimination contrary to the Declaration itself[144].

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[139] *Ibidem.*
[140] Universal Declaration of Human Right. https://www.un.org/en/about-us/universal-declaration-of-human-rights
[141] Buffagni, E. (2022), p. 1.
[142] *Ibidem.*
[143] Universal Declaration of Human Right. https://www.un.org/en/about-us/universal-declaration-of-human-rights
[144] Buffagni, E. (2022), p. 1.

Art. 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination"[145].

Article 29 enumerates the duties, correlative to the rights, with which the individual must comply; they make it clear that the prerogatives of the individual cannot be exercised in contrast with the purposes and principles of the Charter itself and of the United Nations in general, legitimising limitations to the rights and freedoms of each person only to ensure the recognition and respect of the prerogatives of others, with the objective of protecting individual rights and freedoms[146].

Art. 29: "1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Finally, Article 30 prohibits the abuse of these rights[147].

Art. 30: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".

In conclusion, it is worthy of acknowledgement because it defined, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages and because it created the circumstances for the adoption of more than seventy human rights treaties, applied today on a permanent basis at global and regional levels[148].

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[145] https://www.un.org/en/about-us/universal-declaration-of-human-rights.
[146] Buffagni, E. (2022), pp. 1-2.
[147] *Ibidem*, p. 2.
[148] Universal Declaration of Human Right. https://www.un.org/en/about-us/universal-declaration-of-human-rights

Subsequently, the ICERD was approved with the objective of reiterating the promotion of and respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion, to confirm the necessity of eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person[149]. The prohibition of racist speech and activity, as incorporated in Article 4 of the Convention, should have "due regard of the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention" which include, amongst others, the freedom of expression[150]. Once again, the conflict between free speech and hate speech is evident: whilst the right to hold opinions is absolute, the freedom of expression "carries with it special duties and responsibilities" and can be restricted if this is provided for by law and is necessary for respect of the rights or reputations of others or for the protection of national security, public order or of public health or morals[151].

Art. 4: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

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[149] International Convention on the Elimination of All Forms of Racial Discrimination. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial

[150] Alkiviadou, N. (2018), p. 207.

[151] *Ibidem.*

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination"[152].

Art. 5: "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

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[152] International Convention on the Elimination of All Forms of Racial Discrimination. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks"[153].

In the CERD General recommendation 35 on Combatting Racist Hate Speech (2013) it is stated that Art. 4 refers to:

"Racist hate speech […] directed against groups recognized in Article 1 of the Convention — which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin — such as indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups. In the light of the principle of intersectionality, and bearing in mind that "criticism of religious leaders or commentary on religious doctrine or tenets of faith" should not be prohibited or punished,10 the Committee's attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism. Stereotyping and stigmatization of members of protected groups has also been the subject of expressions of concern and recommendations adopted by the Committee"[154].

Yet, it is worthy to analyse the historical circumstances of the enactment of such legislation. "When the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, Article 4 was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was

[153] *Ibidem.*

[154] CERD Recommendation No. 35. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/471/38/PDF/G1347138.pdf?OpenElement

properly regarded as crucial. Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of Article 4 is now of increased importance"[155].

Ultimately, the measures applied by the United Nations will have to be accompanied by legislative, executive, administrative, budgetary, and regulatory instruments as well as plans, policies, programmes, and regimes implemented by national tribunals and other State institutions in a joint action[156]. "As article 4 is not self-executing, States parties are required by its terms to adopt legislation to combat racist hate speech that falls within its scope. In the light of the provisions of the Convention and the elaboration of its principles in general recommendation No. 15 and the present recommendation, the Committee recommends that the States parties declare and effectively sanction as offences punishable by law: (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means; (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin; (c) Threats or incitement to violence against persons or groups on the grounds in (b) above; (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination; (e) Participation in organizations and activities which promote and incite racial discrimination[157]. The term "incitement" is supposed to mean "which seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be expressed or implied, through actions such as displays of racist symbols or distribution of materials as well as words"[158]. Such explanation should be a guide for Members States to define guidelines and measures to combat hateful episodes, although the other step that could be taken by the UN in facilitating the correct implementation of this article is the elucidation

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[155] CERD_Recommendation No 15. https://adsdatabase.ohchr.org/IssueLibrary/CERD_Recommendation%20No15.doc

[156] General Recommendation 32 on the Meaning and Scope of Special Measures in the Convention. https://www2.ohchr.org/english/bodies/cerd/docs/gc32.doc

[157] CERD Recommendation No. 35. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/471/38/PDF/G1347138.pdf?OpenElement

[158] *Ibidem.*

of prohibited conduct and the provision of a definitional framework in respect to racist speech[159].

2.1.2. Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

Two years later, on the basis of the previous Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948, the Council of Europe approved the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), reaffirming the protection and recognition of fundamental freedoms, peace, justice to be maintained in democracy[160]. The European Convention is significant to these days for giving specific legal content to human rights in an international agreement and establishing a machinery for supervision and enforcement[161]. Valuable material has been provided for the elaboration of the provisions on civil liberties and anomalies have been exposed and addressed in national legislation systems[162].

For the needs of the present dissertation, two Articles of the latter are necessary to define.

Article 10 protects freedom of expression, stating that it should include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. It is worth noting that according to this Article, freedom of expression may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others[163]. As a matter of fact, such freedom carries "duties and responsibilities" and which may be subject to limitations in order to, *inter alia*, protect

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[159] Alkiviadou, N. (2018), pp. 209-213.

[160] European Convention on Human Rights. https://www.echr.coe.int/documents/d/echr/Convention_ENG

[161] Brownlie, I., & Goodwin-Gill, G. S. (Eds.). (2006), p. 610.

[162] *Ibidem.*

[163] The European legal framework on hate speech, blasphemy and its interaction with freedom of expression. https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536460/IPOL_STU(2015)536460_EN.pdf

the reputation or rights of others[164]. The risk of an irresponsible exercise of the freedoms guaranteed by the norm makes unavoidable the need to proceed to a balance of interests[165].

Article 14 is a basis for combatting hate crimes in providing that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status[166].

"Freedom of expression is not only applicable to expressions that are favourably received or regarded as inoffensive, but also to those that may shock, offend or disturb the state or any sector of population within the limits of Article 10 of the ECHR". One of the basic principles to enjoy such freedom is therefore that any democratic society should permit open debate on the matters. However, the Parliamentary Assembly also underlined that in multicultural and democratic societies it is often necessary to place restrictions on freedoms of expression, of thought, prescribed by law and proportionate to the legitimate aims pursued"[167].

The interpretation around Article 10, which enshrines freedom of information as an integral part of freedom of expression, has been progressively developed by the European Court of Human Rights (ECHR or ECtHR or Strasbourg Court) in a dynamic way, looking at the Convention as a "living instrument" to be interpreted in parallel with the evolution of social customs and technological innovations. Following the structural transformations triggered by the impressive development of modern digital technologies and, in particular, by the widespread diffusion of the Internet, the Court has ruled on several occasions and from different angles on the question of the limits that may legitimately be placed on the exercise of freedom of information online[168]. This is

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[164] Alkiviadou, N. (2018), pp. 221-222.
[165] Falconi, F. (2019), p. 1025.
[166] The European legal framework on hate speech, blasphemy and its interaction with freedom of expression. https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536460/IPOL_STU(2015)536460_EN.pdf, p. 24.
[167] *Ibidem,* pp. 26-27.
[168] Falconi, F. (2019), p. 1024.

extended also to journalistic activities, subject to the respect of the duty of good faith and the rules of journalistic ethics[169].

If on one hand, the Convention was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding[170], on the other hand, there is no positive obligation on Contracting States to develop legislation or other tools to prohibit hate speech[171]. This represents an evident obstacle to the tentative of tackling hateful behaviour on a supranational level, since the European Court of Human Rights has often shown itself to be a house divided when it comes to freedom of expression[172]. This complexity is enhanced by the fact that there is no common

[169] European Court of Human Rights, 4.3.2019, no. 11257/16: the ECtHR drew attention to the role played by websites in the exercise of freedom of expression, highlighting that, in light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing access to news facilitating the dissemination of information in general, while recalling, at the same time, that the risk of harm resulting from content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, in particular the right to privacy, is certainly greater than that which can result from the press (https://www.foroplus.it/visualizza.php?pag=1&ndoc=1306173GF&sha1=79b52b0a0fd27e7c434d7dc4c964d4b1ae6033cc&ur=MjEyMzU1MA==&w=11257/16). The above assumes even more relevance, the Court observes, in today's technological scenario, in which the individual is confronted with a massive amount of information coming from a multitude of sources: the enormous diffusive potentialities of the Internet and the consequent greater exposure of conventionally protected rights to threats can therefore, in principle be invoked to justify the configuration of even more stringent duties on the part of the electronic media. As will be explained in the following passages of the judgment, however, the peculiarities that characterise the Internet as a new instrument of mass communication take on greater weight in a different direction different direction which, without disavowing the pitfalls just referred to, emphasises the unprecedented opportunities unprecedented opportunities opened up by it in order to promote the exercise of freedom of expression and information, both on the active side of those taking an active role in the information sector, and on the passive side of the recipients who are entitled to receive information on topics of public interest. As regards the decision of the judgment, unlike an act of publication, the function of the hyperlink is not to communicate and disseminate information, but simply to bring to the attention of Internet users the existence of content made available elsewhere on the Web. Moreover, only a free choice, exercised by clicking on the hyperlink, will direct Internet users to an electronic page other than the initial one with consequent access to the content published there. The hyperlink, therefore, to be considered in principle "neutral" as regards content. The journalist - who makes use of a link to indicate the existence of a particular piece of information published elsewhere on the Web on the initiative of a third party and without any restrictions on access - is not in a position to exercise any form of control over the same, neither with regard to its subsequent modification, nor with regard to its possible removal. The Court concludes that there has been a breach of Art. 10 of the ECHR by the Hungarian authorities as the right to information of the Magyar Jeti prevails over the countervailing interest of the protection of the reputation asserted by the party. However, it is worthy to highlight that the duties of diligence that fall on the media - and more in general to anyone exercising freedom of expression - will become more stringent where the linked material manifestly assumes a qualified damaging attitude (in Falconi, F. (2019). Diffamazione via hyperlinking e tutela della liberta` di informazione on-line. *Nuova giurisprudenza civile commentata (5).* 1024-1038).

[170] European Court of Human Rights. European Convention on Human Rights. https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c

[171] Alkiviadou, N. (2018), p. 222.

[172] *Ibidem.*

definition of what constitutes hate speech, no homogeneity among States in the conceptualisation of harm[173].

2.1.3. EU Charter of Fundamental Rights (2000)

In 1999, the European Council commissioned the drafting of a charter of human rights; the latter are based on those retraceable in the European Convention on Human Rights and the European Social Charter[174]. As a matter of fact, Article 9 (freedom of thought, conscience, and religion) and Articles 10 (freedom of expression) of the European Convention of Human Rights are reiterated in Articles 10 and 11 of the EU Charter of Fundamental Rights[175].

EU legal instruments must respect, on one side, the freedom of expression granted to citizens, and, on the other, the non-discrimination principle stated in international legislation. The principle of non-discrimination is further reinforced by the Lisbon Treaty and Article 21(1) of the Charter of Fundamental Rights of the European Union[176] which states that:

"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited"[177].

In other words, freedom of speech does not authorise slander, libel, incitement to hatred, questioning the honour of others, or any violation of Article 21 of the Charter[178].

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[173] Alkiviadou, N. (2019), pp. 22-23.

[174] Brownlie, I., & Goodwin-Gill, G. S. (Eds.). (2006), p. 806.

[175] The European legal framework on hate speech, blasphemy and its interaction with freedom of expression. https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536460/IPOL_STU(2015)536460_EN.pdf, p. 31.

[176] *Ibidem,* pp. 30-31..

[177] Charter of Fundamental Rights of the European Union (2000/C 364/01). https://www.europarl.europa.eu/charter/pdf/text_en.pdf

[178] The European legal framework on hate speech, blasphemy and its interaction with freedom of expression. https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536460/IPOL_STU(2015)536460_EN.pdf, p. 122-123.

On the matter of immunity grated to MEPs while performing their duties, granted by Articles 8 and 9 of the Protocol on the Privileges and Immunities of the European Union, it is important to establish if hate

As previously stated, freedom of expression is a fundamental right, which could be subject to limitations under certain conditions as specified in Article 10(2) of the ECHR[179] and repeated Article 52(1) of the Charter of Fundamental Rights[180].

Article 52(1): "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"[181].

However, it is worth noting that the EU Charter is not a treaty: it is expected to have a normative role in the Communitarian legal system, but its place has not been determined yet[182].

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speech statements made by MEPs fall within or outside the scope of Article 8 or 9 of the Protocol. If the statements in question have been made by MEPs in the performance of their duties, they are covered by absolute immunity and may not be prosecuted for hate speech offences. If the statements in question have not been made in the exercise of parliamentary duties and thus fall outside the scope of absolute immunity, they might still be covered by relative immunity (Article 9 of the Protocol). Opinions, which may be regarded as 'offensive, excessive and annoying', may be covered by absolute immunity if directly and obviously linked to the exercise of duties. However, the JURI Committee has also clarified that statements contrary to Article 21 on Non-discrimination of the EU Charter of Fundamental Rights do not fall within the immunity regime. A practical example is offered by the JURI Committee concerning the request by an Italian Member of the European Parliament for the defence of his immunity in connection with investigations against him by the Court of Milan. The member in question had made statements on supposed characteristics of the Roma ethnic group during a radio interview on 8 April 2013. According to the Italian Prosecutor's Office, these statements were punishable as public defamation and spreading of discriminatory ideas founded on superiority or racial hatred under the Italian Criminal Code. In light of Article 8 of the Protocol No 7, the Parliament's decision not to defend the Member's immunity was based on the fact that his statements had no direct and obvious connection with his parliamentary activities. Moreover, statements exceeded the tone generally encountered in political debate and were deemed contrary to Article 21 of the Charter of Fundamental Rights (*Ibidem)*.

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

[180] The European legal framework on hate speech, blasphemy and its interaction with freedom of expression. https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536460/IPOL_STU(2015)536460_EN.pdf, p. 93.

[181] Charter of Fundamental Rights of the European Union (2000/C 364/01). https://www.europarl.europa.eu/charter/pdf/text_en.pdf

[182] Brownlie, I., & Goodwin-Gill, G. S. (Eds.). (2006), p. 806.

2.1.4.Directive 2000/31/EC[183]

If in the 1990s the provider was considered personally responsible even though the offence was committed by the recipient of their services, in 2000 the EU legislator decided to introduce a special regime for the liability of the access provider, the cache provider and the host provider for unlawful information and content generated by users, with the aim of harmonising the national laws of the Member States. The special regime was defined in the Directive 2000/31/EC, which contains the conditions that must be fulfilled by the provider to benefit from an exemption from liability for an unlawful act caused by information and content transmitted or generated by recipients of information society services. According to Articles 12, 13, and 14 it is necessary that the provider performs the activities of access, cache and host in a passive manner, i.e., it is not required to be aware of or control the content it transmits or stores at the will of the users[184].

"Article 12: Mere conduit

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

[183] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). https://eur-lex.europa.eu/eli/dir/2000/31/oj

[184] Smorto, G., & Quarta, A. (2020), pp. 278-283.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13: Caching

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14: Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information". The provision, however, does not offer any indication with regard to notice and take down procedures and therefore leaves it to the discretion of the Member States and providers[185]. In other words, the removal of the illicit content is not automatic after its signalling. On its part, the provider does not have the obligation to control the information stored and transmitted but must communicate the information when requested by the authorities to identify the perpetrator[186].

Directive 2000/31/EC covers explicitly the judicial responsibility of the ISPs, requiring Member States to provide for "effective, proportionate and dissuasive" sanctions[187], thus leaving to the national legal systems the task to assess the type of liability of the provider, whether criminal, civil or administrative[188].

The E-Commerce Directive allows, first, to outline the ISP's liability and exemptions depending on whether the activity carried out by the latter is one of mere conduit (transmission of information on the network or provision of access thereto), caching (automatic and temporary storage of information) or hosting (storage of information over a long period of time). In the first two cases, in fact, the provider is exempted from liability if it "does not originate the transmission; does not selects the recipient of the transmission; and does not select or modify the information transmitted". In the third case, however, the provider is not liable unless it "has actual knowledge that the activity or information is unlawful" or that, once aware, it "acts immediately to remove the information or to

[185] *Ibidem*, p. 282.
[186] *Ibidem*, p. 283.
[187] Art. 20 of Directive 2000/31/CE.
[188] Gasparini, I. (2017), p. 520.

disable access to it"[189]. The requirement of actual knowledge is therefore of central importance[190]. Therefore, a regime of irresponsibility of such providers has been envisaged, except in cases where they have become aware of illegal activities and have not informed the competent authorities, or where they have not acted after receiving reports from the judicial or administrative authorities[191]. Moreover, it is stated at Recital 46 that: " in order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information"[192].

Coming to the attribution of the ISP's liability for failure to prevent hate speech materially committed by the network user, it should be noted that Directive 2000/31/EC on electronic commerce itself expressly excludes on the part of ISPs "a general obligation to monitor the information they transmit or store", as well as a "general obligation to actively seek out facts or circumstances indicating the presence of unlawful activities"[193]. The rationale for this provision would be to avoid a generalised removal of content for fear of incurring liability[194]. However, Art. 15(2) states that "Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements". A fully compliant indication is also

[189] CJEU, Joined Cases C-236/2008, 237/2008, 238/2008, Google inc. v. Louis Vuitton Malletier SA and others, 23 March 2010. The European courts, to which the case concerning the "Adwords" positioning service offered by Google was submitted, ruled on the compatibility of the active nature of hosting with the exemptions from liability provided for in Article 14 of Directive 2000/31/EC. In: Gasparini, I. (2017), p. 521.

[190] Gasparini, I. (2017), pp. 521-522.

[191] D'Alberti, D. (2021), pp. 763-764.

[192] Directive 2000/31/EC Recital 46.

[193] Directive 2000/31/EC, cited above, Art. 15 and Recital 47.

[194] D'Alberti, D. (2021), p. 763.

made by the Additional Protocol to the Council of Europe Convention on Cybercrime, whose Explanatory Report significantly states that, in order to be exempt from criminal liability, the ISP is not required to perform the role of monitor of potentially offensive conduct committed by third parties[195].

Under the Electronic Commerce Directive, and with specific reference to online hate speech, Member States may derogate from the Directive's main objective to ensure free movement of information society services from another Member States for reasons, *inter alia*, of "public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons".[196] [197].

The immediate removal by the provider of the illegal content or the disabling of access to it allows, pursuant to the same Directive, to achieve a limitation of the liability of the ISP. Nevertheless, the Council of Europe asks for a more cautious approach on content removal obligations, recalling the need for such obligations to be transparent and proportionate to the offence[198].

The new Directive 2010/13/EU[199] on the provision of audiovisual media services proposes to amend, expand and complete certain aspects of Directive 2000/31/EC on e-commerce: it includes among the Union's objectives precisely that of curbing digital hate speech. If approved by the European Parliament, in fact, the proposal would entail an "intensification" in the fight against hate speech online through a new obligation for Member States to ensure that "audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race,

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[195] Gasparini, I. (2017), p. 522.

[196] Art. 3(4)(a)(i) of Directive 2000/31/EC.

[197] The European legal framework on hate speech, blasphemy and its interaction with freedom of expression. https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536460/IPOL_STU(2015)536460_EN.pdf , p. 30.

[198] Gasparini, I. (2017), p. 515.

[199] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013

sex, religion or nationality"[200]. The proposal also proposes to align with the provisions of Directive 2000/31/EC on e-commerce about the regulation of video-sharing platform services, also making them responsible for the objective of protecting all citizens of the Union from incitement to hatred and violence[201]. The new Article 28-bis, in fact, requires that:

"b. Member States shall ensure that video-sharing platform providers take appropriate measures to protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin.

Those measures shall consist of, as appropriate:

(a) defining and applying in the terms and conditions of the video-sharing platform providers the concepts of incitement to violence or hatred as referred to in point (b) of paragraph 1 and of content which may impair the physical, mental or moral development of minors, in accordance with Articles 6 and 12 respectively;

(b) establishing and operating mechanisms for users of video-sharing platforms to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 stored on its platform;

(c) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;

(d) establishing and operating systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;

(e) providing for parental control systems with respect to content which may impair the physical, mental or moral development of minors;

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[200] Art. 6 of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive). https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:en:PDF#:~:text=This%20Directive%20is%20intended%20to,categories%20of%20programmes%20that%20need

[201] Gasparini, I. (2017), pp. 515-516.

(f) establishing and operating systems through which providers of video-sharing platforms explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (b)" [202].

This development indeed represents a significant novelty, capable of protecting European Union citizens from the dissemination of hatred on the Internet not only through self-regulation instruments of the "IT giants", but also and above all through the establishment of obligations with a legislative source and the direct involvement - as guarantors - of the Member States[203].

If, therefore, on the one hand, a general obligation to monitor and remove hate content on the part of the ISP must be excluded, the Court of Justice has repeatedly ruled on the problematic issue of the limits of certain filtering and blocking obligations[204]. As a matter of fact, in the Scarlet v. Sabam judgment, the Court of Justice affirmed the unlawfulness of a filtering system imposed (by means of an injunction) on an internet access provider and characterised - *inter alia* - by its preventive nature and absolute indefiniteness in time. Observing that such a filtering system would require the provider to bear "active surveillance of all the data of each of its customers in order to prevent any future infringement", the Court ruled out its lawfulness not only on the basis of the conflict with the prohibition of a general obligation of surveillance laid down by the Directive, but also in the light of the principle of proportionality, in a balancing operation where the fundamental rights of transmission of information and freedom of thought are in danger[205].

Overall, the Union's policy in the fight against online hate speech includes obligation to remove hateful content from the Web, through digital self-regulation to the extreme intervention of criminal law. The most intricate dogmatic and interpretative knots remain catalysed by the liability of the ISP in making the author of hate content materially placed or transmitted on the Internet without, however, endowing intermediaries with a

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[202] Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0287

[203] Gasparini, I. (2017), p. 516.

[204] *Ibidem*, pp. 522-523.

[205] CGUE, Causa C-70/10, Scarlet Extended SA c. Société Belge des auteurs compositeurs et éditeurs (Sabam), 24 novembre 2011. In : Gasparini, I. (2017), p. 523.

generalised obligation of prior control of the network, which would end up placing them in an unacceptable role as guardians or censors of the Web[206]. The provision, however, does not offer any indication regarding notice and take down procedures and therefore leaves it to the discretion of the Member States and providers[207]. In other words, the removal of the illicit content is not automatic after its signalling. On its part, the provider does not have the obligation to control the information stored and transmitted but must communicate the information when requested by the authorities to identify the perpetrator[208].

2.1.5. Budapest convention (2001)[209] and the Additional Protocol to the Cybercrime Convention of the Council of Europe (2022)[210]

The Council of Europe, recognising for the first time the importance of an adequate and rapid response to the new phenomenon of cybercrime that transcends national borders, invited EU and non-EU member[211] states to sign the Budapest Convention of the Council of Europe on Cybercrime in 2001. It truly represents "the first international treaty on criminal offences committed via the Internet and other computer networks, capable of identifying specific violations such as copyright, computer fraud, child pornography, and breaches of network security. It has the merit of providing for a series of appropriate measures and procedures, such as the search of computer network systems and the interception of data". The main objective, stated in the Preamble, is to pursue a common criminal policy for the protection of society against cybercrime, especially by adopting appropriate legislation and promoting international cooperation[212].

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[206] Gasparini, I. (2017), pp. 531-532.
[207] Smorto, G., & Quarta, A. (2020), p. 282.
[208] *Ibidem*, pp. 282-283.
[209] Convention on Cybercrime. https://rm.coe.int/1680081561
[210] Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence (CETS No. 224). https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=224
[211] Canada, Japan, South Africa and the United States of America.
[212] Curtotti, D. (2022), p. 1017.

It is not, therefore, only a cybercrime treaty: it also enables exercise of procedural powers and international cooperation mechanism in relation to any offence entailing electronic evidence. Thanks to its technology neutral language, the Budapest Convention has been providing responses to complex challenges of crime in cyberspace since 2001[213]. Its aims are therefore to provide a stronger and more harmonized cybercrime legislation worldwide, a consistent approach to criminalizing conduct defining norms of behaviour for cyberspace in order to defend human rights and the rule of law in cyberspace, to secure a more efficient international cooperation between Parties, more investigation, prosecutions and adjudication of cybercrime. Finally, since it is ratified by 68 States, and 158 States have used it as a guideline or source for their domestic legislation, it has a global impact and outreach[214].

The principle of "mutual recognition" of judicial decisions and measures of the Member States was already enshrined in the Lisbon Treaty (Art. 82(2) TFEU[215]), which expressly includes the harmonization of the laws and regulations of the Member States also in the field of substantive criminal law, pursuant to Art. 83, TFEU[216] [217]. Moreover, we remember that pursuant to Art. 3(2) TFEU, the Union also has *exclusive*

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[213] Council of Europe. 20 years of the Convention on Cybercrime. https://www.coe.int/en/web/cybercrime/20th-anniversary-budapest-convention

[214] *Ibidem.*

[215] Art. 82(2): to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States […].

[216] Art. 83: 1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76 […].

[217] Picotti, L. (2022), pp. 1031-1032.

competence for the conclusion of international agreements when such conclusion is provided for in a legislative act of the Union or is necessary to enable it to exercise its competences internally or insofar as it may affect common rules or alter their scope[218] [219].

The Budapest Convention reconciles the vision of a free Internet, where information can freely flow and be accessed and shared, with the need for an effective criminal justice response in cases of criminal misuse. Restrictions are narrowly defined; only specific criminal offences are investigated and prosecuted, and specified data that is needed as evidence in specific criminal proceedings is secured subject to human rights and rule of law safeguards[220]. In this aspect, Article 15 states:

"1. Each Party shall ensure that the establishment, implementation and application of the powers an\d procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality. 2. Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, *inter alia*, include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure.

3. To the extent that it is consistent with the public interest, in particular the sound administration of justice, each Party shall consider the impact of the powers and procedures in this section upon the rights, responsibilities, and legitimate interests of third parties"[221].

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[218] Treaty on the Functioning of the European Union. eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:12012E/TXT

[219] Ruotolo G.M. (2022), p. 1024.

[220] https://www.coe.int/en/web/cybercrime/key-facts

[221] Convention on Cybercrime. https://rm.coe.int/1680081561

Although Parties are obligated to introduce certain procedural law provisions into their domestic law, the modalities of establishing and implementing these powers and procedures into their legal system, and the application of the powers and procedures in specific cases, are left to the domestic law and procedures of each Party. These domestic laws and procedures shall include conditions or safeguards, proportional to the nature and circumstances of the offence, which may be provided constitutionally, legislatively, judicially, or otherwise[222]. The reason why great margins of autonomy are left to the initiative of States is found in the fact that, since the Convention applies to Parties of many different legal systems and cultures, it is not possible to specify in detail the applicable conditions and safeguards for each power or procedure. Parties shall ensure that these conditions and safeguards provide for the adequate protection of human rights and liberties, drawing inspiration from the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and its additional Protocols[223] (ECHR, signed in Rome on 4 November 1950), the International Covenant on Civil and Political Rights (adopted in New York on 16 December 1966 and entered into force on 23 March 1976) and any other applicable international instrument. The emphasises is on the need to seek a satisfactory level of balancing between any State measure restricting or conditioning the use of the Internet by individuals as a means of repressing conduct characterised by a high degree of criminality, on the one hand, and respect for fundamental rights, on the other[224].

In 2006, the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems[225] entered into force. It entails "an extension of the scope of the Cybercrime Convention, including its concrete procedural and international cooperation provisions, to also include offences related to racist or xenophobic propaganda". Thus, in addition to harmonising the actual legal elements of such acts,

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[222] Convention on Cybercrime. Protocol on Xenophobia and Racism. Second Protocol on enhanced Co-operation and Disclosure of Electronic Evidence. Explanatory reports and guidance notes. https://rm.coe.int/booklets-bc-2-protocols-guidance-notes-en-2022/1680a6992a, pp. 69-70.

[223] *Ibidem.*

[224] Ruotolo G.M. (2022), p. 1023.

[225] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. https://rm.coe.int/168008160f

the Protocol aims to provide Parties with the possibility of using the means of international cooperation established in the Convention in this field[226] [227]. "Racist and xenophobic material means any written material, any image or any other representation of ideas or theories, which advocates, promotes, or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors"[228]. Article 3 criminalises the dissemination of racist or xenophobic material via computer systems and covers the conduct of "dissemination or making it available". Article 4 concerns the threat, by means of computer systems, to commit a "serious" offence - according to national law - against a person, on account of his or her membership of a group characterised by "race, colour, descent or national or ethnic origin, or religion in so far as the latter serves as a pretext for either of these elements; or against a group of persons distinguished by one of these characteristics". Article 5 provides for the criminalisation of insulting a person or a group in public, having the characteristics defined in the previous article. Finally, Article 6 provides for the incrimination of the denial, gross trivialisation, approval or justification of genocide or crimes against humanity, which is carried out through conduct of "dissemination by means of computer systems of material" that has such content, which is not made available to the public. All the offences listed above must be committed intentionally and without right, i.e., with intent and except where particular provisions of domestic law may justify or otherwise render such conduct unpunishable. Several clauses are provided to reserve the States the right not to apply, in whole or in part, some of the above provisions[229].

It should be recalled, however, that the delay of more than a year in adopting the Convention was due to the decision, during the preparatory work, to exclude offences of a racist and xenophobic nature committed by means of computer systems from the

[226] So far, Italy has not ratified it yet, though it signed in 2011.
[227] Curtotti, D. (2022), p. 1018.
[228] Art. 2(1) of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.
[229] Picotti, L. (2022), p. 1034.

"cybercrimes"[230] for which the obligation to incriminate was envisaged. In fact, disagreements had arisen, especially with exponents of jurisdictions in which freedom of expression was deemed to prevail and not to be restricted with criminal sanctions in the face of such criminal manifestations, if they did not have a substantial degree of violence, which made it necessary to have more time to find mediations and elaborate proposals that would be acceptable to a wide circle of States, which could also be granted the right to reservations at the time of adoption. The text of the Additional Protocol was therefore adopted later and entered into force internationally on 1 March 2006, as soon as the necessary number of ratifications had been reached, which is still very low compared to the roughly double number of ratifications of the Cybercrime Convention. Among the many reasons, mainly of a political nature, for this reluctance, there is also the erroneous belief that the criminal law in force in the various States is sufficient to consider fulfilled the obligations of incrimination under the Protocol; therefore, one must therefore urge legislative intervention that, together with formal ratification, give it effective and full implementation[231].

Finally, in 2022, the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence[232] has opened for

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[230] It should be emphasised that, in addition to all offences which can be defined as "computer-related in the strict sense" because they contain, among their constituent elements, some that make explicit reference (as object, mode of conduct, event, or other) to information and communication technologies (ICT), the Convention has also mentioned several other offences, which do not have these structural characteristics, so as to be punishable even if they are carried out in the physical world, but which are also relevant for its purposes because they can also be committed today in cyberspace (so-called cybercrimes or cybercrime in a broad sense). Precisely for this reason, they acquire and deserve a particular importance, given the much greater rapidity, ease and potentiality of dissemination, with consequent more serious danger and offensiveness. The Convention therefore provides, as further obligations of incrimination, the crimes of child pornography (both real and virtual), the violation of intellectual property rights and related rights, if committed through a computer system, with full intent and on a large scale. It is clear, however, that the category of cybercrimes is likely to include a much broader scope of offences, which cannot be determined *a priori*. So much so that Article 14(2) of the same Convention, in order to define the scope of application of the provisions of procedural law, to which its Section II is dedicated, expressly includes, in addition to the offences provided for in Articles 2 to 11 of the Budapest Convention, any "other offence committed by means of a computer system", and therefore also or mainly on the Internet, and also "the collection of evidence in electronic form of any offence". Similar content also has Article 23 of the Budapest Convention which concerns the scope of application of the important provisions on international cooperation, to which the entire chapter III of the Convention is dedicated. In: Picotti, L. (2022), pp. 1029-1030.

[231] Picotti, L. (2022), p. 1033.

[232] Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence. https://rm.coe.int/1680a49dab

signature. As stated in the Preamble, "given the proliferation of cybercrime and the increasing complexity of obtaining electronic evidence that may be stored in foreign, diverse, changing or unknown jurisdictions, the powers of law enforcement agencies are limited by territorial boundaries. As a result, only a small fraction of cybercrime acts reported to criminal justice authorities result in convictions. In response to this, the Second Additional Protocol to the Convention on Cybercrime provides a legal basis for disclosure of domain name registration information and direct cooperation with service providers for subscriber information, effective ways to obtain subscriber information and traffic data, immediate cooperation in case of emergencies, mutual assistance tools, as well as data protection safeguards"[233]. It will then pursue the further objective of providing enhanced cooperation tools in order to acquire accelerated forms of cooperation between the Parties for the disclosure of subscriber information and traffic data, achieve faster cooperation and disclosure in emergency situations, and provide for additional tools for mutual assistance, including the use of video-conferencing systems in connection with experts and witnesses and the employment of joint investigation teams. The draft also guarantees data protection and the rule of law, with a view to balance rights, freedoms and interests that are relevant to the sensitive area of personal data under discussion. Moreover, in the same perspective of protection, Parties may avail themselves of reservations and declarations, where provided for in their domestic law[234]. Cooperation is not only meant to be achieved with States, but also among them and Internet Service Providers[235]. In this regard, Article 7 of the Protocol amended Article 18 of the Budapest Convention. In more details, the latter addressed the crucial issue of guaranteeing judicial and police authorities, engaged in investigations following the commitment of crimes, access to subscriber data held by a service provider in its territory, information that is necessary and sometimes essential precisely in the initial phase of investigations. However, the restricted, domestic operation of the provision has been a limitation compared to the real need to acquire the aforementioned data in a generalised, transactional and, above all, efficient manner, and this precisely because of the multitude of existing and

[233] *Ibidem.*
[234] Russo, N. (2022), p. 1021.
[235] Ruotolo G.M. (2022), p. 1022.

globally operating operators. On the other hand, Article 7 of the Additional Protocol could allow a more effective, direct, and cross-border access to subscriber data, regardless of the assumptions of voluntary disclosure by ISPs. The scope of application of Article 7 of the Protocol goes beyond the operational boundaries of Article 18 of the Convention, allowing the competent authority of a State signatory to the Protocol to issue orders for the acquisition of subscriber data to Internet Service Providers having their main or secondary office in the territory of another State[236]. A cardinal principle is thus laid down: a private individual or a service provider operating in a certain territory may not evade the disclosure of computer data and information relating to the users of the relevant services at the request of the authority competent to investigate certain offences[237]. In this regard, over time, a practice has sedimented for which the American ISPs have begun to supply subscriber data to foreign judicial authorities without demanding the completion of the rogatory procedure, but upon exclusive request of exhibition, carried out according to forms and protocols which ISPs themselves have provided to indicate and publish in the respective policy sections. This "voluntary disclosure" has certainly constituted a step forward in the framework of the cooperation between the law enforcements and the ISPs, but it still constitutes a limitation, since it is a methodology of data acquisition linked to the will of the operators and not because of a clear and shared legal basis[238]. The order may be issued only for subscriber data specifically held by the Internet Service Provider, and the qualifying element is that the acquisition order may be issued only in the context of "specific criminal investigations or proceedings" initiated by the issuing Party, in line with the provisions of Article 2 of the same Protocol, as well as to acquire "necessary information" for the said investigations or proceedings[239].

In conclusion, the direct cooperation with the ISP should therefore be the preferred method by which to obtain subscriber data, and this is confirmed in Article 7 itself which provides for a simplified procedure for converting an order issued into a request for enhanced cooperation under Article 8 in cases where the service provider does not

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[236] Pirozzoli, C. (2022), p. 1045.
[237] *Ibidem*, p. 1046.
[238] *Ibidem*, pp. 1046-1047.
[239] *Ibidem*, p. 1047.

comply with the order. The competent authority must wait for the time limit set in the order and in any event no longer than 30 days for the service provider to communicate the data or to express a refusal. Upon the expiration of the deadline or the communication of the refusal, the issuing Party may automatically request the execution of the order through the enhanced cooperation procedure provided for in Article 8 of the Protocol or on the basis of the other forms of mutual assistance[240].

In favour of the criticism of the rogatory procedure, which considerably lengthens the response time, the provisions of Articles 9 and 10 of the Protocol introduce two innovative instruments of enhanced cooperation abstractly suitable to guarantee the effectiveness and efficiency of the investigative action, in order to ensure an effective protection for the victims of crimes in emergency situations identified in those in which "there is a significant and imminent risk for the life or safety of a person", not including those in which the risk to the life or safety of the person has already passed, is insignificant or in which a future risk may exist but is not imminent. The Internet has gradually approached to a voluntary emergency disclosure request[241]. Precisely because of the importance of such requests, most ISPs have designed the relevant policies to facilitate judicial police activity also under this further, and delicate, profile.

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[240] *Ibidem*, p. 1049.

[241] Microsoft was the first company to provide – without rogatory procedure but only on the basis of a request by the Italian public prosecutor - data not only with reference to @hotmail.it mailboxes but also to mailboxes @hotmail.com accounts: and therefore, following a specific policy kept confidential for the law enforcement agencies, the American company has complied with a voluntary disclosure regime with regard subscriber information and traffic data. Google, on the other hand, in the same period of time, had reiterated the need for the rogatory for any request in this sense: however, starting from the Milanese investigation in relation to the video of a disabled person being abused by peers and which had been posted on Google Video (Criminal Cass., Sec. III, 17 December 2013, no. 5107), the American company changed its policy decisively, providing the requested data according to the sole order issued by the Italian judicial authority. In: Cajani, F. (2022), pp. 1055-1056.

However, the Supreme Court, confirming the decision of first instance, excluded the existence of a position of guarantee of the ISP pursuant to Article 57 of the Criminal Code and related liability for failure to control the material published by users on the network, precisely on the basis of the exemptions contained in Articles 16 and 17 of the cited Legislative Decree No. 70/2003. Already in a significant passage of judgment of the court of first instance, the judges had, in fact, emphasised how there is no "codified legal obligation requiring ISPs to perform a preventive check of the innumerable series of data that pass every second through the meshes of the managers or owners of websites, and it does not appear possible to obtain it *aliunde*, overcoming at a stroke the prohibition of analogy *in malam partem*, the interpretative cornerstone of our criminal procedural culture". Even assuming the existence of an obligation of preventive control over all the material placed every second on the network by the endless mass of users, it would not be - states the court – exigible (Tribunal of Milan, 12 April 2010, no. 1972). In: Gasparini, I. (2017), pp. 530-531.

The rule provides for further tools to accelerate the rogatory mechanism in such situations: first, for the transmission of the requested sources of evidence (or a preliminary copy thereof) the Parties concerned may - by mutual agreement - establish a different channel than the one used for the request itself. And, even more significantly, it is provided that such requests may also be sent directly to judicial authorities or through police cooperation channels (Interpol or permanent law enforcement contact points already provided for in Article 35 of the Budapest Convention)[242].

With regard to the protection of fundamental rights, the Protocol, in its Article 13, obliges the States to ensure that the procedures guarantee adequate protection of fundamental rights (albeit "subject to the conditions and safeguards laid down in their domestic law"), and respect for the principle of proportionality, pursuant to Article 15 of the Convention[243].

Art. 13: "In accordance with Article 15 of the Convention, each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Protocol are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties"[244].

Likewise, Article 14 of the Second Protocol deals with the right to protection of personal data, with the obligation for the Party that has received personal data to process them for the only purposes of prevention, detection, investigation and prosecution of criminal offences[245]. It is considered as a fundamental right protected by primary EU law (both the founding Treaties and the Charter of Fundamental Rights of the European Union), subject to standardisation (the well-known General Data Protection Regulation) and harmonisation rules (the Directive on the processing of personal data and the protection of privacy in electronic communications; the Directive

[242] Cajani, F. (2022), pp. 1056-1059.
[243] Ruotolo G.M. (2022), p. 1023.
[244] Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence. https://rm.coe.int/1680a49dab.
[245] Ruotolo, G.M. (2022), p. 1023.

on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data), which will be affected by Art. 14 (Protection of personal data) of the Protocol[246].

Therefore, if on one hand the Protocol presents itself as the fulcrum of the new forms of international collaboration for the circulation of digital evidence, it represents the emblem of a cultural change that strengthens the process of legislative harmonisation without compromising the legal traditions, the sovereignty of the States involved and the autonomy of the individual jurisdictions[247], on the other hand, the fact that digital evidence covered by the Protocol is at the (exclusive) disposal of online service providers makes it clear that private operators play, with regard to "digital" cases, a decisive role not only in regulating and correctly balancing opposing legal positions (think of the role of content-sharing service providers with regard to online freedom of opinion and expression), but also in enforcement, to the extent that their "quasi-governmental" function has been recognised[248]. With regard to the so-called intermediaries (and their liability, even if not criminal), the European Commission had already started two legislative initiatives some time ago by presenting, on 15 December 2020, a package of measures to update the EU discipline of the digital sector, divided into two proposals of secondary legislation: the Digital Services Act (DSA), which aims to regulate security, transparency and conditions of access to online services and, consequently, to amend Dir. 2000/31/EC, and the Digital Markets Act (DMA), which deals instead with commercial and competition aspects[249]. The liability regime of online intermediaries outlined in the proposed text, however, does not seem to undergo any particular changes with respect to what was defined in the e-commerce Directive: the tripartite division between mere conduit, caching and hosting services is re-established. Moreover, the exemption from a general monitoring obligation of the contents and information entered by users is confirmed. Finally, the

[246] *Ibidem,* pp. 1025-1026.
[247] Nocerino, W. (2022), p. 1053.
[248] Ruotolo, G.M. (2022), p. 1026.
[249] *Ibidem.*

so-called "Good Samaritan clause" remains in place, according to which the intermediary who in good faith prevents access to objectionable material or activities does not incur liability[250].

2.1.6. Framework Decision on Racism and Xenophobia 2008/913/JHA (2008)

Following seven years of negotiation, the EU developed the Framework Decision on Combatting Racism and Xenophobia through Criminal Law. This document seeks to tackle the phenomena of racism and xenophobia as manifested, *inter alia*, through hate speech, endorsing criminal law as the only tool. As such, this is not a mechanism to tackle hate speech in its entirety but, rather, one that *also* deals with racist and xenophobic speech[251]. Nevertheless, the Council Framework Decision 2008/913/JHA represents on a European Union level the central document that can be used for the criminalisation of hate speech[252]. As stated in the preamble, "racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States"[253]; therefore, more harmonization and judicial cooperation between States is needed in order to tackle the rising and worrying phenomenon of hate speech and hate crime, prohibiting "publicly inciting to violence or hatred against a group of persons or a member of such a group defined by reference race, colour, religion, descent or national or ethnic origin"[254].

It follows that State Members must undertake legal solutions to punish the perpetrator. However, one of the main problems which prevent regulation to be effective is the fact that "EU Member States have diverging rules and apply different standards to counter

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[250] D'Alberti, D. (2021), p. 771.
[251] Alkiviadou, N. (2018), p. 218.
[252] Alkiviadou, N. (2019), p. 27.
[253] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913.
[254] Art. 1 of Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913.

hate speech and hate crimes"[255]; this could lead to legitimization of hate speech and narratives by citizens of a State or its political representatives, almost naturalising it, and discouraging victims from denouncing it. In other words, one of the major problems encountered when trying to arrive to a common approach in matter of hate speech is that "since the Member States' cultural and legal traditions are, to some extent, different, particularly in this field, full harmonisation of criminal laws is currently not possible"[256], in addition to the relatively vague, broad language used in the regulation and the introduction of safety nets which give Member States wide discretion when transposing the provisions. This has led to a different threshold concerning the content that is to be criminalised in the Member States, which complicates any harmonised application of the legislative procedure, such as the Framework Decision or the Code of Conduct, which will be the subject of the next section[257]. This is mainly due to the fact that there is no universally accepted definition of hate speech, resulting from two main reasons: the varying interpretation of free speech, predominantly between countries or regions, and the interlinked differentiations in the conceptualisation of harm. As argued, hate speech lies in a complex nexus with freedom of expression and group rights, as well as concepts of dignity, liberty, and equality[258].

With regard to the safety nets allowed by the regulation, that is tools for Member States that wish to limit the scope of its application, the Article 1 of the Framework Decision states that:

"1. Each Member State shall take the measures necessary to ensure that the following *intentional* conduct is punishable:

a. publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

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[255] Hate speech and hate crime in the EU and the evaluation of online content regulation approaches. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655135/IPOL_STU(2020)655135_EN.pdf, p. 13.

[256] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913.

[257] Quintel, T., & Ullrich, C. (2019), p. 5.

[258] Alkiviadou, N. (2019), pp. 22-23.

b. the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

c. publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

d. publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

3. For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.

4. Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only"[259].

The bias motivation is thus the defining element of hate speech and hate crime[260]. Member States may choose only to punish conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting, thereby giving

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[259] Alkiviadou, N. (2019), pp. 27-28.

[260] Bakowski, P. (2022). Combating hate speech and hate crime in the EU. https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733520/EPRS_ATA(2022)733520_EN.pdf, p. 1.

the possibility to Member States to heighten the threshold even further[261]. Apart from racist and xenophobic threats, parties have the possibility of incorporating a provision that punishment will only occur if an act leads to hatred, contempt or ridicule (racist and xenophobic insult), may choose not to criminalise conduct if other effective remedies are available (racist and xenophobic material) or may even choose not to apply a provision (for example in relation to insults and denial, gross minimisation, approval or justification of genocide or crimes against humanity[262]. Intention is necessary and the punishable conduct must be public. Furthermore, the speech must amount to incitement. It is not sufficient that there is a mere dissemination of ideas as is the case with Article 4 of the ICERD[263].

The Framework Decision also "requires that Member States take measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance by their criminal laws, or alternatively, may be taken into consideration by the courts when setting penalties"[264]. It provides the obligation for States to provide for effective, proportionate and dissuasive sanctions, including criminal penalties. On a strictly criminal law level, therefore, the Framework Decision aims to ensure harmonised and effective judicial cooperation between the States of the Union in combating certain forms and expressions of racism and xenophobia through criminal law[265].

Finally, each State conceptualises harm and its threshold differently; what makes the matter of legal harmonization even more arduous is the continuing balance between safeguarding the freedom of expression and the need to protect individuals against racist and xenophobic acts: the Framework Decision holds that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression[266], bearing in mind, though, that freedom of expression should not violate or infringe the sensibility and dignity of others.

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[261] Alkiviadou, N. (2018), pp. 218-219.
[262] Alkiviadou, N. (2019), p. 28.
[263] Alkiviadou, N. (2018), p. 218.
[264] Art. 4 of Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0027
[265] Gasparini, I. (2017), p. 517.
[266] Alkiviadou, N. (2019), p. 25.

2.1.7. Code of Conduct on countering illegal hate speech online (2016)[267]

More recently the approach of EU institutions regarding hate speech (and more generally also illegal content) has moved from the use of hard law to soft law: namely, toward the use of forms of co-regulation where the Commission negotiates a set of rules with private companies under the assumption that the latter will have more incentives to comply with the rules agreed[268].

The Code of Conduct on countering illegal hate speech online (Code of Conduct, 2016) binds social media platforms (Facebook, Twitter, Instagram, and YouTube, among the many) to greater accountability of what their users post, through the obligation to remove reported content in a short timeframe.

"To prevent and counter the spread of illegal hate speech online, in May 2016, the Commission agreed with Facebook, Microsoft, Twitter and YouTube a Code of Conduct on countering illegal hate speech online. In the course of 2018, Instagram, Snapchat and Dailymotion took part to the Code of Conduct, Jeuxvideo.com in January 2019, TikTok in 2020 and LinkedIn in 2021. In May and June 2022, respectively, Rakuten Viber and Twitch announced their participation to the Code of Conduct"[269]. By means of their agreement, IT companies committed to the establishment of community guidelines regarding measures to be taken to tackle illegal hate speech. According to the Code, the companies should review notifications on illegal content received by users within a certain timeframe in less than 24 hours and should set up procedures to block or remove such content. The latter obligation of removal is based on Article 14(3) of Directive 2000/31/EC on e-commerce. In addition, the companies should contribute to raising the awareness of their staff and intensifying cooperation between themselves and other

[267] EU Code of Conduct on countering illegal hate speech online. https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination-0/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en

[268] Casarosa, F. et al. (2020), p. 18.

[269] UE Code of conduct on countering illegal hate speech online. https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination-0/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en

platforms, other than supporting counter-hate speech campaigns and educational programs[270].

It is worth to note that the Code of conduct builds its definition of hate speech on that provided in the above-mentioned Framework Decision without adding any more detailed criteria. However, the Code of conduct requires IT companies to define in their "Rules or Community Guidelines" incitement to violence and hateful conduct. As each IT company has included its own qualification of hate speech, this may lead to additional discrepancies between the applicable law (EU or national) and contractual obligations applicable to users of the IT services provided. The definitions provided by the IT companies and those in the Code of conduct do not completely converge. Instead, the definitions provided by the IT companies widen the scope of the prohibition to sex, gender, sexual orientation, disability or disease, age, veteran status, etc. This may be interpreted as achievement of a higher level of protection. However, the inclusion of hate speech prohibition in the rules or community guidelines becomes *de facto* rules of behaviour for users of such services. In this sense, the IT companies, *ex officio* or on notification, are allowed to verify the content of expressions published on their platforms, leading to a privatisation of enforcement as regards those conducts that are not covered by the Framework Directive[271].

The Code is a form of self-regulatory measure: in addition to public regulation, i.e., a body of binding rules issued by an authority, there are forms of self-regulation, namely, systems of rules created by the recipients of the rules. The task of issuing rules, verifying compliance, choosing adherence mechanisms, the degree of autonomy and bindingness, resolving disputes, downgrading the role of the public authority, and sanctioning can also be exercised by private bodies since they are more knowledgeable and more expert of the field to define rules. However, this type of regulation can often be problematic, especially when there is a lack of transparency, lack of documentation to make the decision-making process accessible, making it difficult to establish accountability mechanisms and verify the legitimacy of decisions[272].

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[270] Quintel, T., & Ullrich, C. (2019), p. 5.
[271] Casarosa, F. et al. (2020), pp. 19-20.
[272] Smorto, G., & Quarta, A. (2020), pp. 82-85.

The lack of transparency is one of the most crucial issues here since, according to the Code, it is the companies that are "taking the lead" on countering the spread of illegal hate speech online, public authorities are only marginally (if at all) involved in the decision-making process. As a matter of fact, no reference is made to the counteraction the user can exercise in case of deletion of one's own content, to the protection of freedom of expression or personal data when automatic detection tools, such as algorithms, are used to find illegal content[273].

Automated forms of control, resulting from the use of algorithms and artificial intelligence, play a central role. Through an algorithm it is possible to define a certain standard of conduct, collect information, and monitor individual behaviour to see whether that standard has been met, sanctioning any violations[274]. Algorithms are strongly suggested by European Union in order to detect and expeditiously remove harmful content, giving particular priority to notifications received by trusted flaggers who would authorise quicker removal, as the quality of the notice would be higher due to the expert knowledge of these flaggers[275]. However, one of the greatest risks of the proactive action on the part of social media platforms demanded by the European Union, according to the principle that the longer the content stays available, the more damage it can inflict on the victims and empower the perpetrators[276], could be a tendency towards excessive blocking to comply to the requirements and not held liable, representing a threat to the freedom of expression on the part of the users. Hence, the Code of Conduct was complemented by a Communication in September 2017[277] and a Recommendation[278] that the EU Commission published on 1 March 2018 on measures to effectively tackle illegal content online[279].

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[273] Quintel, T., & Ullrich, C. (2019), p. 6.
[274] Smorto, G., & Quarta, A. (2020), p. 89.
[275] Quintel, T., & Ullrich, C. (2019), p. 7.
[276] Alkiviadou, N. (2019), p. 32.
[277] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms', COM (2017) 555 final, Brussels, 28.9.2017. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0555
[278] Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, C(2018) 1177 final, Brussels, 1.3.2018. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32018H0334
[279] Quintel, T., & Ullrich, C. (2019), pp. 6-7.

2.1.8. Implementation of Communication (2017) 555 and Recommendation C(2018) 1177

Over the years, the European Commission has invited online platforms to behave in a more responsible way on a voluntary basis. In this regard, the Communication (2017) 555[280], dedicated to the fight against illegal content online, is aimed at encouraging responsible conduct of platforms and adopting self-regulatory measures to stop worrying episodes such as the dissemination of material concerning incitement to hatred or terrorism, child pornography.

They are more explanatory than the vague language used in the Code[281] and defend the interests of users to a greater extent, affirming the right of users to counteract if their content is deleted, to obtain a response from the platform in this regard, to obtain a reversal of the decision on the removal; greater protection of personal data is guaranteed as well as greater transparency regarding the work of the platforms to publish information about removed or disabled content, the number of notices and counter-notices submitted, including the time needed for taking action[282].

In particular, it is stated that: a. when the report consists of a judicial or law enforcement action, platforms should cooperate by removing the content to prevent dissemination; b. when reporting is made by "specialised entities with specific expertise in identifying illegal content, and dedicated structures for detecting and identifying such content online", the platform should show readiness to cooperate, including through an expedited procedure; c. with regard to user-submitted reports, platforms should provide mechanisms and procedures to indicate the illegal content accurately and justify the reasons for the illegality. It is not necessary for platforms to identify the user, who may also report anonymously. The Commission, which is aware of the risk of a compensatory action in the case of preventive removal of content later found to be lawful, states that if they have difficulties assessing the lawfulness of a particular content online platforms could benefit from submitting doubtful cases to a third party for advice. Self-regulatory bodies or competent authorities play this role in several Member States. The removal of

[280] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0555
[281] Quintel, T., & Ullrich, C. (2019), p. 2
[282] *Ibidem,* pp. 8-9.

content allows the platform to enjoy the special regime of provider liability and the use of automatic filtering tools via algorithms is encouraged[283]. On the official website of www.commission.europa.eu users can have access to factsheets dealing with monitoring round of the Code of Conduct, as a result of an increased transparency requested from platforms.

However, just like the Code of Conduct, the Communication and the Recommendation are non-binding instruments and therefore not enforceable against online platforms. There is no certainty about the effects if it is applied[284].

Although the Communication puts forward measures to prevent over-removal, the adherence to fundamental rights and the compliance with data protection standards, the proposed measures depend on the will of the online platforms to take action as non-compliance will not lead to sanctions[285]. The effectiveness of the regulation will be assessed based on the ability of platforms to establish common criteria for content considered harmful and their freedom to design solutions that correspond to the technical capabilities of their systems and on the basis of the involvement of the European Union in evaluating the implementation phases of these standards[286].

2.1.9.Communication 777 (2021)

Given the limitations of the Framework Decision, which focused only on crimes of a racial and xenophobic nature, a step forward was made with the Communication (2021) 777[287], aimed at "extending the list of EU crimes to hate speech and hate crime" which fall under the scope of the Article 83(1) of the TFEU for a more inclusive Europe. The further step is represented by the adoption of substantive secondary legislation establishing minimum rules on the definitions and sanctions of hate speech and hate crime.

The fundamental principles on which the European Union is based are "pluralism, the non-discrimination, tolerance, justice, solidarity and equality" which ensure "values of

[283] Smorto, G., & Quarta, A. (2020), p. 295.
[284] *Ibidem*, p. 196.
[285] Quintel, T., & Ullrich, C. (2019), p. 8.
[286] *Ibidem*, p. 19.
[287] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021DC0777

human dignity, freedom, democracy, equality, rule of law and respect for human rights, including the rights of persons belonging to minorities".

In a world that is increasingly interconnected and marked by political, economic, and social instability on a daily basis, it is becoming increasingly evident that more and more categories of people (refugees, ethnic minorities, women, the disabled, members of the LGBTIQ+ community) are becoming targets of hateful comments and behaviour. Such incidents have severe consequences on the physical and mental health of the victims: they may be victims of physical violence, when communication takes place in the real world, or victims of psychological violence, such as "depression, suspicion of others, self-blame and a profound sense of isolation". This constant state of anxiety and alertness irretrievably affects the entire community, as everyone can become a target.

"Establishing hate speech as a crime is necessary to protect the rights and freedoms of others and genuinely meets objectives of general interest recognised by the Union. Any Union legislation requiring Member States to criminalise hate speech and thus affecting the right to freedom of expression should be proportionate and respect the essence of the right to freedom of expression"[288]. For this reason, the Council of Europe adopted the decision according to which "hate speech and hate crime shall be an area of crime within the meaning of Article 83(1) of the TFEU", in order to provide protection for the victims and ensure a more joint effort in judicial cooperation among States. This would imply "the need to effectively address hate speech and hate crime on other grounds beyond those covered by Framework Decision 2008/913/JHA, and in particular on the grounds of sex, sexual orientation, age and disability has been identified in the Union of Equality strategies, namely the Gender Equality strategy 2020-2025, the LGBTIQ Equality strategy 2020-2025, and strategy for the Rights of Persons with Disabilities 2021-2030".

2.2. Case law

2.2.1. ECtHR, Case of Beizaras and Levickas v. Lithuania (Application no. 41288/15)[289]

[288] *Ibidem.*
[289] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-200344%22]}

Comments constituting hate speech and incitement to violence are clearly unlawful and may, in principle, require positive measures to be taken by States. Incitement to hatred does not necessarily imply a reference to an act of violence or other acts of criminal relevance. Nevertheless, authorities may consider that attacks on the person, committed by insulting, ridiculing or slandering specific groups, are sufficient to justify the restriction of freedom of expression exercised irresponsibly.

The Internet plays an important role in increasing public access to news and facilitating the dissemination of information more generally. At the same time, the potential impact of the medium is a key factor to be assessed when considering the duties and responsibilities of those who publish a certain piece of information. Indeed, even the publication of a single hateful comment is serious enough to be taken seriously if it states that certain people should be killed.

While the protection of the family in the traditional sense is, in principle, a legitimate and compelling reason to justify a difference in treatment, the State may adopt a wide range of measures in pursuit of this objective. The State is free to choose the type of measures that aim to protect the family and ensure respect for family life. However, in doing so, it must consider changes in perceptions of social issues, relationships, and marital status, including the fact that there is no single way or choice to live one's family or private life. In any case, the attitudes or stereotypes that prevail over a certain period of time among the majority of the members of a society cannot serve to justify either discrimination against other persons solely on the basis of their sexual orientation or the restriction of the right to protection of private life.

(One of the two applicants had posted a photo of a kiss between him and his partner on his Facebook page, which had received numerous 'likes' and comments, including thirty-one with offensive and homophobic content. The public prosecutor had considered it unnecessary to initiate a preliminary investigation, while the domestic courts had subsequently failed to carefully examine the applicants' complaint of discrimination. The ECHR found discrimination on the basis of sexual orientation, which also constituted a violation of the right to private and family life under Article 14 in conjunction with Article 8. The Court also

found a violation of the right to an effective remedy under Article 13, given the failure of the judicial authorities to fulfil their positive obligation to ensure the enjoyment of the rights set forth in the ECHR, which materialised in their refusal to provide an effective response to the complaint) [290].

Article 35

Article 35-1 Exhaustion of domestic remedies

NGO pursuing criminal complaints in the interest of applicants targeted by homophobic comments on Facebook: admissible.

Article 13 Effective remedy

Discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law: violation.

Article 14 Discrimination

Refusal to prosecute authors of serious homophobic comments on Facebook including undisguised calls for violence, without effective investigation beforehand: violation.

Facts – The applicants are two young men. In 2014 one of them posted a photograph of the couple kissing on his Facebook page (in "public" mode, without access being restricted to a particular group of "friends"); this was intended to accompany the announcement of their relationship and to trigger a debate on the rights of LGBT persons in Lithuanian society. This online post went viral and received hundreds of virulent homophobic comments (containing, for example, calls to "castrate", "kill" and "burn" the applicants).

At the applicants' request, an organisation upholding the rights of LGBT people (of which they were members) lodged a complaint with the prosecutor's office against thirty-one of these comments, asking the prosecution service to open an investigation for incitement to homophobic hatred and violence (Article 170 of the Criminal Code, criminalising incitement to discrimination on the basis – inter alia – of sexual orientation).

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[290] https://www.lawpluralism.unimib.it/oggetti/932-beizaras-and-levickas-v-lithuania-no-41288-15-e-ct-hr-second-section-14-january-2020

The prosecutor's office having refused to open a preliminary investigation, the courts dismissed (in 2015) the association's appeals against this refusal, on the grounds:

– firstly, that posting this "eccentric" photograph publicly had amounted to provocation on the applicants' part, contrary to the respect due to the opinions of others, in view of the "traditional family values" prevailing in Lithuania;

– and, secondly, that the impugned comments expressed their authors' unfavourable opinion in terms that were admittedly immoral, obscene or badly chosen, but that nevertheless they did not, on this basis alone, contain the actus reus and mens rea elements of the offence in issue (as these seemed to derive from the Supreme Court's case-law) in respect of each of their authors, taken individually.

Law – Article 14

(a) Admissibility (exhaustion of domestic remedies) – The applicants explained that they had preferred to ask the association to act on their behalf for fear of retaliation by the authors of the online comments. The association's complaint and subsequent appeals to protect the applicants' interests concerned specific incidents which had breached the rights of two of its members: whatever their possible "strategic" aspect for a wider cause, the association's actions were not therefore an actio popularis. Moreover, the association's legal standing had never been examined or contested at domestic level. In any event, Lithuanian law required the prosecutor's office to carry out an investigation following any notification, even where it was submitted anonymously. Lastly, it was the applicants, acting on their own behalf, who had lodged the application before the Strasbourg Court, after the domestic courts had delivered decisions in the case which concerned their interests.

Having regard to the seriousness of the allegations in issue, the Court considered that it had to have been open to the association to act as a representative of the applicants' interests within the domestic criminal proceedings. To find otherwise would amount to preventing serious allegations of a violation of the Convention from being examined at the national level, given that in modern-day societies recourse to collective bodies

was one of the accessible means, sometimes the only means, available to citizens whereby they could defend their particular interests effectively (see Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], 47848/08, 17 July 2014, Information Note 176, and Gorraiz Lizarraga and Others v. Spain, 62543/00, 27 April 2004, Information Note 63).

As to the availability of remedies other than through criminal proceedings, this question was intrinsically linked to the merits (see below).

(b) Merits – For the reasons set out below, the Court concluded that the applicants had indeed suffered discrimination on the grounds of their sexual orientation, without good cause, given that:

– the hateful comments by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community;

– and the same discriminatory state of mind was subsequently at the core of the authorities' failure to discharge their positive obligation to investigate in an effective manner.

(i) Applicability – It was clear that the comments on the first applicant's Facebook page had affected the applicants' psychological well-being and dignity. Article 14 was therefore applicable under the "private life" aspect of Article 8, having regard also to the level of seriousness of these attacks.

(ii) The allegedly provocative nature of the post – While recognising that the atmosphere in respect of this issue was tense in Lithuania, the Court found that the applicants' deliberate intention to incite discussion about homosexuality could not be viewed as a threat to cause public unrest. On the contrary, it was through a fair and public debate between persons with different views that social cohesion was promoted.

The authorities had emphasised the "eccentric" nature of the applicants' conduct – and the court of appeal had added that it would have been preferable for the applicants to share their picture only with "like-minded people", a possibility offered by the Facebook network.

In the light of these specific references to the applicants' sexual orientation, it was clear that one of the reasons for the refusal to open a preliminary investigation lay in disapproval of the fact that they were open about this sexual orientation.

With regard to the courts' additional references to the fact that the majority of Lithuanian society appreciated the values linked to the family in its traditional meaning, and the preservation of those values as the foundation of society, there was no reason to consider that those factors were incompatible with social acceptance of homosexuality, as evidenced by the growing general tendency to view relationships between same-sex couples as falling within the concept of family life (the Lithuanian Constitutional Court had itself ruled to this effect since 2011).

There thus seemed to be a prima facie case that the applicants' homosexual orientation had played a role in the way they were treated by the authorities. In consequence, it was for the Government to demonstrate that the way in which the authorities had assessed the relevant facts, as reported to them, had been acceptable.

(iii) Assessment of the criminal nature of the impugned comments – Without going so far as to hold that any utterance of hate speech must, as such, attract criminal prosecution and sanctions, the Court in the present case could not subscribe to the reasons given by the domestic authorities:

– with regard to the intrinsic content of the impugned comments: the concept of inciting hatred, in particular, did not necessarily entail a call for an act of violence or other criminal acts: insult, holding up to ridicule or slander could be sufficient to tilt the balance against protecting freedom of expression that was exercised in an irresponsible manner. In addition, the Government had failed to respond convincingly to the argument that if the impugned comments were to be considered as not being covered by the criminal law in question, then it was hard to conceive what statements could be;

– with regard to the relevance of the lack of a "systematic" aspect to the attacks: the hateful nature of a comment – let along calls to "kill" the applicants – was, in the Court's opinion, sufficient to be taken seriously, even if its author had posted only one such remark.

Admittedly, the route of criminal sanctions, including against the individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an ultima ratio measure; this equally applied to hate speech against the sexual orientation and sexual life of others. That being stated, the present case concerned undisguised calls for an attack on the applicants' physical and mental integrity. In consequence, protection by the criminal law was required.

While the Lithuanian Criminal Code in theory provided for such protection, in practice, however, it had been denied to the applicants as a result of the authorities' discriminatory attitude, an attitude which was at the core of the failure on the part of those authorities to discharge their positive obligation to investigate in an effective manner whether the impugned comments constituted incitement to hatred and violence.

As to whether other remedies were available to the applicants (before the civil courts or administrative authorities), it would have been manifestly unreasonable in this case to require the applicants to exhaust them, and would have had the effect of downplaying the seriousness of the impugned comments.

Conclusion: violation (unanimously).

Article 13: Considering the nature and substance of the Article-14 violation found above, a separate examination was warranted in respect of whether, on account of discriminatory attitudes which had negatively affected the application of domestic law, the generally effective remedies had proved ineffective in this particular case.

On the technical level, as the majority of the impugned comments had been posted by persons using their own personal profiles, it could not

be argued that the authorities would have encountered difficulties in identifying their authors, had they wished to do so.

Having regard to the general trend in the case-law of the domestic courts, the conclusions reached by international monitoring bodies and the statistical information communicated to it, the Court held that the above question had to be answered in the affirmative. It found, in substance, that:

– the manner in which the prosecutor had seen fit to apply the Supreme Court's caselaw could not be considered as providing for an effective domestic remedy with regard to complaints concerning acts of homophobic discrimination (as the Supreme Court had never had an opportunity to clarify the standards to be applied in hate speech cases of comparable gravity);

– the authorities were doing almost nothing in the face of the growing intolerance towards sexual minorities; in reality, the bodies responsible for applying the law did not recognise prejudice as a motivation in such offences; they had not adopted an approach which took account of the seriousness of the situation; and, in particular, there was no comprehensive approach to tackle the issue of racist and homophobic hate speech.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 to each of the applicants in respect of non-pecuniary damage.

2.3. Conclusion on the comments of the doctrine

The technological globalisation of recent decades has brought with it an exponential increase in cyberhate, i.e., the propagation in virtual space of messages and content characterised by discrimination or hate-bias. It is a phenomenon that cannot go

unnoticed due to its structural peculiarities, damaging potential, and unprecedented obstacles it poses to attempts to counter it[291].

2.3.1. Limitation to freedom of expression

Owing to its essential role in (and for) a democratic society, freedom of expression has been acknowledged as a human right not only at the European and national levels but also at the international level[292]. At the same time, institutions have to balance this fundamental right with those stated in Article 2 of TEU ("the Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities")[293].

In this respect, although freedom of expression enjoys a wide protection as a fundamental right, not all forms of expression are protected. Limitations may be applied according to specific conditions and in cases of specific content such as "expressions which spread, incite, promote or justify hatred based on intolerance". In such cases, expression by an individual may fall in the category of hate speech. Several pieces of legislation address the concept of hate speech but there is not a shared definition across Europe. As a matter of fact, the definitions of hate speech provided at the international and national levels focus on different facets of this concept, looking at the content and the manner of speech, and at the effect and at the consequences of the speech[294]. Therefore, national constitutions allocate the burden of balancing competing interests to domestic courts, whether civil, criminal, or administrative; this leads to different scenarios and remedies: the remedies available may differ and may range from limitation to personal freedom to imprisonment to pecuniary sanction, highlighting once again the lack of a common approach[295].

The ECtHR has dealt with several hate speech cases but has tiptoed around the definitional framework of the phenomenon. The result is that, although States receive

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[291] Gasparini, I. (2017), p. 505.
[292] Casarosa, F. et al. (2020), p. 8.
[293] https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.
[294] Casarosa, F. et al. (2020), p. 16
[295] *Ibidem*, p. 24.

guidelines from institutions, such as the CERD, to prohibit the dissemination of racist ideas and racist expression, there is no technical analysis of themes such as thresholds and delineations between potentially conflicting freedoms such as expression and non-discrimination[296]. As a result, it does not provide specific guidelines concerning the balancing between freedom of expression and protection of human dignity[297].

Any limitation to freedom of expression should comply with the following criteria: a. have a legitimate aim, i.e. be aimed at a general interest recognised by the Union or the need to protect the rights and freedoms of others; b. be necessary for the objective pursued; c. be proportionate to the objective pursued. The necessity of measures is evaluated on a case-by-case basis and considers the relevance of the reasons presented by national authorities justifying restrictive measures[298].

2.3.2. ECtHR jurisprudence

It seems possible to recognise a general approach: ECtHR decisions can be distinguished according to the approach taken by the court, namely a broader approach or a narrower approach. The broader approach analyses the facts of the case through the lens of Art. 17 ECHR, which prohibits the abuse of rights, whereas the narrower approach analyses the facts of the case through the lens of Art. 10(2) evaluating restrictions imposed on the protection of freedom of expression, which implies a detailed balancing exercise between freedom of expression and the legitimate objectives that lead to its limitation. In the narrow approach, the jurisprudence of the ECtHR has established a set of identification criteria that qualify hate speech, including the context and the intention of the speech, the status of the perpetrator and the form and impact of the speech, in each decision showing the difficulty in drawing the boundary between an expression that may "offend, shock or disturb," which is protected under Art. 10 ECHR, and hate speech[299].

[296] Alkiviadou, N. (2018), p. 209.
[297] Casarosa, F. et al. (2020), p. 18.
[298] *Ibidem*, p. 13.
[299] *Ibidem*, p. 21.

2.3.3. Protecting the dignity of the victims

Increasingly serious and growing behaviour of hatred, discrimination, racist violence are becoming manifest through IT systems: this underlines an outward expression of a will to persecution, contempt, humiliation against individual victims or against the group with which they are identified because of their characteristics of race, ethnicity, nation, colour, origin, religion. And the communication and dissemination in Cyberspace of this hatred has a strong emotional and emulative impact on the two opposite sides of the aforementioned victims, who are directly affected, and of the possible subjects who are instigated or incited to perform further activities, in accordance with the (publicly) affirmed hatred. Such communication has the effect, on the one hand, of violating the victim's right to honour and reputation, and, on the other hand, of spreading racism and discrimination based on intolerance, prevarication and oppression towards subjects, considered inferior for some minority reason (minors, women, migrants, ethnic, racial, religious minorities or even because of their sexual or political-cultural identity). The legal asset to be protected is no longer honour or reputation, but the fundamental and inviolable asset of the recognition of and respect for the equal dignity and equality of people[300]. It is therefore always necessary to balance the superior and inalienable legal asset of the equal dignity of people, hence of their equality, the protection of which is imposed, also in terms of criminal incrimination, by the articulated obligations of international source referred to above, with the right of expression and of thought[301]. In other words, hate speech, characterized by discrimination based on prejudices, differ from free expression of thought, whose exchange and dissemination must certainly be guaranteed as far as possible, are an offence to the very foundations of peaceful civil coexistence[302].

In a globalized and interconnected world like the current one, international agreements aimed at tackling the problem of Cybercrimes and Cyberhate, such as the Budapest convention or the Code of conduct, are essential to ensure constant and direct

[300] Articles 1, 2 and 7 of the Universal Declaration of Human Rights, Article 14 of the European Convention on Human Rights and its Protocol No. 12; Articles 1 and 20 ff. of the Charter of Fundamental Rights of the European Union; Articles 2 and 3 of the Italian Constitution. In: Picotti, L. (2022), p. 1036.
[301] Picotti, L. (2022), p. 1038.
[302] *Ibidem*, pp. 1038-1039.

contact between the authority issuing the data acquisition order for the conduct of investigations and the service provider[303]. The European legislator's intention is to introduce a regulation that clearly identifies the procedural guarantees that must always be respected for the acquisition of digital data, regardless of the place where the investigation or criminal proceedings are performed: the provision of *ad hoc* rules governing the assessment of the regularity of enforcement procedures carried out abroad to obtain sensitive information makes it possible to restore legal certainty and respect for individual prerogatives in a sector that is still too often mortified by legislative silences and cross-jurisdictional character[304].

2.3.4. Para-regulatory and para-jurisdictional powers of online platforms

IT giants seem to have attained a legitimacy far stronger than that conferred on them by market dynamics. Certain trends, in fact, demonstrate a true legal legitimisation of these powers, which are being transformed into authorities in law, capable of expressing themselves with rules capable of binding the addressee, independently of their assent. For instance, the activity of deletion pursuant to Article 15 of Directive 2000/31/EC on e-commerce implies an interference in the legal sphere of others, regardless of the recipient's consent to its effects. That being so, the question arises whether the provision of a special liability regime for omission of interference in the legal sphere of others is not itself the implied legal recognition of a private authority[305]. Practical examples are provided when relating to the issue of procedural guarantees of users in the Code of conduct. A first question is related to the availability of internal mechanisms that allow users to be notified, to be heard and to review or appeal against decisions by IT companies. In this case, the Code of conduct does not provide any specific requirement, either in terms of judicial procedures or through alternative dispute resolution mechanisms. Therefore, it is left to the IT companies to introduce an appeal mechanism. Currently, among the signatories to the Code, only Google provides such a mechanism. It only allows the user to present an appeal against the decision to take

[303] Pirozzoli, C. (2022), p. 1048.
[304] Nocerino, W. (2022), pp. 1053-1054.
[305] D'Alberti, D. (2021), pp. 748-749.

down his/her uploaded content. In all other cases, the contractual rules included in the user agreements regarding conflicts between users and the relevant IT company apply. According to the agreements currently in force, users may be subject to the jurisdiction of US courts or EU courts where consumer protection regulations apply. In the case of a consumer resident in a Member State who has had his/her profile blocked on a decision by the IT company on the basis of allegedly hate speech content, the national court may have a difficult task evaluating the contractual obligations of the IT company and the available remedies in the case of erroneous evaluation of the content as hate speech[306] [307].

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[306] Casarosa, F. et al. (2020), p. 20.

[307] Court of Trieste, 27.11.2020, Federazione Nazionale Arditi d'Italia v Facebook Ireland Ltd. The relationship between the user and Facebook is governed by the contract unilaterally drawn up by the information platform. Violation of the so-called Community standards constitutes valid grounds for annulment and deactivation of the user profile. It follows that the user profile deactivated as a result of the breach of the aforementioned standards, which took the form of the publication, together with news and photographs relating to the Fascist period, cannot be reactivated. In: *La nuova giurisprudenza civile commentata (4)*, 2021, p. 778.

As a precautionary measure, it is neither unlawful nor abusive the choice of the social network Facebook to exercise its right of contractual annulment and permanently closure of the profile of an association that published content inextricably linked, by temporal and ideological context, to the fascist regime. Nor could the judgment confer on the applicant the reinstatement that he seeks to anticipate, since the unjustified termination of the contract by one of the parties, constituting a breach of contract, would at most justify an order to pay damages, in the presence of a concrete finding of a specific financial loss. In: *Giurisprudenza italiana (10),* 2021, p. 2089.

With regard to the precedents in which Facebook was called upon to reactivate suspended accounts for activities attributable to hate speech, the cases concerning Casapound and Forza Nuova are of particular relevance, as well as the ruling of the Court of Siena. In the case examined by the Court of Siena, the *fumus bonis iuris* was not considered to exist, due to the many publications contrary to the standards of the Facebook community. The judge starts from the consideration that the one between Facebook and users is a contract under private law and analyses the contractual conditions established by Facebook, examining the conduct in the light of these, concluding that the exclusion does not raise profiles of constitutional relevance. In the cases of Casapound and Forza Nuova, two opposing outcomes were reached, and the distinction is based on the content published: while in the case of Forza Nuova, the judge considered that there was incitement to hatred, in the case of Casapound, the contents did not seem to the judge to be serious enough to justify the disabling of the entire page, considering the removal of the unacceptable content to be sufficient intervention, although the conduct was repeated; a circumstance which, in the opinion of the Author, would in itself be sufficient to determine and justify the exclusion. In the latter case, the ordinance emphasises the importance of Facebook for anyone wishing to participate in political debate. The ordinance states that: "the relationship between the operator and the user who intends to register for the service (or with the user already authorised to use the service, as in the case in point) cannot be likened to a relationship between any two private parties"; the operator occupies a special position whereby, in its relationship with users, it must strictly comply with constitutional and legal principles, until it is proved, by means of a full-cognizance judgement, that they have been infringed by the user. Although the association and, more generally, the non-individual user also needs protection towards the platform as a weaker party, in the European context there has always been a strong need to combat expressions that may incite violence. This need becomes even more pressing within social networks, which foster polarisation. These guidelines should not be undermined because of the qualification of a subject as a party or because of freedom of

The restriction, suspension or termination of the service is a measure that the platform may adopt on the basis of the normal events that end the contractual relationship with the platform. In some cases they are imposed following the violation by the user of a code of conduct, either defined in the rules that the platform lays down, present in the contractual conditions or in any case practised by the platform, or derivable from the general rules that require platforms to intervene to moderate user content, in the presence of manifest offences, as well as to prevent the recurrence of such conduct. The grounds for the termination of the provision of the service or part of it can, therefore, be traced back to contract termination or annulment. Non-fulfilment may also result from violation of the "community rules" that the platform has given itself. As a rule, the platform itself contractually reserves the right to intervene to remove content or restrict access to the service and uses this possibility also regarding the discipline of content moderation to which it is bound[308]. Authoritative doctrine records, in fact, the "expansion of the unilateral annulment, with the transposition of models also originating in practice", as "the unilateral declaration represents a much more agile instrument in its material exercise, concreting itself in a mere communication, free in its form"; it allows "overcoming the time of cognizance trial, but also the costs that it generates; it overcomes the problem of the concurrence of actions" and operates with immediate effectiveness[309].

As provided for by the new EU Regulation No. 1150/2019 regulating account suspension[310], one can find the introduction of a notice obligation as a general rule, not applicable in certain serious and particular cases comparable to just cause[311]. However, it is needed to introduce special procedures that guarantee the position of the weaker

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expression, since this too must be balanced within the regulatory and jurisprudential framework of the European Union. Facebook, in the light of its responsibility as a provider, acts and decides within this framework and, therefore, on the merits, both its decision and that of the court appear to be agreeable (In: Martinelli, S. (2021), pp. 2093-2094.

[308] Martinelli, S. (2021), p. 2094.

[309] *Ibidem.*

[310] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R1150

[311] The Directive provides in Article 16(5) that, in the event of termination of the contract or annulment, the service provider may "prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service inaccessible to them or by deactivating his user account".

party, ensuring greater formalisation and transparency with respect to the actions of the strong contractor, so that the decisions taken by the latter can be reviewed, in particular in order to protect competition and the principle of equality[312].

However, according to EU Reg. No. 1150/2019, the platform is required to indicate in the general contractual conditions "the reasons justifying decisions to suspend, terminate or otherwise restrict, in whole or in part, the provision of online intermediation services". It is required to notify the user "in advance or at the time the restriction or suspension takes effect", specifying the reasons[313]. For terminations, concerning the entire service offered by the platform, the notice must be given at least 30 days before the measure takes effect[314]. The notice period does not apply to cases where the platform "a. is subject to a legal or regulatory obligation which requires it to terminate the provision of the whole of its online intermediation services to a given business user in a manner which does not allow it to respect that notice period; b. exercises a right of termination under an imperative reason pursuant to national law which is in compliance with Union law; c. can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in the termination of the provision of the whole of the online intermediation services in question"[315]. In any event, "in the case of restriction, suspension or termination, the provider of online intermediation services shall give the business user the opportunity to clarify the facts and circumstances in the framework of the internal complaint-handling process referred to in Article 11. Where the restriction, suspension or termination is revoked by the provider of online intermediation services, it shall reinstate the business user without undue delay, including providing the business user with any access to personal or other data, or both, that resulted from its use of the relevant online intermediation services prior to the restriction, suspension or termination having taken

[312] Martinelli, S. (2021), p. 2095.

[313] Art. 3(1)(c) of Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

[314] Art. 4(1) of Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

[315] Art. 4(4) of Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

effect"[316]. The statement of reasons must contain "a reference to the specific facts or circumstances, including contents of third party notifications, that led to the decision of the online intermediation services", as well as a reference to the "relevant reasons" set out in the general conditions as possible grounds for suspension, termination or restriction. The reasons may be omitted where there is a "statutory or regulatory obligation not to disclose the specific facts or circumstances"; the platform may also omit the reference to the "specific reasons" where the adoption of the measure has been prompted by repeated and demonstrable breaches of the applicable terms and conditions[317]. Although the Regulation places this burden of reinstatement on the ISP itself, it seems reasonable to assume that a court may order reinstatement. Moreover, the objective of the Regulation is to counteract practices that deviate from improper behaviour on the part of the platforms. It must be remembered that digital platforms often have "superior contractual power, which enables them to act *de facto* unilaterally in a manner that may be unfair and thus detrimental to the legitimate interests of their commercial users and, indirectly, also to consumers in the Union". However, it is reiterated, even the reasoning and notice obligations imposed by the Regulation in the event of suspension or interruption of the service are waived where the service provider can prove that the (commercial) user concerned has repeatedly breached the applicable terms and conditions[318].

On the subject of content removal, moreover, the European Commission has intervened on several occasions in recent years, both with communications and with acts and regulatory proposals, introducing greater responsibility for platforms and greater control over their actions, in the light of their role, but also inviting them to intervene with "voluntary measures"[319], i.e., measures that are not compulsory but whose adoption

[316] Art. 4(3) of Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

[317] Art. 4(5) of Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

[318] Martinelli, S. (2021), pp. 2096-2097.

[319] Art. 7 DSA: Voluntary own-initiative investigations and legal compliance. Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 4, 5 and 6 solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with the requirements of Union law and national law in

is suggested by the Commission. With respect to these measures, the Commission specifies that they will not make the provider an "active host", directly responsible for the contents and will not determine the inapplicability of the principles set forth in Directive 31/2000, which provide for an exemption from liability of these subjects for stored contents, a rule now also re-proposed in art. 6 of the Digital Services Act[320] [321].

It is increasingly clear the establishment of para-regulatory and para-jurisdictional powers of the large online platforms[322]. It is undeniable that they have progressively established themselves through the socio-economic power, becoming therefore a *de facto* authority. The question is to understand whether and how their power has been transformed into a *de jure* authority. Their contractual relations are characterised by general conditions, a consent only formally manifested, but tending to be almost imposed[323] [324]. A first indicator of such transformation into a *de jure* authority is provided by the Directive 2000/31/EC and its special liability regime for ISPs, then expanded by the two Proposals of DSA and DMA. The special liability regime for such providers was designed to encourage their activity, avoiding penalising them by providing for an ordinary liability regime, which would have led to a generalised and even unjustified removal of content in order to avoid incurring liability of any kind. This

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compliance with Union law, including the requirements set out in this Regulation. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020PC0825

[320] Art. 6 DSA: Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 3, 4 and 5 solely because they carry out voluntary own-initiative investigations or other activities aimed at detecting, identifying and removing, or disabling of access to, illegal content, or take the necessary measures to comply with the requirements of Union law, including those set out in this Regulation. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020PC0825

[321] Martinelli, S. (2021), pp. 2092-2093.

[322] D'Alberti, D. (2021), p. 750.

[323] *Ibidem*, pp. 762-763.

[324] Provisions which, in requiring compliance with obligations of clarity and transparency in the drafting of terms and conditions of platforms, allow such providers to adopt rules capable of affecting the sphere of users regardless of an actual manifestation of consent. Often these terms are known by a click or by scrolling down the page. These are general terms and conditions where consent is a blanket assent and where the clauses are configured according to the take-it or leave-it model. The need to use digital services nowadays entails an inevitable adherence to such terms. There is no doubt that such forms of negotiation have been used by providers for years and, however, if the proposed regulation were to be converted into a definitive regulatory text, there would be provisions legitimising a private authority in law. In order to reach this conclusion, it is not sufficient merely to read Article 12 of the DSA, entitled Terms and Conditions, under which providers of intermediary services are required to formulate, in clear and unambiguous language, information about any restrictions that may be imposed in connection with the use of their service. In: D'Alberti, D. (2021), p. 778.

is also in full compliance with the objectives of the Directive. At the same time, however, the provision of such a liability regime implies a logical premise, namely the recognition - albeit implicit - of the corresponding power of the provider to take action, or rather to interfere in the legal sphere of the person who has published unlawful content, in order to authoritatively order its removal. Although there is no explicit *ex ante* legitimisation of the power of these platforms, a *de jure* authority is delineated, which arises, on the one hand, as a reflection of the liability - and, therefore, as the provider's power of self-protection - and, on the other, as a power to be exercised in the interest of others. If, in fact, the power to order the removal of a content, regardless of the consent of the person who published it, prevents the provider from incurring liability; on the other hand, it carries with it the traits of a real *munus* of private law, shaped by the need to guarantee the interest of other web users. The authority of law is, therefore, simultaneously an exercise of self-defence and power[325]. In the long run, its power, which should be limited to a power of activation in the presence of the conditions already examined, would also extend beyond cases of manifest unlawfulness. Here the provider would extend his authority from *de facto* to *de jure*[326].

Platforms, like other providers, enjoy specific powers and duties, such as the power to remove or disable access to specific contents reported by third parties because they are considered illegal: it is true that there is a duty to remove, in the event of notification, but only if the provider considers the report to be well-founded. A margin of discretion for the provider remains, therefore, who is required not only to express its opinion on the actual unlawfulness of the content, but also to identify - by means of a necessary balancing act and a judgement of proportionality - what is the most appropriate decision. In other words, it is the provider which decides whether the mere removal of the content is sufficient; whether it is appropriate to suspend the provision of services temporarily or permanently to the user who has published that content or whether it is even necessary to close that user's account. Such decisions, of a quasi-judicial nature, must be communicated, accompanied by clear and specific reasons, to the user who has shared such content. This is to guarantee him the possibility of

[325] D'Alberti, D. (2021), p. 765.
[326] *Ibidem*, p. 767.

complaining about such decisions. Complaints can be lodged within six months with the internal complaints management system or, alternatively, with an out-of-court dispute settlement body. In any case, therefore, before private justice bodies. Again, large online platforms, together with other providers, have the power to suspend the provision of their services for users who frequently publish manifestly illegal content or have the power to suspend internal communication or complaint mechanisms for users who frequently submit manifestly unfounded communications or complaints. Like public officials, they have the obligation to notify suspected offences. Finally, they have transparency obligations[327].

However, if one proceeds with a combined reading of Articles 12 and 13(1)(b) of the DSA, one can see the identification of a real authority in law. Art. 13(1)(b), in fact, provides that, within the reports of illegal content that Web actors must publish annually, they have to specify whether these reports were undertaken for violations of terms and conditions. Terms of use are no longer merely clauses of a unilaterally arranged contract, but actual rules to be observed in order to make use of a given service. Rules that, when verifying the unlawfulness of conduct practised online, are equated with legal provisions. Also symptomatic of the metamorphosis into an authority of law is the adoption of codes of conduct in order to reduce systemic risks. Although they are private instruments, prepared by private powers, such codes are capable of binding and affecting with *erga omnes* effects the legal sphere of the addressees regardless of their manifestation of consent. In fact, while regulation is intended to limit abuses committed in the exercise of such private powers, at the same time it is increasingly becoming a source of attribution of para-jurisdictional and para-regulatory powers[328].

2.3.5. Digital citizenship

The consequences of an excessive criminalisation of the network would be felt, however, in terms of suppression of freedom, of interferences of the public sector in controlling and blocking the connection, of restricting the use of anonymity and encryption, and of abusive collection of users' personal data. Those who support this

[327] *Ibidem*, p. 773.
[328] *Ibidem*, pp. 779-780.

approach argue, therefore, in the sense of preserving the network as a neutral instrument, to be valued, indeed, as a channel endowed with positive force, exploitable precisely for the purpose of conveying a message of opposite meaning, in other words a counter-narrative, educating users to "digital citizenship". The advantages of not adopting a restrictive policy and keeping the Internet open and free from restrictive excesses would be attributed to several factors. First of all, the network, and in particular the social media, make it possible to establish a dialogue, raise the awareness of millions of users, and launch a powerful positive counter-message and opposite to that of hatred or discrimination; open source intelligence or the search for information on an open network is an effective investigative tool, also thanks to the traceability of the Web; the speed of intervention that the digital channel guarantees (e.g. through the immediate deletion of offensive content or the closure of an account) far exceeds that of the traditional judicial instrument; finally, the digital platforms' own involvement in combating the phenomenon - through forms of self-regulation - is particularly valuable in order to quickly filter or block hate content. The EU moved in different directions: through monitoring and reporting tools by users themselves, as well as facilitating the dissemination of counter-narratives to make users aware; obligations for ISPs to remove hate content from digital platforms; forms of liability (including criminal liability) for the author of hate speech and the ISP[329].

2.3.6. Europe's approach against multi-jurisdictionality

In conclusion, all these measures show how the battle against hate speech, both online and offline, has become a priority on the institutions' agenda. However, the transnational character of the Web makes it difficult to set precise boundaries within which to delimit this offence[330]. While States are able to successfully prosecute hate crime that takes place within their own territorial boundaries, they have not been able to extend their reach

[329] Gasparini, I. (2017), pp. 509-510.
[330] Baccari G.M., Marraffino, M. (2021), p. 1015.

beyond their borders. Consequently, online hate speech which originates in one jurisdiction, but whose effects are felt elsewhere, continues to go unregulated[331] [332].

States have sought to regulate the domain of the Internet through the conventional strategy of national law. However, the multi-jurisdictionality of the Internet has undermined States efforts to place geographical demarcations onto Cyberspace. Web sites that are closed in one jurisdiction may simply re-open in another thus remaining available to Internet users worldwide. Furthermore, the global nature of the Internet makes the total legal regulation of cyberspace impossible. Consequently, it is necessary to seek alternatives through which to both limit the publication of hate speech online and minimise the harm caused by such behaviour. By combining legal intervention with technological regulatory mechanisms – monitoring, IPS user agreements, user end software and hotlines – the harm caused by online hate can be diminished. Moreover, through the careful integration of law, technology, education and guidance, a reduction in the dissemination and impact of online hate speech can be achieved without adversely affecting the free flow of knowledge, ideas and information online[333].

More recent proposals of the European Commission envisage specific regulations to be adopted, both in the field of artificial intelligence systems and in the field of digital services, which may provide important indications for the imputation of liability and for subjective culpability itself, at least in terms of fault, for events damaging and violating legal assets. At the same time, these can offer valuable support to criminal justice, starting with investigations for the search and collection of electronic (and other) evidence of offences, although a clear legal regulation appears to be necessary in any case, to guarantee the fundamental rights that are in danger and often in potential conflict. The future that awaits us is, therefore, that of a development, not exclusively criminal, of the regulation of the enormous potential that modern artificial intelligence technologies disclose, in order to guarantee protection of essential legal assets that belong to

[331] In particular, the US First Amendment affords considerable protection to those espousing hate from websites, in direct contrast with many other nations' approaches to hate speech. It follows that European nations' commitment to combating the growth of online hate is undermined by the US First Amendment which provides a refuge for many of those propagating hate In: Banks, J. (2010), p. 238.

[332] Banks, J. (2010), pp. 235-236.

[333] *Ibidem*, pp. 238-239.

individuals and to community. However, it will always be the criminal law, as an extreme resource, to guarantee justice in the face of the most serious offences[334].

[334] Picotti, L. (2022), pp. 1032-1033.

Chapter 3

Comparative law remarks

Comparative law is the branch of law whose one of the objectives is to go beyond the political boundaries of a State, questioning the similarities and differences between the legal models present in different territories. The comparatist uses taxonomy to unite experiences that share historical roots and characterising elements: he categorises legal systems into families, according to the role and preponderance of legislative, jurisprudential and doctrinal formants. The value of comparative law lies in its ability to explain the evolution of law, the link between law and society, by examining similarities and differences in systems that have historical links, assessing the appropriateness of acquiring new institutions in the domestic system along the lines of foreign systems. The factual approach of comparative law consists in looking beyond the definitional dimension in different countries (formal statement) to the concrete operation of the rule, even if not made explicit (operational rule) to compare apparently distant and irreconcilable phenomena[335].

It is possible to count different advantages of comparative law: it helps to transcend the boundaries of national positive law since the latter cannot be circumscribed and would suffer from incompleteness; it broadens the scholars' perspectives and shows how other States develop different models and prosper; foreign legal systems are a resource of ideas and examples because they demonstrate different ways of dealing with common social problems. Universality and the relativisation of domestic models prevail. In short, the study of law cannot be limited by borders, but must be studied on a universal level due to the nature of history and law, especially in an increasingly connected and interdependent world[336].

Factors determining these influences are migrations of peoples/ethnic groups, revolutions, advent of philosophical and religious models, technological innovation,

[335] Brutti, N. (2019), p. 15.
[336] *Ibidem,* pp. 20-21.

harmonisation in certain areas through the creation of supranational organisations, such as the European Union[337].

The tendency to use foreign experiences, however, suggests that, even if two texts are identical, it is not certain that the application practice is identical. It follows that for a satisfactory comparison and possible transplant, it is not enough to remain on the surface of the law in books, but one must also analyse the law in action. In order to adopt a solution that has been accepted in another legal system, it is necessary to check whether that solution works well in the country that followed it and whether it can also work well elsewhere without causing rejection crises. An example of the complexity of legal transplants is the untranslatability of legal terminology due to substantial differences between civil law and common law juridical systems. The concepts created, elaborated, defined by the legislator or jurists of a given system do not necessarily correspond to the concepts elaborated for another system[338].

However, in the legal sphere, the interdependence of law with the place where it comes into being and is applied highlights the importance of the relationship between legal norms and places. This would explain why legal systems sometimes are reluctant to adopt solutions or concepts adopted in foreign systems. It applies, for instance, to the concept of punitive damages, created in common law systems, and the restorative value of apologies in Japan[339].

In the last chapter, the hypothesis of introducing such institutions into civil law systems will be discussed.

3.1. Punitive damages

In the United States, punitive damages, meant as a form of compensation with a deterrent and punitive function, are designed to discourage the defendant from continuing unlawful conduct in the future[340], if the latter committed a serious or reprehensible tort with malice or gross negligence[341]. More precisely, the purpose of the institution is seen in supplementing the typical restorative-compensatory function of damage compensation

[337] *Ibidem,* p. 45.
[338] *Ibidem*, pp. 45-46
[339] *Ibidem,* p. 21.
[340] *Ibidem*, p. 22.
[341] Scarchillo, G. (2018), p. 290.

when this is considered insufficient to meet a number of needs, such as: punishing the offender; constituting an effective deterrent for the perpetrator and other potential offenders when mere compensation of the damage is not likely to influence behaviour and to prevent unjust profit from the commitment of the damage; to remunerate the plaintiff for the efforts made in the assertion of their right since it contributes to a concomitant strengthening of the legal order; compensate the victim for the prejudice suffered[342].

The injured party shall be awarded compensation beyond what is necessary to compensate the damage suffered, if it proves that the wrongdoer has acted with wilful misconduct or serious negligence. The compensatory function, typical of the civil tort sanction, is overlapped by a punitive function, typical of the criminal sanction[343].

Similar remedies are also contemplated in other systems such as the English[344], and partially in the continental and Italian systems[345].

However, the amounts awarded in the United States for punitive damages are larger than in other jurisdictions. This is due to the fact that in the US, the quantification of punitive damages is left to juries, i.e. citizens with no legal training who will opt for a more generous settlement where they find it useful to facilitate the deterrence of certain behaviour; in England, on the other hand, the role of juries has been diminishing and punitive damages are decided by professional, more objective judges. The experience of the trial by jury is completely distant from the civil law system, in which the court has an active role in decreeing *de facto* and *de jure* situations[346].

In addition, another reason why for the high sum awarded for punitive damages is represented by the lawyers' fees. According to the contingent fee agreement, a lawyer will only be able to claim his fee in the event of a winning verdict. If the case is victorious,

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[342] Nicotra, F. (2015), p. 3.

[343] *Ibidem.*

[344] In British law, the first application dates back to the 1700s, before being implemented in the colonies. The underlying rationale was, on the one hand, the need to punish misconduct and, on the other hand, the deterrence from reiteration of future conduct. Today their scope of application is greatly reduced. The leading case of Rookes vs. Barnard (1964) represented a turning point: punitive damages can be imposed only in cases where the wrongdoer has made a substantial profit (e.g., mass tort litigations, that is torts affecting a non-predetermined number of victims), there has been a form of abuse by the public administration, or where there is a specific regulatory provision. In: Fittante, A. (2019), p. 108.

[345] Brutti, N. (2019), p. 22.

[346] *Ibidem.*

the lawyer will receive a fixed percentage of the amount awarded to his client[347] [348]. It happens that as much as 75% of the compensation is collected by the lawyers, who anticipate the onerous costs of the trial[349].

3.1.1. Italian civil liability

Completely peculiar, however, compared to common law systems, is the Italian civil liability system, which revolves around the preponderant role played by the Civil Code of 1942[350]. The fundamental rule governing liability in tort is provided by Article 2043 of the Civil Code, which states that "any intentional or negligent act that causes unjust damage to others shall oblige the person who committed the act to compensate for the damage". On the one hand, the norm manifests the need to compensate for damages caused by a person whether they are voluntary, culpable, or accidental, according to the *neminem ledere* principle; on the other hand, it highlights how the Italian legal system does not provide for a distinction between damages that are and are not susceptible to compensation since in abstract all damages can find reinstatement. The sanction requires that the damage be repaired by pecuniary compensation or, in cases where it is possible, by specific performance under Article 2058 of the Civil Code. Thus, civil liability is based on the principle of full reparation of the damage, thus restoring the balance altered by the tort in order to restore the injured party's assets to the condition they were in before the commission of the wrongful act[351].

3.1.2. Recognition of punitive damages (Cass., S.U. 5 July 2017 No 16601)

Going back to the institution of punitive damages and their possible admissibility, recently in Italy it has been affirmed that they are not incompatible with the domestic public order anymore[352]. The starting point is represented by the judgment of the Court of Cassation in United Sections of 5 July 2017 No 16601: the case stems from a dispute that arose over the recognition of a US judgment in which, according to one of the parties,

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[347] *Ibidem,* pp. 22-23.
[348] Contingency fees are forbidden in the Italian legal system.
[349] Carleo, R. (2018), p. 273.
[350] Civil liability is ruled in the Civil Code within Articles 2043-2059.
[351] Scarchillo, G. (2018), p. 298.
[352] Carleo, R. (2018), p. 259.

there was a sentence for punitive damages, which according to a long-standing orientation of the Court of Cassation could not be recognised in the Italian system, being contrary to public order[353]. Already in other occasions, in fact, the United Sections have highlighted that the punitive function of the compensation for damage is no longer incompatible with the general principles of the Italian system, for instance, the pecuniary reparation for defamation, provided for by Article 12 of Law No. 47 of 1948 on the press, in which the regulatory provisions seem to superimpose the punitive functions of the sanction[354].

It has been affirmed a multi-functional nature of civil liability and compensation: alongside the preponderant and primary compensatory reparatory function, based on the principle of full reparation of damage with the aim of restoring the assets of the injured party to the condition as it was before the commission of the offence[355], also in relation to non-pecuniary, moral and subjective prejudice (honour, dignity)[356], is now recognised a preventive and punitive one[357]. In other words, compensation is no longer paid in a perspective of reparation of damage, but also in a perspective of punishment[358], although by many this punitive function continues to be considered extraneous to civil liability[359]

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[353] Aventaggiato, V. (2017), p. 1.
[354] Nicotra, F. (2015), pp. 3-4.
[355] Aventaggiato, V. (2017), p. 1.
[356] Brutti, N. (2019), p. 261.
[357] Aventaggiato, V. (2017), p. 1.
[358] The United Sections affirmed - in sharp contrast to previous judgements and reformulating the concept of public order - that compensation for damages is not assigned the sole purpose of restoring the patrimonial legal sphere of the injured party but, on the contrary, a deterrent and sanctioning function is characteristic of the Italian civil liability system. The Court, therefore, elaborates the following principle of law according to which "in the current legal system, civil liability is not only assigned the task of restoring the patrimonial sphere of the person who has suffered the injury, since the deterrent function and the punitive function of the civil liability are intrinsic to the system. The American institution of punitive damages is therefore not ontologically incompatible with Italian law. Recognition of a foreign judgment containing such a sentence must, however, be subject to the condition that it has been pronounced in the foreign legal system on the basis of rules guaranteeing the predictable nature of the hypotheses of conviction, and the quantitative limits. The only consideration that should be taken into account in the deliberations is whether the effects of the foreign act are compatible with the domestic public order. Lastly, the concept of international public order has been interpreted as "the set of fundamental principles characterising the domestic legal system in a given historical period, but based on the requirements for the protection of fundamental human rights common to the various legal systems and deducible, first and foremost, from the systems of protection set up at a higher level than ordinary legislation [that is the Constitution, the Lisbon Treaty, the Nice Charter which guarantee protection of fundamental rights]". In: Scarchillo, G. (2018), pp. 313-318.
[359] Carleo, R. (2018). Punitive damages: dal common law all'esperienza italiana. *Contratto e impresa (1)*. 259-275.

[360]. On the other hand, the basic conviction underlying the punitive function would seem to be that the greater the amount of compensation, the greater the deterrent effect it can have on the conduct of citizens[361].

3.1.3. Comments of the doctrine

The Italian doctrine has parted into two factions: those who fear the introduction of punitive damages, in terms of proportionality of the punishment, of unjustified enrichment of the injured party[362], and those who welcome them, hoping that they can instil a deterrent approach to the perpetrators and send a firm message to society on the wrongfulness of certain behaviours and on the seriousness of certain wrongdoings[363] [364].

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[360] Generally, the possibility of providing for compensatory hypotheses that go beyond the damage suffered cannot, therefore, find general acceptance, running the risk of trespassing into the sphere of punishment that can hardly be considered compatible with civil liability, also considering the characteristics of Italian legal system, which tends to preclude complete transplantation of the punishment institutions typical of common law legal systems. In: Nicotra, F. (2015), pp. 5-7.

[361] Carleo, R. (2018), p. 265.

[362] Quarta, F. (2019), p. 100.

[363] In the US tort system, this consists not only of a punitive function (punitive damages), but also to reaffirm the social dignity of the injured party through a compensatory assessment appropriate to the specific case (compensatory damages). In: Brutti, N. (2018), p. 805.

In US tort law, compensatory damages are damages awarded by a court equivalent to the loss a party suffered. The amount awarded is based on the proven harm, loss, or injury suffered by the plaintiff. This award does not include punitive damages, which may be awarded when the defendant's actions are especially reckless or malicious. Receiving compensatory damages does not prevent a party from also receiving punitive damages. When calculating compensatory damages, courts will often look at the fair market value of destroyed/damaged property, lost wages/income, and necessarily incurred expenses. Courts may also include damages for emotional distress; however, due to the difficulty of placing an economic value on these intangible factors, the application is inconsistent. https://www.law.cornell.edu/wex/compensatory_damages

[364] Brutti, N. (2018), p. 803.

The Italian legal system, marked by a principle of atypicality of the tort[365], has for a long time juxtaposed a model of certainty of the punishment[366] (Article 2059 of the Civil Code) about the compensability of non-pecuniary damage. This approach collapsed with the constitutionalised reading of Article 2059 by the doctrine and case law[367] [368].

The idea of shaping the compensation of non-pecuniary damage also in a punitive and deterrent function, with particular attention to collective interests must be contrasted with the problem of the difficult capitalisation of certain legally protected rights/interests. Reference is made to assets outside the market, to so-called idiosyncratic and intangible values, to the question of subjective moral damage, in its broadest version. A universal

[365] It is one of the characteristics of the discipline of tort law in the Italian legal system. In order to establish whether a damage caused by the conduct of a certain subject is compensable under art. 2043 of the Civil Code, it must be established whether this injury is unjust, i.e., whether it has injured interests worthy of protection according to the legal system. And the judgement of the worthiness of protection of a given interest against a given injury is not already formulated and expressed by the legislator, specifically providing for the individual interests whose injury is unjust pursuant to Article 2043 of the Civil Code, but is entrusted to the appreciation of the judge who decides, case by case, whether the interest whose injury has occurred in the case presented to them is worthy of protection pursuant to Article 2043 of the Civil Code. No one can be punished except for an act expressly provided for by law as an offence. http://www.enciclopedia-juridica.com/it/d/atipicit%C3%A0/atipicit%C3%A0.htm.

Today, it is considered that the tort is atypical and that non-pecuniary damage must be compensated whenever the tort affects constitutionally guaranteed personal values. Therefore, the limitation of the law cases is understood as a reference to the rules of the Constitution. https://www.brocardi.it/codice-civile/libro-quarto/titolo-ix/art2059.html

[366] Principle that requires the criminal legislator to conform to a technique of formulation of the rule capable of ensuring a precise determination of the legal case, i.e., to make it easy to deduce what is criminally lawful and what is criminally unlawful. As a consequence of the principle of (-), a corollary of the principle of legality, it is therefore necessary for the criminal rule to be formulated in such a way as to enable the judge to identify the type of fact governed by a given rule, so as to ensure a correspondence between the historical fact giving concrete form to a given offence and the relevant abstract model. Also deriving from the principle under consideration is the principle of typicality, according to which only that fact expressly provided for and peremptorily considered as such by the law is an offence. The principle of (-) therefore satisfies two requirements: it provides a guide to the citizen, who is placed in a position to discern exactly what is lawful from what is unlawful; it guarantees the defendant's right of defence, which would be undermined by the lack of a precise legal description of the contested fact. https://dizionari.simone.it/1/tassativita

[367] In the past, according to the Art. 2059, the compensation of non-pecuniary damage, that is, damage that has no repercussion on material wealth, but only pain, humiliation, was excluded in principle. Part of the doctrine strenuously argued for the non-recoverability of pure moral damage, on the assumption that there is no moral legal patrimony, that the intangibility and inviolability of human personality is not in itself a civil and private right, but a right whose protection is provided only by public criminal law, that the assessment of moral damage would not be possible. In the current system, however, a more flexible interpretation of compensation for non-pecuniary damage, which affects interests protected by the Constitution, was made. Nevertheless, in the new system it was stated that pure moral damage is compensable only in cases determined by law. https://www.brocardi.it/codice-civile/libro-quarto/titolo-ix/art2059.html

[368] Brutti, N. (2018), p. 801.

problem of concrete justiciability[369] arises in these cases, which translates into the (dis)value to be attributed to the violation of a legally protected interest[370].

It should be noted that the horizon within which the Italian legal system operates is still the equitable assessment under Article 1226 of the Civil Code, different from the operational criteria of overseas juries[371]. The institution of punitive damages is alien to the civil law tradition, which has always settled on a compensatory-reintegrative function of civil liability, involving both pecuniary and non-pecuniary damages, leaving the typical general-preventive and deterrent function to criminal law. Although there may be points of conjunction, as seen in the hypothesis of injury to honour and dignity, one must not incur the misunderstanding of considering punitive damages superimposable on damages for psychic or moral suffering. It should be pointed out that these elements are difficult to translate into money (pain and suffering), they tend to be compensated in our Civil Code as non-pecuniary damages pursuant to Article 2059 and 1226, only if their consistency and seriousness (which cannot be considered *in re ipsa*) is proved. Such evidence is presumptive, and it is evident that one of the elements is the seriousness of the tort and its consequences for the person in the light of common feeling[372] [373].

Moving on to the problems of integrating punitive damages in the Italian legal system some scholars of the doctrine identify the predictability or calculability as well as the typicality of the punishment, i.e., whether the civil court may impose a penalty (or an order for punitive damages) if it is not expressly provided for by law. The need for predictability or calculability of the decision is hardly reconciled with the determination of punitive or ultracompensatory damages to the discretion of the judge: for example, doubts are reported about the applicability of punitive damages with reference to personal injury, which is subject to statistical measurements and Tables[374]. Moreover, the calculation of the compensatory penalty requires reference not only to the principle of

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[369] Art. 24 of Italian Constitution: All persons are entitled to take judicial action to protect their individual rights and legitimate interests. The right of defence is inviolable at every stage and level of the proceedings. The indigent is assured, by appropriate measures, the means for legal action and defence in all levels of jurisdiction. The law determines the conditions and the means for the redress of judicial errors. http://www.prefettura.it/FILES/AllegatiPag/1187/Costituzione_ENG.pdf

[370] Brutti, N. (2018), p. 804.

[371] *Ibidem*, pp. 804-805.

[372] Civ. Cass. no. 1183/2007. https://www.avvocato.it/massimario-8926/

[373] Brutti, N. (2019), pp. 262-263.

[374] Carleo, R. (2018), p. 271.

legality, but also to other constitutional principles such as those of proportionality (on which see also Art. 49(3) ECHR[375]) and reasonableness[376]. Therefore, many argue that punitive damages, due to their magnitude and unpredictability, cannot be the subject of a real legal transplant in the Italian legal system. On the other hand, an interpretation of Article 2059 of the Civil Code is sufficient to allow the judge to modulate the compensation for non-pecuniary damage from a perspective that is also punitive towards the damaging party. The instrument of compensation in terms of deterrence would undoubtedly constitute a step towards adequate protection of the person; alongside this, however, it would also be necessary to establish shared parameters which, if applied uniformly, would ensure greater certainty and rationality in the determination of the *quantum* of compensation[377].

On the contrary, those who entertain the idea of punitive damages are guided by the assumption that "a civil liability that does not caress deterrence" is not "a true civil liability". The invitation is to consider the judgement of civil liability no longer only in its typical intersubjective dimension, but greater visibility is given to the deterrent function of tort law, whereby overcompensation of the victim is perhaps the only instrument capable of deterring the damaging party[378]. The drafters of the Civil Code of 1942, aware of the partiality of the horizons that can be reached through Article 2043 of the same, added Article 2059 in the regulation of civil tort which, while not defining non-pecuniary damage, admits its reparability only in the hypotheses foreseen by law, aiming to ensure the repression with preventive character of that special category of personal damage that also constitutes offence to the legal order (Article 2 Constitution). Article 2059 of the Civil Code, in short, assigns to the legislator the task of establishing a list of

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[375] Art. 49 - Principles of legality and proportionality of criminal offences and penalties: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that shall be applicable. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations. 3. The severity of penalties must not be disproportionate to the criminal offence. http://fra.europa.eu/en/eu-charter/article/49-principles-legality-and-proportionality-criminal-offences-and-penalties

[376] Carleo, R. (2018), p. 274.

[377] Monti, S. (2021), pp. 252-253.

[378] Quarta, F. (2019), pp. 92-93.

offences that, in addition to those constituting a crime, require a surplus of attention by the courts in the phase of liquidation of the *quantum*, i.e., the inviolable rights of the person, which are placed above everything and everyone[379]. Having thus ascertained the injustice of the damage, Article 2043 of the Civil Code has the purpose to offer compensation for any objectively recognisable alteration *in pejus*, patrimonial or not, with the only constraint that the *quantum* be calibrated as precisely as possible on the worsening of the individual condition of the damaged party. In other words, Article 2043 acts in a strictly compensatory function, while Article 2059 deals with reparation in a punitive-deterrent function; in conjunction they aim to repress, disincentivise and offer protection against the most serious offences in the event of violation of fundamental rights[380]. The doctrine proposes that it would be sufficient to consider the level of premeditation and the gravity of the fact as reference points, and on these to calibrate the proportionality of the sanction[381].

According to Quarta, critics are contrary to punitive damages since they would integrate an unjustified enrichment on the part of the damaged one, disregarding the contribution that private enforcement is able to provide in the safeguarding of fundamental rights. The holder of an unjustly injured fundamental right, who chooses the path of procedural action rather than that of silent resignation, is considered a sort of cooperator of justice rather than an injured party; and he will be compensated not only because he has suffered unjust discrimination, but because it is socially important to combat discrimination and encourage victims not to suffer it by keeping silent. In common law systems, the instrument of the ultra-compensatory civil sanction has traditionally protected the fundamental rights of the individual, integrating the public enforcement, in order to discourage the reiteration of undesirable conduct[382].

According to Monateri, the equitable assessment pursuant to Art. 1226 of Civil Code would allow the judge to overcome the limit of damage compensation, taking into consideration the conduct of the damaging party[383].

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[379] *Ibidem*, pp. 93-94.
[380] *Ibidem,* pp. 94-95.
[381] *Ibidem,* p. 95.
[382] *Ibidem,* p. 100.
[383] Ponzalli, G. (2008), p. 32.

3.1.4. Adherence to public order policies

The recognition of foreign judgments in Italy is limited by the violation of international public order, i.e., by the set of fundamental principles laid down by international and community law (Reg. EC No. 44/2001 (Bruxelles I)[384], now repealed by Reg. (EU) No. 1215/2012 (Bruxelles I bis)[385]), by the Constitution and by state laws, such as the law reforming the Italian system of private international law (Art. 16 and 64(g) of Law 218/1995[386], modelled on the rules of the 1968 Brussels Convention). By means of Art. 33(1) of Brussels I, the Community legislator automatically recognizes judgments issued in one of the Member States, without recourse to judicial authority, unless (as the third paragraph of Art. 33 states) a dispute contrary to public policy arises (Art. 34 and 35[387])[388].

In contrast to the concept of domestic public policy, when deciding on international public policy, jurisprudence must assess the concrete effects resulting from the

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[384] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R0044

[385] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012R1215

[386] Article 16 (Public policy). 1. A foreign law shall not be applied if its effects are contrary to public policy. 2. In this case the law referred to by any other connecting factor that may be laid down for the same statutory hypothesis shall apply. In the absence thereof, Italian law shall apply.

Article 64 (Recognition of foreign judgments). 1. A foreign judgment shall be recognised in Italy without any special procedure being required when: g) its provisions do not produce effects contrary to public policy. https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1995;218. The same is stated in art. 45 of EU Reg. No 1215/2012.

[387] Article 34. A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35. 1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72. 2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction. 3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

[388] Scarchillo, G. (2018), pp. 300-302.

application of foreign law[389]. If the foreign rule causes effects conflicting with the domestic public policy, it cannot be applied[390]. On one hand, the Italian legal system is characterized by openness to external legal traditions through the application of rules of private international law, but it is complemented at the same time by instruments aimed at preserving the public policy, whose aim is that of protect the internal harmony of the legal system and avoid incompatibilities with the ethical, economic, political and social principles[391].

3.1.5. Examples of punitive damages in Italian institutions

Ponzanelli identifies four reasons why punitive damages make the American experience unique with the consequences of the difficulty of legal transplant: a. the civil tort is strongly dependent on the criminal one. The civil tort is born in the womb of criminal liability and even when it achieves its autonomy it maintains a strong criminal characterisation; b. the presence of the jury, which structurally raises the *quantum* of compensation, not only for proper reparation, but also for punishment. The jury does not have to motivate and must balance a deficient social security system; c. the American rule. The absence of the principle according to which the costs of the proceedings are charged to the party losing the case[392] induces the judge to considerably increase the measure of compensation, beyond the damage actually sustained, because the principle of full reparation, to be understood as excluding all further costs (and therefore also legal costs), is to be ensured and safeguarded; d. the economic analysis of the law. It requires, in a situation of undercompensation, to transfer all the sums not compensated in favour of those who have succeeded in obtaining compensation[393].

In Italy, the system is completely different: a. the civil tort is today completely detached from the criminal tort. That is, the civil court may independently ascertain the abstract existence of a criminal tort for the purpose of awarding non-pecuniary damage; b. no jury is foreseen. Redistributive temptations are compressed, even though the reparative need is strong, and certainly prevalent; c. the principle of charging the

[389] Brutti, N. (2019), p. 248.
[390] Scarchillo, G. (2018), p. 300.
[391] *Ibidem*, p. 302.
[392] In the Italian legal language, this principle takes the name of "principio di soccombenza".
[393] Ponzanelli, G. (2008), pp. 26-27.

proceedings costs to the losing party is envisaged (this could be seen also in a logic of deterrence towards disputes that prove to be manifestly unfounded). d. the economic analysis has not taken root[394].

However, the question arises as to whether it is possible to consider a punitive-deterrent reading of certain civil law institutions of the Italian legal tradition that present similarities with the Anglo-Saxon institution[395]. A first analysis is made with regard to the non-patrimonial damage provided for by the combined provisions of Article 2059 of the Civil Code[396] and Article 185(2) of the Criminal Code[397]. Essentially, the doctrine denies that non-pecuniary damage falls within the category of punitive damages since the focus is on the legal sphere of the injured party and not so much on the reprehensible conduct of the damaging party, which is the case with American punitive damages. In fact, non-pecuniary damage has the purpose of securing compensation to the injured party, while punitive damage has a punitive purpose by focusing on perpetrator's fault and their economic condition, without taking into consideration the correlation between the injury suffered by the injured party and the amount of the punishment imposed on the offender. Nonetheless, from the jurisprudential point of view, judges in many trials take into account the subjective element of the person responsible and his or her economic conditions[398]. Therefore, those who welcome punitive damages in the Italian legal system see in Art. 2059 of the Civil Code a punitive and deterrent function; they are poorly compatible with the compensatory function as it would be impossible to restore the initial condition of the defamed[399].

Lastly, a careful analysis is needed with regards to the pecuniary compensation under Article 12 of Law No 47/1948, according to which in the case of defamation by means of the press, the injured party may claim, in addition to compensation for damages pursuant to Article 185 of the Penal Code, compensation of patrimonial damage under Article 2043 of the Civil Code and the compensation of moral damage under Articles 2059 of the Civil

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[394] *Ibidem,* p. 27.
[395] Scarchillo, G. (2018), p. 306.
[396] Non-pecuniary damage must be compensated only in cases determined by law.
[397] Article 185 (Restitution and damages). 1. Every offence obliges to provide restitution in accordance with civil law. 2. Every offence that has caused damage to pecuniary or non-pecuniary assets obliges the perpetrator and persons who, in accordance with civil law shall be liable for the act, to make restitution.
[398] Scarchillo, G. (2018), p. 307-308.
[399] Pardolesi, R., Simone R. (2021), p. 429.

Code, a sum by way of reparation. The sum shall be determined in relation to the seriousness of the offence and the circulation of the printed matter[400]. Part of the doctrine has found similarities with punitive damages: the purpose of monetary reparation, similarly to punitive damages which are awarded whenever the agent's conduct is intended to achieve, by means of a tort, a profit that exceeds the damages, is not entirely that of compensating the victim, but rather that of discourage the reprehensible conduct of the offender. It thus overcomes a fundamental principle of civil liability, according to which the amount of the civil penalty may not exceed the damage suffered[401]. Therefore, similar institutions to punitive damages are present also in a civil law system like Italy.

3.1.6. Tentative conclusions

The punitive power is entitled to the State, legitimised to intervene with criminal sanctions, which are exquisitely punitive, when the fundamental values on which social equilibrium is based are offended, also in function of the taxability of the hypotheses of criminal offence. In short, punishment is the mandatory task of the criminal legislature, and cannot be counted among the purposes of civil law, in general terms, and civil liability in particular. Monetary punishment would be, to all intents and purposes, a criminal sanction, which could only be introduced by the primary source, i.e., the law, and, in any case, by a criminal law[402].

Situations in which the court may award sums which exceed the prejudice suffered by the victim are indeed permissible. The legislative intermediation, however, is always needed, which, by focusing on the conduct and activity of the injured party, can legitimise this sanction. Since the scope is that of non-economic damages, Article 2059 of Civil Code cannot but be mentioned again. In the quantification of non-pecuniary damages, the conduct of the damaging party cannot fail to assume specific relevance. The valuation of the injured asset - i.e., life - on the one hand must provide for uniformity of valuation, on the other hand subjective protected situations must be considered. The higher compensation owed, resulting from a personalised assessment of the damage, reflects a deterrent sensitivity and acquires a clear punitive function. Therefore, these provisions

[400] Scarchillo, G. (2018), p. 312.
[401] *Ibidem,* pp. 312-313.
[402] Ponzanelli, G. (2008), pp. 27-28.

attest the existence in the Italian legal system of cases that place the emphasis on the conduct of the damaging party and that award high compensation for damage not because it has been suffered by the victim, but because of the urgency of punishing the conduct that has exceeded a certain threshold of unlawfulness. Only in the presence of a sure normative index, however, can the judge award a sum higher than the damage suffered by the victim[403].

Punitive damages are, therefore, configurable in the Italian legal system but still represent an exception that, as such, must be legitimised by a specific legislative provision. The legislator has to decide in which cases punitive damages can be configured. The principle of the rule of law established by Article 23 of the Constitution[404] establishes that the decision to pay a sum in addition to that strictly necessary to re-establish the *status quo ante* (punitive compensation) is configurable only and only if there is an *ad hoc* rule[405]. Therefore, punitive damages sentences could be admissible in the Italian system only by way of deliberation, while they could never be pronounced by local courts, in the absence of the necessary legislative intervention[406], notwithstanding the need to assess the compatibility and limits of similar possible sentences in our legal system as well[407]. At the same time, the principle of typicality must characterise the foreign legal system as well: in order for a foreign judgment to be recognised in Italy, there must be a specific rule in the foreign legal system providing for punitive damages; it must come from a recognisable source of law, that is to say, that the judge *a quo* has pronounced the sentence on the basis of adequate normative bases, which comply with the principles of typicality and foreseeability. Also, the principles should not be in contrast with the public order. It follows that there must be a precise delimitation of the

[403] *Ibidem,* pp. 31-32.

[404] No obligations of a personal or a financial nature may be imposed on any person except by law. http://www.prefettura.it/FILES/AllegatiPag/1187/Costituzione_ENG.pdf. The Italian legal system widely contemplates criteria of liquidation of damages marked by deterrence or sanction, thus allowing the judge to incorporate them more and more often in their indemnity evaluation. Systematically, this allows foreign punitive damages judgments to be considered compatible with the public order, now revised at supranational level. In: Brutti, N. (2019). *Diritto privato comparato*. Letture interdisciplinari. Giappichelli.

[405] Aventaggiato, V. (2017), p. 1.

[406] Carleo, R. (2018), p. 260.

[407] *Ibidem,* p. 271.

case (typicity) and specification of the quantitative limits of the sentences that can be imposed (foreseeability)[408] [409].

Even though attempts of legal transplants are being taking into consideration due to the increasing phenomenon of globalization and the existence in the legal system of a grey area, in which civil liability includes a punitive role, blurring the line between the civil and criminal spheres, the general rule in the Italian system is still that of considering civil liability as an instrument aimed at restoring the injured party's patrimonial sphere, recognising at the same time the legitimacy of civil sanctioning-deterrent instruments, albeit within the limits of Article 23 of the Constitution. In order to recognise and introduce punitive damages[410], a law will be needed since the matter cannot be left to the sole discretionary activity of the judge[411] [412]. The sentence of compensation must also assume an educational function, i.e., it must represent a deterrent to be used not only against the convicted person but also against the entire community[413].

3.2. Apologies

Comparative law requires to consider options that are not foreseen in the domestic legal system. Among these, one could find the remedy of apologies, widely spread in Asian cultures when dealing with disputes involving damages: it is fundamental and preliminary to the negotiation to offer an apology and request for forgiveness to the victim, regardless of the ascertaining of liability. This is aimed at preserving social harmony and facilitates cooperation. It occurs because in those cultures the legal dimension of relationships and traditions and customs are intertwined; the pacifying rituality of conflicts in Confucian doctrines and social harmony play a major role[414]. In addition, another reason for their spread and implementation of such institution is the distinction between law in action and law in books: some norms, although implanted at

[408] Scarchillo, G. (2018), pp. 319-320.
[409] Aventaggiato, V. (2017), pp. 1-2.
[410] Scarchillo, G. (2018), pp. 320-327
[411] In addition to legislative interventions, which are increasingly frequent, it is mainly the jurisprudence that contributes to the introduction of extra-compensatory damages, incorporating the demands coming from foreign legal systems, reducing the limits traditionally imposed by the concept of public order. In: Carleo, R. (2018), p. 266.
[412] Carleo, R. (2018), p. 271.
[413] Scarchillo, G. (2018), p. 323.
[414] Brutti, N. (2019), pp. 98-99.

the legislative level, are scarcely applied and operational, precisely because of the presence of conflicting social practices and political-religious customs[415].

3.2.1. Apologies for hate speech cases

When people decide to litigate or to pursue a claim it requires the person to recognise that they have been harmed, to blame someone for that harm and then to claim[416]. In the specific case of hate speech, understood as "the use of content or expressions aimed at spreading, propagating or fomenting hatred, discrimination and violence on racial, ethnic, national, religious grounds, or based on gender identity, sexual orientation, disability, or personal and social conditions, through the dissemination and distribution of writings, images or other material, including through the Internet, social networks or other telematic platforms"[417], the debate focuses on where to draw the line between the constitutional principles of freedom of expression and the interests that hate speech is capable of damaging, although every democratic society should ban expressions of though which are meant to discriminate[418].

3.2.2. Anti-discrimination provisions

To some extent, the conceptualisation of harm varies according to cultural factors: even EU State Members cannot give a proper definition of what hate speech is and whether the conduct is willing to hurt and therefore needs to be adjusted[419]. However, the EU was founded with the objective of creating a common area where everyone could be

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[415] *Ibidem*, p. 101.

[416] Vines, P. (2021), p. 31.

[417] Senato.it. Relazione della commissione straordinaria per il contrasto dei fenomeni di intolleranza, razzismo, antisemitismo e istigazione all'odio e alla violenza. https://www.senato.it/service/PDF/PDFServer/DF/408311.pdf. In: Viglione, F. (2020), p. 776.

[418] Viglione, F. (2021), p. 189.

[419] The need to fully achieve substantive equality, by redeeming the fate of the weakest groups in society, is an objective which, on the criminal law level, must come to terms with the principle of offensiveness, and on the private level must be made compatible with the very structure of the remedial models which characterise the individual legal systems, sometimes firmly anchored to a compensatory nature of civil liability. The two levels inevitably end up intertwining, since in both cases the prerequisite for judicial intervention is the correct identification of the right to life threatened by hate speech, as well as the balancing of freedom of expression against other fundamental rights, a balancing that can only lead to delimiting the area of unlawfulness. In this regard, even among European countries, which adopt similar legal instruments, there is no uniformity in the identification of the justificatory basis of the penalties imposed on those who utter hate speech, a basis that is complicated to define because of the difficulty of defining the right of honour or dignity to vast groups of people, often ethnic, linguistic or religious minorities. In: Viglione, F. (2020), pp. 781-782.

recognised as part of a whole: this ideal is enshrined in anti-discrimination provisions[420], found also in the Constitutions of State Members, e.g., Art. 3 of the Italian Constitution, admitting the possibility for the legal system to punish even crimes of mere conduct and abstract danger, as well as the irrelevancy for the incitement to hatred to achieve concrete effects[421] [422].

3.2.3. Alternative dispute resolutions

The European Union, under the influence of lawmakers who promoted methods of alternative dispute resolution for its wide range of advantages[423], followed this trend through the adoption of various directives, recommendations, regulations, and codes of conduct. Along with these efforts, national legislators have encouraged non-litigious dispute resolution as well[424]. For instance, in Italy Article 5 of Legislative Decree no. 215/2003 entitles associations and legal persons specialised in the promotion of the right to equality and enrolled in the Register of the National Office Against Racial Discrimination (UNAR) to act in support of or on behalf of victims of racial and ethnic discrimination, which *inter alia* performs the tasks of countering the spread of hate speech. Before reaching the court, parties could apply for a mediation by the UNAR, an

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[420] We recall Article 2 of the Treaty of European Union, the non-discrimination principle, as one of the fundamental values of the Union; Article 10 of the Treaty on the Functioning of the European Union requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, when defining and implementing its policies and activities; the Employment Equality Directive (2000/78/EC) prohibits discrimination on the basis of sexual orientation, religion or belief, age and disability, in the area of employment; and the Racial Equality Directive (2000/43/EC) which introduced prohibition of discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, as well as goods and services. In: Viglione, F. (2021), p. 186.

[421] Since the 1980s, the case law frames anti-racist aims in the spirit of the Constitution, thus deeming admissible the configuration of offences of pure conduct and abstract danger, as well as the omission of any assessment of the incitement to achieve concrete effects. In the background, however, there remains the alternative between a foundation that lies in the personalistic protection of the dignity of individuals and the hypothesis that the incriminating provision is intended to protect the peaceful coexistence of the various groups within society. Viglione, F. (2020), p. 783.

[422] Viglione, F. (2021), p. 188.

[423] Parties can save money and reduce the chances of financial loss even for the winning party; can save time since ADR can offer a faster, more efficient path to resolution in most situations; have more control and opportunities to direct the process; are ensured that dispute is kept confidential; can preserve the relationship given the fact that ADR can ensure negotiations stay amicable, constructive and amenable; are guided by an unbiased, third-party who can lead negotiations and steer them toward the best resolution. https://nswbar.asn.au/using-barristers/alternative-dispute-resolution#:~:text=Alternative%20dispute%20resolution%2C%20or%20ADR,litigious%2C%20amicable%20and%20constructive%20means.

[424] Vandenbussche, W. (2021), p. 47.

equality body: the plaintiff has to demonstrate that the offence reaches the level of wrongfulness of a discriminatory act, while the defendant has the right to defend themselves. The UNAR would ascertain whether a hate speech has occurred and seek to facilitate a confidential settlement, such as agreement to desist, apologise, to publish a retraction, or to conduct an educational campaign in the workplace. However, one has to ponder the weight of Art. 21 of the Italian Constitution, which makes difficult identifying the basis for criminal sanctions[425].

3.2.4. When it is acceptable to limit freedom of speech

The repressive attitude of the legal system could, on the contrary, reinforce a combative identity of those who are united by feelings of hatred and contempt for diversity. And even political speech, although it manifests itself in the most degraded forms in hate speech, cannot tolerate limitations designed to imprison it with prohibitions that make it impracticable[426] [427]. But, as the doctrine declares, the right to free

[425] Viglione, F. (2021), pp. 188-192.

[426] Viglione, F. (2020), pp. 790-791.

[427] The Court of Cassation affirmed the principle that racial propaganda is criminally relevant if the medium used disseminates a discriminatory message based on race superiority, whereas the crime does not exist if the propaganda induces the expulsion of foreigners who commit crimes. Political speech is strongly protected in liberal democracies. The New York Convention defines discrimination as any conduct which, directly or indirectly, involves a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, religious beliefs or practices and which has the purpose or effect of destroying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social and cultural fields and in any other field of public life. The first case is contained in Court of Cassation, Sec. III, Sentence (date of hearing 23/06/2015) 14/09/2015, No. 36906 ("The message in itself, which does not refer to any violent method for the implementation of the politics "no more foreigner"' written on the leaflet, does not appear to propagate racial hatred, https://onelegale.wolterskluwer.it/document/cass-pen-sez-iii-sent-data-ud-23-06-2015-14-09-2015-n-36906/10SE0001604531#dispositivo), while the second situation is represented by Court of Cassation, IV Criminal Division, Sentence No. 41819 of 30 October 2009 ("The offence of propaganda of discriminatory ideas, provided for in Article 3(1)(a) of Law No. 654 of 1975, can be committed by putting up posters on city walls with the following content: "No to nomad camps. Sign too to send the gypsies away", https://onelegale.wolterskluwer.it/document/cass-pen-sez-iv-sent-data-ud-10-07-2009-30-10-2009-n-41819/10SE0000806616?searchId=2041463793&pathId=d1834416d57e6&offset=0&contentModuleContext=all). In: Baldi, F. (2015). "Nessun reato se il volantino elettorale valorizza solo i comportamenti illeciti degli stranieri". *Il Quotidiano Giuridico*. https://www.altalex.com/documents/2015/09/24/nessun-reato-se-il-volantino-elettorale-valorizza-solo-i-comportamenti-illeciti-degli-stranieri.

Moreover, "the Legislative Decree No 215/2003 is integrated if the statements made are such as to create a hostile climate (i.e. aimed at spreading hatred and excluding the addressees from the social structure), degrading (insofar as they are capable of offensively and demeaningly affecting the dignity of social groups) and humiliating, due to the gratuitous attribution of inferior qualities due to ethnicity and nationality; nor can it be considered that the expressions used fall within the scope of the freedom of manifestation of political thought if those who hold political and institutional positions have not balanced the expressions used with the respect and dignity of the subjects referred to. The protection of the right to equal dignity and equal access to fundamental rights is frustrated by such discriminatory conduct and

manifestation of thought should be deemed to prevail only if the matter concern the mere dissemination of racist ideas that are devoid of defamatory or insulting content; if the expressions are thought to offend the dignity of a social group or of the individual a remedy may legitimately be expected, which may well take the form of damages as well as an order to publish the decision at the expense of the offender[428].

3.2.5. Apologies as legal remedies

When some kind of torts happen, hate speech in this specific case, two paths are feasible: the provision of either criminal sanctions or civil ones; in the latter the discussion around apology legislation arises[429]. It involves remedies that are different from pecuniary compensation, which could be inadequate for emotional harm, and that can rebuild social harmony in the community[430]. Scholars envisage multiple advantages of apologies in the sense that they may sensitise speakers to the harm they have caused, make the victim feel better, restore their dignity, send a powerful message to society that certain behaviours are not acceptable, and fulfil an educative role[431]. The focus is on the effect of the law on the health of the individual or on enhancing psychological or physical well-being, what is known under the name of therapeutic justice[432]. Plus, law legislation encompasses a combination of statutory provisions aimed at reducing litigation and removing the adverse legal consequences of apologizing, preventing plaintiff from using to his advantage the fact that defendant has apologized[433]. The latter aspect has, however, raised concerns and doubts by defendants who fear that expressing regret may lead to acknowledgement of fault[434]. This would be contrary to the idea of ideologies, where the presumed benefits consist in issuing a morally effective statement that has no legal effect. Even though all legislation declare that apologies are no admission of fault or liability, that they cannot be

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therefore associations with such a statutory purpose are entitled to compensation for non-pecuniary damage" (Court of Milan, 6 June 2018, https://www.asgi.it/banca-dati/tribunale-di-milano-ordinanza-6-giugno-2018/). The manifestation of thought, in this case, determines an infringement of equal social dignity and the right to non-discrimination; moreover, the anti-discrimination legislation also penalises conduct that is only potentially damaging, but which is capable in the abstract of creating an intimidating, hostile, degrading, humiliating and offensive climate. In: Viglione, F. (2020), p. 786.

[428] Viglione, F. (2020), pp. 784-785.

[429] Viglione, F. (2021), pp. 181-182.

[430] *Ibidem,* pp. 189-190.

[431] *Ibidem,* p. 183.

[432] Vandenbussche, W. (2021), p. 70.

[433] *Ibidem,* p. 48.

[434] Vines, P. (2021), p. 35.

part of the decision-making process, and it is the responsibility of the court to assess whether the legal requirements of liability are fulfilled, if the factual elements are proven, in the absence of specific rules apologies can come be considered an admission. Even though a party cannot acknowledge fault or liability as such, factual elements can be severed from apologetic statements and used as substantive evidence. It remains true that statements of empathy (regret, remorse or consolation) or admissions of fault or wrongdoing including factual information relevant for the determination of liability can be interpreted as admissions of fact[435].

3.2.6. Lack of apology legislation

The current lack of apology legislation in continental Europe compared to common law systems is attributed to the fact that apologies relate in most of the cases to tort proceedings. As this type of proceedings involve higher damages amounts in common law systems, lawmakers are more apt to reassure the public that it is safe to apologize, while tort law proceedings are less problematic in continental Europe which would make lawmakers less interested in stimulating ADR in torts[436]. Moreover, civil law systems are less familiar with legal rules prohibiting the use of specific items of evidence, namely exclusionary rules, which prevents the government from using most evidence gathered in violation of the United States Constitution[437]. In such way, apology cannot be used as admissible evidence by juries although relevant. As the core of apology legislation consists of providing for inadmissibility of evidence, this technique will always be more effective in a jury system than in a trial lead by a judge. If an apologetic statement is inadmissible, juries will never be aware of it. In contrast, in civil law systems, if a statement is inadmissible, this implies that a trial court should not take it into account, but it is always possible that it plays a role indirectly in making a final decision. Moreover, legal instruments preventing a judge from following his own logical cognitive path are fewer in number in civil law systems[438].

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[435] Vandenbussche, W. (2021), pp. 82-83.

[436] Tort law proceedings have been replaced by social security law, such as compulsory health insurance, workers' compensation and widows' pensions, discouraging the need for claiming. In: Vandenbussche, W. (2021), p. 91.

[437] https://www.law.cornell.edu/wex/exclusionary_rule

[438] Vandenbussche, W. (2021), pp. 89-93.

3.2.7. Court-ordered apologies

However, this does not imply that apologies are totally absent in civil law systems: courts may order apologies as a remedy for non-pecuniary harm when the defendant is not willing to apologise spontaneously. By definition, an order to apologise uses the authority of the law to compel a defendant to acknowledge the wrongfulness of their conduct and to express contrition. For this reason an ordered apology is different in nature and purpose to a voluntarily offered apology[439]. Some legislations specifically provide for directions to be given for publication of the apology, orders must be satisfied within a specified time period or the defendant will be subject to a fine and be more vulnerable during the proceedings[440]. However, nearly every Western European legal system is unfamiliar with court-ordered apologies by way of legal remedy, but it has been suggested since it may serve purposes and have effects which cannot be attained by monetary damages. This is particularly true for emotional harm, since this type of harm does not affect the patrimonial sphere of the injured party, but the payment of damages is expressed in monetary terms[441]. Court-ordered apologies as a form of non-monetary relief for emotional harm are only available if within this legal system compensation for emotional harm is obtainable, and this compensation may take a non-monetary form. The victim, in addition to monetary damages, may ask for recognition of the emotional harm caused by the offences, for example by an acknowledgement of the facts[442].

The concerns around ordered apologies regard the fact that they are useless since they would lack the sincerity necessary for conveying feelings of sorrow, regret and remorse. Secondly, there is a view that to order an apology that is not sincere is inappropriate because it provides no benefit[443]. Nevertheless, while greater psychological value is attributed to an apology that is offered willingly, spontaneously and with perceived sincerity, the absence of these features does not necessarily mean that the apology will have no value to a victim[444].

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[439] Carroll, R. (2021), p. 147.
[440] Carroll, R. (2021), p. 161.
[441] De Rey, S. (2021), pp. 203-204.
[442] *Ibidem,* pp. 222-223.
[443] Carroll, R. (2021), p. 159.
[444] *Ibidem,* p. 148.

Law makers consider them capable of achieving at least some of the functions of a sincere apology: 1. A party seeking a court ordered apology may regard it as having remedial value to them; 2. Reference to an apology as voluntary or compelled does not necessarily provide a useful basis for assessing the willingness of a party to apologise in court proceedings or the meaningfulness of the apology to the parties or a court. 3. A court cannot compel a sincere apology. A distinction must be made therefore between the meaning and functions of a socially and morally meaningful apology and the meaning and function of an apology made in a legal setting. 4. In some circumstances, a court may consider there are remedial benefits of ordering a defendant to apologise[445].

In particular, court-ordered apologies have been issued mostly in civil proceedings involving anti-discrimination law to redress loss or damage caused to the complainant by the respondent's unlawful conduct[446] [447]. Court-ordered apologies as types of non-pecuniary relief and ways of mitigating loss and vindicating a plaintiff's reputation include public apologies, publication of the court decision, right of reply, public correction, and retraction[448]. But courts are reluctant to issue court-ordered apologies since another concern in this context is related to the interference with a defendant's freedom of expression and of the press[449]. Yet, courts must balance that freedom against other protected rights since the exercise of the right of freedom of expression carries with it "duties and responsibilities" and "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and

[445] *Ibidem*, pp. 147-148.

[446] For instance, a media defendant can be ordered to publish a corrective notice or a public authority ordered to publish a public statement to ensure that the public is informed about the unlawful discriminatory conduct in terms stipulated by the court. In: Carroll, R. (2021), p. 165.

[447] Carroll, R. (2021), p. 150.

[448] Viglione, F. (2021), p. 200.

[449] Common law courts in particular do not regard an apology order as a remedy that is available to a defamation plaintiff because courts do not have the power to order a defendant to publish an apology due to constitutional protections of freedom of expression. In: Carroll, R. (2021), p. 155-156.

impartiality of the judiciary" (Article 10(2) of the European Human Rights Convention) [450] [451].

3.2.8. ECtHR approach

The European Court of Human Rights has, therefore, followed two different approaches on a case-by-case basis considering the nature of the offensive or hateful speech and the context in which it was made: the first is based on Article 17 of the Convention (Prohibition of abuse of rights) which excludes hate speeches from any protection since it negates fundamental values of the Convention; the second one, on the contrary, enforces Article 10 (Freedom of Expression), when it is likely to destroy the fundamental values of the Convention; possible limitations of such right must be established convincingly[452] [453]. Indeed, to be justified under Article 10(2) ECHR, it is required that court-ordered apologies, as an interference of the right to freedom of expression, a. are "prescribed by law" as a legal remedy[454]; b. can be justified for one of

[450] Examples from the European Court of Human Rights (ECHR) of apology orders being made in defamation cases: Aleksey Ovchinnikov v Russia [2010] ECHR 2033 (16 Dec 2010) (Russia); Melnychuk v Ukraine (Decision of 5 July 2005) (Ukraine); Kania and Kittel v Poland [2011] ECHR 978 (21 June 2011) (Poland). Each of these ECHR cases involved claims that the apology order made against a newspaper as a remedy for media law infringements infringed the freedom of expression conferred by Article 10 of the European Convention on Human Rights. Carroll, R. (2021), pp. 157-158.

[451] Carroll, R. (2021), p. 160.

[452] Court-ordered apologies by virtue of the general rules on tortious liability have to pass a proportionality test, that is the court is required to give adequate reasons for its decision, making clear that it not only has weighed the right to freedom of expression against other rights laid down in Article 10(2) ECHR, but also that the restriction imposed satisfies the proportionality test laid down in that same provision. The more serious the unlawful conduct, the more this may justify an order for an apology; important factors include gross discrimination or serious infringements of personality rights, the intent and impact of the wrong (social, private or public), the type of the wrongdoer (public or private person, public authority), the type of the ordered apologies (written or oral, specified or unspecified wording, public or bilateral) and the form of enforcement (simple invitation by the court or with a sanction, such as additional monetary damages or penalty payment). In: De Rey, S. (2021), pp. 229-231.

[453] Viglione, F. (2021), p. 191.

[454] In order to meet the conditions of Article 10(2) ECHR, the ECtHR does not require court-ordered apologies to be explicitly allowed by statutory provisions. Indeed, the legal ground required under Article 10(2) ECHR does not have to be formal, but may be unwritten or result from established case law. According to the ECtHR, a norm can be regarded as a 'law' within the meaning of Article 10(2) ECHR, if it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if necessary with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences of his actions. However, those consequences are not required to be foreseeable with absolute certainty. When the courts can reasonably interpret that under a provision an order for apologies is available, the ECtHR is ready to accept this provision as a 'law' formulated with sufficient precision within the meaning of Article 10(2) ECHR. In: De Rey, S. (2021), pp. 227-228.

the legitimate aims laid down in this provision[455]; and c. are "necessary in a democratic society"[456] [457]. Nevertheless, when the wrongdoer forced to do so by the court, it is said that this may cause a sense of shame and public humiliation and therefore pillory the wrongdoer. However, one must recognize that apology serve re-educational and socio-adaptive effects, with the aim of deterring future conducts and providing a sign of unacceptable conduct and shared values to the general public[458]. That is why, especially for the infringement of personality rights by the press, other forms of compensation than monetary damages, such as apologies, are often more appropriate. Court-ordered apologies may therefore satisfy the need for "a shift from an exclusive focus on the patrimonial aspect of a damaged reputation to the human aspect"[459].

3.2.9. Partial and full apologies

Scholars recognize two different types of apologies: partial and full. They involve an affirmation or acknowledgment of fault; an expression of regret, remorse or sorrow; a willingness to repair and a promise to adapt future behaviour. Whereas partial apologies would consist of some, but not all of these components, such as acknowledgment of fault without any expression of sympathy or regret, full apologies would enclose all or at least the majority of them[460].

3.2.10. Threefold categorization of legal systems

Legal systems could be categorised into a threefold typology according to the availability of apologies as a legal remedy: 1. court-ordered apologies are prescribed by

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[455] The "protection of the reputation of others" is one of the legitimate aims of Article 10(2) ECHR. The ECtHR is ready to accept this legitimate aim may justify court-ordered apologies in case of defamation. The "protection of rights of others" is another legitimate aim under Article 10(2) ECHR. This legitimate aim is interpreted broadly and provides a justification for the enforcement of apologies in all cases other than defamation of honour and reputation. In: De Rey, S. (2021), p. 226-229.

[456] According to the ECtHR, the adjective "necessary", within the meaning of Article 10(2) ECHR, implies the existence of a "pressing social need". This test requires it to determine whether the interference was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In assessing whether such a need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This margin of appreciation is not unlimited, but goes hand in hand with a European supervision by the ECtHR, whose task it is to give a final ruling on whether a restriction is reconcilable with the freedom of expression as protected by Article 10 ECHR. In: De Rey, S. (2021), pp. 229-230.

[457] De Rey, S (2021), pp. 226-227.

[458] De Rey, S. (2021), p. 208.

[459] *Ibidem*, p. 231.

[460] Vandenbussche, W. (2021), pp. 51-52.

statutory provisions (for instance, in China[461]); 2. Courts are prepared to make an order for apologies based on general provisions and/or principles requiring the respondent to compensate for the loss, even if these provisions do not explicitly provide for court-ordered apologies (for instance, in Canada, Japan, Poland, Ukraine, South, and South Africa); 3. Court-ordered apologies are not an explicit remedy in statutory provisions, nor have they been accepted in case law on other grounds (Germany, France, Belgium and the Netherlands). However, in recent years, these legal systems have been interested in court-ordered apologies for their adherence to mitigation of damages and to the principles of reasonableness and fairness[462].

3.2.11. Tentative conclusions

On the basis of the evidence given above, it is possible to conclude by claiming that alternative dispute resolutions are possible and even desirable, but the pragmatic and individualistic Western legal mentality, with its tendency to rely on the reasonable man criterion and litigation as a method to resolve disputes, seems far removed from traditions marked by communitarist-spiritualist values. Even if institutions different from those existing in the Western world have been overlooked as exoticism or folklore, the lessons from these legal traditions should not be underestimated in order to have an enriching opportunity for a less conflictual and self-referential view of law, through a valorisation of politeness as a factor of social pacification[463].

The success of apology legislation as an ADR instrument is based on two important assumptions. First, if a legal system enacts apology legislation, parties will be more inclined to apologize, and the chill will be lessened. Second, if an apology is offered, parties will be more open to enter into a settlement, which can lead to disputes resolved more amicably and less expensively. Apology legislation can only play its full role as an ADR instrument when both objectives are achieved. While legal action provides for compensation, apologies are able to satisfy non-financial concerns (such as a need for

[461] A wrongdoer usually needs to make the apology personally, acknowledging that his act is unlawful and has caused damage or harm to the victim, indicating to the victim that he will be responsible for all damage caused by his act, expressing his sorry for causing any trouble, and promising that he will restrain his behaviour so that such act will not happen again in the future. The apology can be made publicly or in private, orally or in writing. In: De Rey, S. (2021), p. 211.

[462] De Rey, S. (2021), pp. 203-249.

[463] Brutti, N. (2019), pp. 99-101.

explanation, a need for accountability or a desire to prevent similar incidents happening in the future). In that respect, apology legislation can also be perceived as a complement to - rather than substitute for - legal action. Various scholars claim that apologies generate positive effects on the outcome of a case. Apologies would be mutually beneficial to injurers (as it permits them to maintain self-respect) and victims (as it inspires them to regain trust and repair the relationship). Nevertheless, despite legislative interventions, some scholars assert that parties are often advised against disclosures and apologies. Lawyers may not realise that there are legally safe ways to apologize, they might lack confidence that the rules will effectively protect the apology or fault-admitting statement of their client[464].

Apologies by way of legal remedy may serve a threefold purpose: a. compensation for emotional harm and contribution to the emotional well-being of the victim (stress mitigation, repair of self-esteem and dignity); b. acknowledgement of victimhood and suffering within society, a community or particular group, for example as a result of discrimination, infringement of personality rights or unlawful dismissal; and c. signalization of unacceptable conduct and shared values[465].

In order to be accepted, an apology should contain three components, even when the respondent does not consider the facts to be wrong, but still has to acknowledge the harmful consequences as a result of his acts: a. an affirmation of facts or admission of fault; b. an affect implying regret or remorse; c. the willingness to take remedial actions, such as compensation. They should also include an expression of "regret as to any trouble, inconvenience and damage to reputation that was caused". Additionally, an apology could include some other components, considered less essential, such as explanation on the facts and/or the infringement – why the behaviour was wrong, a request for forgiveness, an expression of self-insight and a promise or commitment showing that the respondent wishes to avoid new similar facts or harmful consequences. Finally, where the wrong took place in the press or online (e.g., discrimination or infringement of personality rights), it is reasonable that the respondent is required to publish his apologies at the very same place[466].

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[464] Vandenbussche, W. (2021), pp. 72-74.
[465] De Rey, S. (2021), p. 207.
[466] *Ibidem,* pp. 238-240.

Hate speech case law can be of some help in shaping the boundaries of compensation of non-patrimonial damage, especially because judges take into consideration many elements linked to the function of civil liability: a. seriousness of the behaviour; b. psychological element (negligence, gross negligence, intention); c. eventual enrichment obtained as a consequence of the wrongful behaviour; d. economic condition of the wrongdoer. All these elements seem to reveal another function of non-patrimonial damages, which is its punitive scope. The remedies traditionally used, that is pecuniary compensation, clearly show a very limited expressive or restorative power. Restoring the targeted group's reputation (or dignity, or honour) could instead be achieved by compelling the wrongdoer to take back his words and apologize for spreading them. In Italian case law, the importance of apologies is limited, since they can be considered as a mitigating tool in the assessment of non-pecuniary damage (Art. 2059 of the Civil Code); on the contrary, if the wrongdoer, instead of apologising, reiterates the tort, the damages granted by the court may be augmented as a consequence of an additional harm[467].

According to the principle of full compensation, which constitutes a guiding principle within the law of torts in nearly every legal system, the victim is entitled to compensation (monetary or non-monetary) for the entire loss incurred, nothing less, nor anything more. This explains why the courts cannot combine an order for apologies with an order for monetary damages if those damages compensate the same emotional harm as already compensated in a non-monetary way by the court-ordered apologies. If the court wishes to impose, in addition to court-ordered apologies, an order for monetary damages, the court should provide proper justification of which types of losses are compensated in a non-monetary way by apologies (e.g., reputation, reduction of self-esteem) and which types of losses are compensated in a monetary way by payment of damages (e.g., stress or depression feelings). In essence, the court will have to point out that, under the circumstances, court-ordered apologies do not provide full compensation and therefore additional monetary damages are imposed[468]. Hence, court-ordered apologies as an acknowledgement of facts, unlawful conduct and/or harmful consequences and emotional

[467] Viglione, F. (2021), p. 197.
[468] De Rey, S. (2021), p. 242-243.

suffering should be considered as a fulfilment of a legal obligation rather than a statement of sincere feelings of regret[469].

A scarcity of legal instruments thus seems to emerge from the picture just outlined, given that the criminal sanction evokes scenarios of limitation of freedom of expression and the main civil remedy, i.e. compensation for the damage suffered by the author of the hateful statement, may not only collide with the difficulty of quantification, which can generally be overcome by means of an appropriate "tabular" system, but above all risks having only a minimal effect on the damage caused and generating various possible negative consequences, including a sort of distancing from the harm suffered by the victim[470]. It should be remarked that monetary compensation may seem inadequate for matters related to the physical and psychological well-being of victims. That is why apologies represent a form of corrective justice, operating as redress that tends to equalise the relationship between the wrongdoer and the victim, and moreover they express a clearer restorative purpose[471]. The real difficulty, however, in providing remedies for hate speech lies not so much in its compatibility with the constitutional principles of freedom of expression, which requires a careful drawing of the boundaries of freedom itself, but rather in the proper delimitation of the right of the person that hate speech is capable of harming[472].

Transplants of legal institutions must be encouraged in order for apparently different and distant models and cultures to interact. To this end, greater efforts will still have to be made to reduce the profound cultural, even more than legal, diversity and to ensure that interaction become a necessary tool for implementation[473]. In this way, the domestic legal system will benefit of other legal remedies which are meant to assert rights, recognize social dignity, and reduce the contentiousness of the process.

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[469] *Ibidem,* p. 245.
[470] Viglione, F. (2020), pp. 791-792.
[471] Viglione, F. (2021), p. 201.
[472] Viglione, F. (2020), p. 784.
[473] Scarchillo, G. (2018), p. 327.

Conclusions

The main purpose of the current dissertation was to study and examine the main legislation enacted at national and supranational level for what concerns the tackling of the rising issue of hate speech in online environment. It was followed by a case law review in which some of the most relevant courtroom proceedings where it was shown in practice the application of the legislation. The conclusions were drawn upon the comments of the doctrine on the matters displayed. Finally, the last chapter invites civil law systems to take into consideration legal remedies that belong to other jurisdictions, namely common law systems and Asian cultures, in order to open new horizons of justice.

The results of the present study shows that the approach to tackle online hate speech is not homogeneous: there is still difficulty in defining the concept of hate speech itself and States not always know where to draw the line in the balance between freedom of thought and expression and protection of inviolable human rights, but important steps have been made in order to recognize the individual's dignity and honour, especially of those discriminated on the basis of their skin colour, sexual orientation, religious affiliation and so forth. Moreover, legal institutions that favour freedom of expression (first amendment of the US Constitution) may undermine those attempts to make a joint effort to resolve the issue and harmonise the law.

Research has shown that users are more likely to indulge in unpleasant attitudes if protected by anonymity, or by the security of a non-face-to-face, screen-mediated interaction. For this reason, it is of paramount importance the regulation of the cyberspace in order to prevent hateful behaviour amongst users, and to educate population to make better use of the instrument. The legal sphere is compelled to question the need for careful regulation of this social phenomenon and, in particular, of the way in which the relationship between the citizen/user and the social media is regulated so that it does not undermine certain fundamental rights.

In more details, both legal systems, Italian and European, have placed great emphasis on safeguarding the fundamental rights of the person, often appropriately balancing them with other fundamental freedoms, such as freedom of thought, going so far as to state that the latter must be restricted if the expressions uttered have the capacity to incite hatred, violence or offend the dignity of a group of people on the basis of their physical, sexual or religious nature. The worrying increase, online and offline, of hate and

violence phenomena is due to a myriad of factors: economic crisis, politics, violent propaganda, desacralisation of human relations. In cyber contexts, the seriousness of offence is more pronounced due to the multitude of people that the Internet or a social network can reach. Other peculiar characteristics of the Internet are the permanence of content over time, the anonymity that makes the user feel isolated from his surroundings and deludes him that his actions will have no repercussions, and the inter-jurisdictional aspect, whereby computer content also spreads globally. Here arises the problem of ISP and large online platforms liability, their para-regulatory and para-jurisdictional powers, placing themselves above users, subjected to unilateral contracts with only apparent consent, and above the same laws that increasingly encourage them to take control in order to regularise the IT sphere through the adoption of codes of conduct. However, the EU, fearing that platforms may arbitrarily apply the right of censorship, invites providers to be more transparent as it is interested in safeguarding citizens' rights.

In conclusion, it can be said that although a homogeneous line in jurisprudence is not adopted and circumstances are decided and assessed on a case-by-case basis (e.g., the victim must prove the seriousness of the offence), great progress has been made in the defence of the dignity of others, expanding the possibility of compensation for non-pecuniary damage. It is assessed according to equitable criteria and, recently, the different types of non-pecuniary damage are liquidated individually and independently with increased percentages of personalisation. In this regard, many scholars have found similarities between the liquidation of non-pecuniary damages and the American institute of punitive damages insofar as large sums are charged to the perpetrator in cases where jurisprudence wants to prevent the same conduct from being reproduced in the future, to protect the victim and to send strong signals to the community. The second foreign institution analysed are legal apologies, civil remedies other than monetary compensation, which may be inadequate for emotional harm, and which can help rebuild social harmony in the community. They are prevalent mainly in Asian societies and common law systems. Scholars foresee multiple benefits, such as making people aware of the harm they have caused, making the victim feel better, restoring dignity, sending a strong message to society that certain behaviour is not acceptable and playing an educational role. In this sense, apology legislation can also be perceived as a complement to - rather than a substitute for - legal action. While such legal transplants are desirable, a careful

assessment of compatibility with domestic public policy is required. Furthermore, it is recalled that law is a discipline linked to the place and language in which it originates and applies; therefore, this would explain why systems are reluctant to incorporate foreign legal remedies.

In conclusion, this research has allowed me to gain an in-depth knowledge of the subject, but it has also made me reflect on the need for a more conscious use of computer technology and the contrasting freedoms and interests it involves. An education of society would be desirable to show that freedom of thought should cease when someone feels threatened or the target of discrimination. The results obtained have important implications for future practice and research. Future investigations could focus on considering the importance of counter-hate speech campaigns and educational programmes to raise the awareness of users, as well as enhancing the cooperation between States and platforms for a combined action.

Riassunto in italiano

Il presente elaborato si occupa di rintracciare e studiare la normativa vigente a livello nazionale e sovranazionale volta a combattere il preoccupante fenomeno del linguaggio d'odio nei contesti informatici. La tesi si conclude con l'invito a un approccio comparatistico: dopo aver analizzato le implicazioni dell'adozione di istituti provenienti da sistemi legali esteri, si rivolge l'invito a dotare l'apparato giuridico domestico di strumenti nuovi sul modello degli orientamenti stranieri.

La domanda a cui ci si propone di rispondere è se le leggi approvate finora siano sufficienti per risolvere la problematica dell'hate speech online, inteso come "l'utilizzo di contenuti o espressioni volte a diffondere, propagare o fomentare l'odio, la discriminazione e la violenza per motivi razziali, etnici, nazionali, religiosi, o basati sull'identità di genere, sull'orientamento sessuale, sulla disabilità, o sulle condizioni personali e sociali, attraverso la diffusione e la distribuzione di scritti, immagini o altro materiale, anche attraverso Internet, social network o altre piattaforme telematiche".

La tesi si compone di cinque parti: l'introduzione, in cui sono delineati i concetti principi, come la definizione di anonimato, isolamento dell'utente, discriminazione, linguaggio d'odio; il primo capitolo è dedicato al sistema legale italiano, il secondo al sistema legale dell'Unione Europea, il terzo valuta le implicazioni dell'introduzione nell'apparato domestico istituti stranieri. Infine, la conclusione riassume i risultati dell'elaborato. Il primo e il secondo capitolo hanno una struttura simile, dedicando ciascun paragrafo a ognuno dei formanti del sistema legale occidentale: si delinea in primo luogo la legislazione approvata sul piano civile e penale, si illustrano brevemente delle sentenze giurisprudenziali che mostrano come le leggi analizzate precedentemente siano state applicate, segue un commento conclusivo basato sulla base delle considerazioni dottrinali.

Procedendo per ordine, l'introduzione spiega perché il fenomeno del linguaggio d'odio online sia così diffuso. La globalizzazione tecnologica degli ultimi decenni ha portato con sé un aumento esponenziale del cyberhate, ovvero la propagazione nello spazio virtuale di messaggi e contenuti caratterizzati da discriminazione o odio. Si tratta di un fenomeno che non può passare inosservato per le sue peculiarità strutturali, il suo potenziale dannoso e gli ostacoli senza precedenti che pone ai tentativi di contrasto.

Le ragioni della recente proliferazione di forme di espressione potenzialmente pericolose per la vita civile sono legate ad alcuni fattori caratteristici dei nuovi strumenti digitali e, soprattutto, dei social network: la permanenza per molto tempo dopo essere stati pubblicati, aumentando e prolungando così la gravità del reato; l'itineranza, capacità del contenuto offensivo di sopravvivere altrove sul Web anche quando viene rimosso dal luogo in cui è stato originariamente pubblicato, amplificando il potenziale dannoso dell'odio online, non solo nel tempo ma anche nello spazio; l'anonimato o la possibilità di utilizzare uno pseudonimo, che contribuisce in modo significativo a facilitare l'hate speech, eliminando o anestetizzando le inibizioni poste a contenimento delle condotte devianti grazie alla rassicurante percezione di essere esente da sanzioni; infine, il carattere inter-giurisdizionale, cioè la natura transnazionale (in termini di sede operativa, perimetro delle attività e localizzazione dei molteplici livelli di attori coinvolti) degli intermediari di servizi informatici, che rende necessaria una cooperazione internazionale tra le diverse giurisdizioni. Da questo piccolo prospetto si evince che la comunicazione su Internet, essendo eterea, offre un terreno fertile per la vituperazione e il disprezzo razziale, oltre ad aumentare l'irritabilità e l'incidenza di comportamenti compulsivi e sconsiderati, trovandosi gli utenti in uno stato di quasi alienazione dal resto del mondo. La risposta delle istituzioni a livello nazionale ed europeo si configura con l'implementazione di normative, decreti, codici di condotta, convenzioni, ampliamente descritti nei capitoli successivi.

Ogni Stato membro dell'Unione Europea concepisce l'odio e il danno in modo diverso; questo ha portato ogni Stato a creare un proprio corpo di leggi accanto a quelle europee.

L'ordinamento italiano non fornisce una definizione di crimine d'odio o di discorso d'odio, come anche l'Unione Europea non presenta una definizione condivisa. Tuttavia, dispone di numerose norme sulla tutela dei diritti umani inviolabili e sui principi di pari dignità e uguaglianza degli esseri umani.

Il primo capitolo si apre con la definizione di tre Articoli della Costituzione, la principale base giuridica per la definizione delle fonti del diritto e dei metodi per la loro interpretazione. Il divieto di discriminazione razziale per motivi etnici, nazionali e religiosi fa parte di un ampio quadro normativo costituzionale e internazionale. Il principio di non discriminazione è pienamente riconosciuto negli Articoli 2 e 3 della Costituzione, che sanciscono i diritti inviolabili delle persone, nonché il principio di

uguaglianza e il conseguente divieto di discriminazione. L'Art. 21 fa riferimento alla libertà di espressione, ammettendo riserve in caso di contenuti lesivi.

Passando poi alle leggi in ambito penale, non si possono non nominare la legge Scelba, sebbene fosse più incentrata sull'evitare un ritorno del fascismo, e la legge Reale-Mancino, uno strumento completo volto a combattere l'odio, la discriminazione, la violenza sulla base di motivi razziali, etnici, nazionali, religiosi. È bene ricordare che la legge Reale, poi integrata ed emendata dalla legge Mancino, fu adottata in seguito alla ratifica della Convenzione di New York del 1965 sull'eliminazione di tutte le forme di discriminazione razziale. Tuttavia, sebbene queste due leggi convivano per la similarità degli interessi che proteggono, si lamenta una sovrapposizione normativa che rende difficile tracciare una concreta distinzione tra le due fattispecie. A tal proposito, la giurisprudenza ha decretato la marginalità della Legge Scelba rispetto alle disposizioni repressive in materia di razzismo.

Passando alla dimensione del Cyberspace, nel contesto giuridico italiano, gli atti di odio online possono costituire il reato di diffamazione aggravata non solo per il mezzo di comunicazione utilizzato (art. 595 comma 3 del Codice penale), ma anche per le finalità di odio razziale, ai sensi dell'art. 3 della Legge n. 205/1992 "in quanto la particolare diffusività del mezzo utilizzato per propagare il messaggio offensivo rende l'agente meritevole di un più severo trattamento penale". La Suprema Corte di Cassazione si è espressa in merito, giungendo ad affermare "la diffusione di un messaggio nelle modalità consentite dalla bacheca di Facebook ha potenzialmente la capacità di raggiungere un numero indeterminato di persone. Pertanto, se si considera tale commento offensivo, esso ricadrà nell'ambito di diffamazione aggravata. Ciò solleva un'ulteriore questione: la responsabilità dell'Internet Service Provider. È stato introdotto un regime di responsabilità speciale, ai sensi del Decreto Legislativo 70/2003, che si ispira alla Direttiva 2000/31/CE: si afferma che il provider, per beneficiare di un'esenzione dalla responsabilità per un atto illecito causato da informazioni e contenuti trasmessi o generati dagli utenti, è necessario che svolga le attività di accesso, cache e host in modo passivo, ossia non è tenuto a conoscere o controllare i contenuti che trasmette o memorizza per volontà degli utenti. Tuttavia, se il fornitore di servizi Internet viene notificato di un contenuto offensivo e non agisce, è considerato responsabile, ai sensi dell'art. 2043 del Codice civile.

Accanto ai rimedi penali, è diffusa la tendenza del presunto diffamato a preferire i rimedi civili per il risarcimento del danno (art. 2043 c.c. e seguenti). La norma introduce la responsabilità extracontrattuale e il principio del *neminem laedere*, secondo il quale ogni cittadino è tenuto a non violare la sfera giuridica altrui (art. 2 della Costituzione). Si distingue tra danno patrimoniale, cioè la lesione del patrimonio economico del soggetto, e danno non patrimoniale, che consiste nella lesione di interessi della persona non aventi rilevanza economica. Quest'ultimo si concretizza nel danno biologico, ossia la lesione psico-fisica della persona, oggetto di valutazione medico-legale, che incide sulla sua vita quotidiana e sulle sue relazioni, ma che prescinde dalla sua capacità reddituale, nel danno morale, quale turbamento transitorio dello stato d'animo, e nel danno esistenziale, che, ledendo altri diritti costituzionalmente protetti, compromette la possibilità di svolgere le attività che compongono la persona umana (art. 2059 c.c.). Pertanto, la lesione del diritto all'onore, alla reputazione, all'immagine, all'identità personale dà diritto al risarcimento del danno; ai fini del risarcimento, è irrilevante che l'atto sia stato commesso intenzionalmente o per negligenza poiché ciò che conta è la violazione di diritti costituzionalmente protetti, il cui mancato rispetto costituisce reato. Dal momento che tali beni non hanno un valore di mercato, le tabelle giudiziali, in particolare quelle di Milano, sono state elaborate per liquidare il danno biologico secondo una valutazione equitativa da parte del giudice (art. 1226 c.c.). In base alla gravità, sono stati elaborati dei criteri che indciano le rispettive somme di liquidazione del danno. Al giudice è perciò lasciata la discrezione di fissare l'entità del risarcimento quando il danno è certo ma di difficile determinazione (art. 1226 e 2056 c.c.). sulla base di uno strumento in grado di garantire l'uniformità nella valutazione del danno alla persona, in omaggio al generale principio di uguaglianza, procedendo a un'interpretazione costituzionale dell'art. 2059 c.c. tra l'interesse della persona costituzionalmente tutelato e l'esistenza di un diritto inviolabile. Le nuove Tabelle di Milano (10 marzo 2021) presentano la valutazione autonoma del danno morale, essendo stata separata dalla voce unitaria del danno non patrimoniale, e l'aggiunta ai valori medi onnicomprensivi (tabella base) di percentuali di incremento di personalizzazione. Nell'ipotesi di diffamazione, da essa deriva anche una lesione permanente dell'integrità psico-fisica. In questo caso il risarcimento del danno biologico non sarà sufficiente a risarcire il danno in quanto è necessario liquidare anche i diversi danni separatamente e indipendentemente dalla lesione alla reputazione. Si può persino

ravvisare una funzione punitiva del danno non patrimoniale: è scarsamente compatibile con la funzione risarcitoria, poiché è impossibile ripristinare la condizione iniziale del diffamato.

Tra le altre iniziative volte a contrastare il fenomeno dell'hate speech, l'Autorità per le Garanzie nelle Comunicazioni (AGCOM), riconoscendo che l'ascesa delle piattaforme online e il loro impatto sulla disinformazione richiedono un profondo ripensamento del quadro normativo esistente che persegue gli obiettivi della concorrenza leale, del pluralismo dei media e della tutela dei diritti fondamentali degli utenti di Internet, si è prodigata a redigere la Delibera n. 157/19/CONS "Regolamento recante disposizioni in materia di rispetto della dignità umana e del principio di non discriminazione e di contrasto all'hate speech" in cui si invitano i fornitori di servizi audiovisivi e radiofonici soggetti alla giurisdizione italiana a garantire il rispetto della dignità umana e del principio di non discriminazione e a contrastare l'istigazione alla violenza e all'odio nei confronti di gruppi di persone o membri di tali gruppi definiti con riferimento al sesso, alla razza o all'origine etnica, alla religione, alla disabilità, all'età o all'orientamento sessuale e a qualsiasi altra caratteristica o situazione personale.

In conclusione, la giurisprudenza, e in particolare la Corte costituzionale italiana, è attenta a fare un'analisi accurata tra libertà di espressione (art. 21 Cost.) e lesione della dignità altrui, anche se a volte questa linea di demarcazione è difficile da tracciare. Difatti, il suo approccio non è uniforme. Se da un lato non si può negare l'utilità, anche pedagogica e simbolica, delle norme incriminatrici contro le manifestazioni fasciste e razziste che contrastano palesemente con lo spirito democratico della Costituzione e con la tutela dei diritti fondamentali della persona, rimane però il problema di giustificare limiti a manifestazioni di pensiero che, per quanto deprecabili, non comportano la violazione di diritti individuali o collettivi. A un quadro normativo chiaro e solido che indichi la necessità di sanzioni punitive per le varie forme di discriminazione razziale, etnica, nazionale e religiosa, va affiancata un'indispensabile opera di prevenzione attraverso l'educazione, la sensibilizzazione, lo studio e l'intervento sociale.

Gli stessi ideali sono reiterati nel secondo capitolo, dedicato alla normativa vigente a livello europeo. Negli ultimi tempi, l'instabilità economica e politica, la crisi dei rifugiati, la propaganda politica volta a diffondere odio e paura tra i loro elettori ha portato a un aumento dei discorsi e dei crimini d'odio nell'Unione Europea.

Anche se la libertà di espressione è considerata uno dei pilastri di una società democratica e pluralista, l'Unione Europea ha sempre lottato per difendere i valori di uguaglianza, parità e non discriminazione. A tal proposito, ha adottato strumenti di soft e hard law nel tentativo di risolvere la problematica.

I primi documenti che riconoscono i diritti fondamentali dell'uomo, cioè dignità, uguaglianza, giustizia, libertà, pace, adeguato tenore di vita, fratellanza, sono la Dichiarazione universale dei diritti dell'uomo (1948) e la Convenzione internazionale sull'eliminazione di tutte le forme di discriminazione razziale (1965), approvata con l'obiettivo di ribadire la promozione e il rispetto dei diritti umani e delle libertà fondamentali per tutti, senza distinzione di razza, sesso, lingua o religione. L'obiettivo di questi testi delle Nazioni Unite si configura nella necessità di eliminare la discriminazione razziale in tutto il mondo in tutte le sue forme e manifestazioni e di assicurare il rispetto della dignità della persona umana. Per la prima volta si afferma che, mentre il diritto di avere opinioni è assoluto, la libertà di espressione "porta con sé doveri e responsabilità speciali" e può essere limitata se ciò è previsto dalla legge per il rispetto dei diritti, della reputazione altrui, per la protezione della sicurezza nazionale, dell'ordine pubblico, della salute o della morale pubblica. Tale concetto culminerà poi con la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali e, in seguito, nella Carta dei diritti fondamentali dell'UE. La prima è significativa per aver dato un contenuto giuridico ai diritti umani in un accordo internazionale e per aver istituito un meccanismo di supervisione e applicazione. È stato fornito materiale prezioso per l'elaborazione delle disposizioni sulle libertà civili e sono state evidenziate e affrontate le anomalie nei sistemi legislativi nazionali. In particolare, l'art. 10 tutela la libertà di espressione, affermando che essa dovrebbe includere la libertà di avere opinioni e di ricevere e diffondere informazioni e idee senza interferenze da parte dell'autorità pubblica e indipendentemente dalle frontiere. Vale la pena notare che, tuttavia, essa può essere soggetta alle formalità, condizioni, restrizioni o sanzioni previste dalla legge e necessarie in una società democratica (art. 10 comma 2 della CEDU, art. 52 comma 1 della Carta dei diritti fondamentali.). Se da un lato la Convenzione è stata il primo strumento a rendere effettivi e vincolanti alcuni dei diritti enunciati nella Dichiarazione universale dei diritti dell'uomo, dall'altro non vi è alcun obbligo per gli Stati contraenti di sviluppare una legislazione o altri strumenti per proibire i discorsi d'odio. Ciò rappresenta un evidente

ostacolo al tentativo di armonizzazione legislativa. Questa complessità è accresciuta dal fatto che non esiste una definizione comune di ciò che costituisce il discorso d'odio, né un'omogeneità tra gli Stati nella concettualizzazione del danno. Gli strumenti giuridici dell'UE devono rispettare, da un lato, la libertà di espressione garantita ai cittadini e, dall'altro, il principio di non discriminazione sancito dalla legislazione internazionale. Quest'ultimo è ulteriormente rafforzato dal Trattato di Lisbona.

Si è già menzionata la Direttiva 2000/31/EC che introduce il regime di responsabilità speciale per gli Internet Service Provider. In maggiori dettagli, la Direttiva sul commercio elettronico consente, in primo luogo, di delineare le responsabilità e le esenzioni dell'ISP a seconda che l'attività svolta da quest'ultimo sia di mera trasmissione di informazioni, memorizzazione automatica e temporanea di informazioni o di memorizzazione di informazioni per un lungo periodo di tempo. Nei primi due casi, infatti, il provider è esente da responsabilità se "non dà origine alla trasmissione, non seleziona il destinatario della trasmissione e non seleziona o modifica le informazioni trasmesse". Nel terzo caso, invece, il provider non è responsabile a meno che non "sia effettivamente a conoscenza del fatto che l'attività o le informazioni sono illegali" o che, una volta a conoscenza, "agisca immediatamente per rimuovere le informazioni o per disabilitarne l'accesso". In altre parole, deve svolgere l'attività in modo passivo. La rimozione del contenuto illecito non è automatica dopo la sua segnalazione. Da parte sua, il provider non ha l'obbligo di controllare le informazioni memorizzate e trasmesse, ma deve comunicarle quando le autorità lo richiedono per identificare l'autore del reato. Se da un lato l'ISP potrebbe applicare una politica di cancellazione generalizzata dei contenuti per evitare di incorrere nella responsabilità, il Consiglio d'Europa. Per evitare il rischio di censura da parte degli ISP, chiede un approccio più cauto sugli obblighi di rimozione dei contenuti, ricordando la necessità che tali obblighi siano trasparenti e proporzionati al reato. Nel complesso, la politica dell'Unione nella lotta contro i discorsi d'odio online prevede l'obbligo di rimuovere i contenuti, attraverso l'autoregolamentazione digitale fino all'intervento estremo del diritto penale. È previsto il coinvolgimento degli Stati membri, ma la disposizione non offre alcuna indicazione in merito alle procedure di notifica e rimozione, lasciandole quindi alla discrezione degli Stati membri e dei provider.

La Convenzione di Budapest del Consiglio d'Europa sulla criminalità informatica (2001) rappresenta "il primo trattato internazionale sui reati penali commessi attraverso

Internet e altre reti informatiche, in grado di identificare violazioni specifiche come il diritto d'autore, la frode informatica, la pedopornografia e le violazioni della sicurezza della rete. Ha il merito di prevedere una serie di misure e procedure appropriate, come la perquisizione dei sistemi di rete informatica e l'intercettazione dei dati". L'obiettivo principale è quello di perseguire una politica penale comune per la protezione della società contro la criminalità informatica, contro la lesione dei diritti personali, per mezzo di una legislazione adeguata secondo il principio del mutuo riconoscimento e della cooperazione internazionale. Poiché è stata ratificata da 68 Stati e 158 Stati l'hanno utilizzata come linea guida o fonte per la loro legislazione interna, ha un impatto e una portata globali, sebbene agli Stati sia lasciata discrezione in merito alle modalità di implementazione e applicazione delle procedure nei loro sistemi legali. La Convenzione è affiancata da due Protocolli addizionali: il Protocollo addizionale alla Convenzione sulla criminalità informatica, relativo alla criminalizzazione di atti di natura razzista e xenofoba commessi attraverso sistemi informatici (2006), che estende il campo di applicazione della Convenzione per includere anche i reati legati alla propaganda razzista o xenofoba, inteso come "qualsiasi materiale scritto, qualsiasi immagine o qualsiasi altra rappresentazione di idee o teorie, che sostenga, promuova o inciti all'odio, alla discriminazione o alla violenza, contro qualsiasi individuo o gruppo di individui, sulla base della razza, del colore, dell'ascendenza o dell'origine nazionale o etnica, nonché della religione se usata come pretesto per uno di questi fattori", e il Secondo Protocollo aggiuntivo alla Convenzione sulla criminalità informatica sulla cooperazione rafforzata e la divulgazione delle prove elettroniche (2022), che fornisce una base giuridica per la divulgazione dei nomi di dominio, la cooperazione diretta con i provider per una divulgazione volontaria dei dati degli utenti, la cooperazione immediata e rafforzata tra le Parti in caso di emergenza, nonché garanzie per la protezione dei dati, salvaguardia dei dirittie delle libertà. Si consente all'autorità competente di uno Stato firmatario del Protocollo di emettere ordini di acquisizione dei dati degli abbonati agli Internet Service Provider aventi sede principale o secondaria nel territorio di un altro Stato; quest'ultimo non può sottrarsi alla divulgazione di dati informatici e di informazioni relative agli utenti dei relativi servizi su richiesta dell'autorità competente a indagare su determinati reati. Pertanto, se da un lato il Protocollo si presenta come il fulcro delle nuove forme di collaborazione internazionale per la circolazione delle prove digitali, dall'altro

rappresenta l'emblema di un cambiamento culturale che rafforza il processo di armonizzazione legislativa senza compromettere le tradizioni giuridiche, la sovranità degli Stati coinvolti e l'autonomia delle singole giurisdizioni.

L'UE ha successivamente elaborato la Decisione quadro sulla lotta al razzismo e alla xenofobia attraverso il diritto penale (2008), siccome "il razzismo e la xenofobia sono violazioni dirette dei principi di libertà, democrazia, rispetto dei diritti umani e delle libertà fondamentali e dello Stato di diritto, principi su cui si fonda l'Unione Europea e che sono comuni agli Stati membri"; è quindi necessaria una maggiore armonizzazione e cooperazione giudiziaria tra gli Stati per affrontare il crescente e preoccupante fenomeno dei discorsi e dei crimini d'odio, vietando "l'incitamento pubblico alla violenza o all'odio nei confronti di un gruppo di persone o di un membro di tale gruppo definito in base a riferimenti di razza, colore, religione, discendenza o origine nazionale o etnica". Tuttavia, come già espresso, diversi problemi impediscono l'efficacia della regolamentazione: il linguaggio vago della normativa, la presenza di zone grigie che concedono ampia libertà discrezionale nella trasposizione delle disposizioni, e il fatto che gli Stati membri dell'UE differiscono nella concettualizzazione di ciò che è considerato offensivo o lesivo; perciò una completa armonizzazione in ambito penale non è possibile. Ciò è dovuto principalmente al fatto che non esiste una definizione universalmente accettata di discorso d'odio, che deriva dalla diversa interpretazione della libertà di espressione, i concetti di dignità, libertà e uguaglianza.

Più di recente l'approccio delle istituzioni europee nei confronti dell'hate speech (e più in generale anche dei contenuti illegali) si è spostato dall'uso della hard law alla soft law: in particolare, verso l'uso di forme di co-regolamentazione in cui la Commissione negozia una serie di regole con le aziende private partendo dal presupposto che queste ultime saranno maggiormente incentivate a rispettare le regole concordate. A tal proposito, il Codice di condotta sul contrasto all'hate speech illegale online (2016) vincola le piattaforme di social media (Facebook, Twitter, Instagram e YouTube, tra le tante) a una maggiore responsabilità nei confronti di ciò che i loro utenti pubblicano, attraverso l'obbligo di rimuovere i contenuti segnalati dagli utenti entro 24 ore e la creazione di linee guida per gli utenti. In questo senso, le aziende sono autorizzate a verificare i contenuti pubblicati sulle loro piattaforme, portando a estendere il loro potere decisionale. Una delle

critiche che viene rivolta al Codice è la mancanza di trasparenza, di documentazione che renda accessibile il processo decisionale e la verifica della legittimità delle decisioni.

Infatti, non viene fatto alcun riferimento alle azioni di contrasto che l'utente può esercitare in caso di cancellazione dei propri contenuti, alla protezione della libertà di espressione o dei dati personali quando vengono utilizzati strumenti di rilevamento automatico, come gli algoritmi, per trovare contenuti illegali. Per evitare perciò la tendenza di un eccessivo blocco dei contenuti per conformarsi ai requisiti e non essere ritenuti responsabili, , minacciando però la libertà di espressione degli utenti, il Codice di condotta è stato integrato dalla Comunicazione 555 (2017) per invitare le piattaforme online a comportarsi in modo più responsabile. Sono più esplicative rispetto al linguaggio vago utilizzato nel Codice e difendono maggiormente gli interessi degli utenti, affermando il loro diritto di controbattere se il loro contenuto viene cancellato, di ottenere una risposta dalla piattaforma al riguardo, di ottenere l'annullamento della decisione sulla rimozione; viene garantita una maggiore protezione dei dati personali e una maggiore trasparenza riguardo all'operato delle piattaforme nel pubblicare le informazioni sui contenuti rimossi o disabilitati, il numero di avvisi e contro-avvisi presentati, compresi i tempi necessari per agire. In caso di difficoltà nel valutare la liceità di un particolare contenuto, le piattaforme online potrebbero sottoporre i casi dubbi alla consulenza di organismi di autoregolamentazione o di autorità competenti nei diversi Stati membri. Tuttavia, si tratta di strumenti non vincolanti.

Visti i limiti della Decisione quadro, che si concentrava solo sui reati di natura razziale e xenofoba, un passo avanti è stato fatto con la Comunicazione 777 (2021), volta ad "estendere l'elenco dei reati dell'UE ai discorsi e ai crimini d'odio", che rientrano nell'ambito di applicazione dell'articolo 83 comma 1 del TFUE per un'Europa più inclusiva. Il passo successivo è rappresentato dall'adozione di una legislazione secondaria sostanziale che stabilisca regole minime sulle definizioni e sulle sanzioni dei discorsi e dei crimini d'odio. Questi episodi hanno gravi conseguenze sulla salute fisica e mentale delle vittime che si ripercuote sull'intera comunità, poiché tutti possono diventare un bersaglio.

Sebbene la libertà di espressione goda di un'ampia tutela in quanto diritto fondamentale, non tutte le forme di espressione sono protette. Le limitazioni possono essere applicate in base a condizioni specifiche e in caso di contenuti particolari, come

“espressioni che diffondono, incitano, promuovono o giustificano l’odio basato sull’intolleranza”. La necessità delle misure viene valutata caso per caso siccome mancano linee guida sul bilanciamento tra libertà di espressione e tutela della dignità umana, sebbene debba prevalere il superiore e inalienabile bene giuridico della dignità delle persone, quindi della loro uguaglianza. Al contrario, i discorsi d’odio, caratterizzati da discriminazioni basate su pregiudizi, diversi dalla libera espressione del pensiero, il cui scambio e la cui diffusione devono essere certamente garantiti per quanto possibile, costituiscono un’offesa ai fondamenti stessi della pacifica convivenza civile.

Il fatto che le prove digitali siano nella disponibilità esclusiva dei fornitori di servizi online rende evidente che svolgono un ruolo decisivo non solo nella regolamentazione e nel corretto bilanciamento di posizioni giuridiche contrapposte, ma anche nella misura in cui è riconosciuta loro una funzione quasi governativa, arrivando a interferire nella sfera giuridica altrui. Alcune tendenze dimostrano una legittimazione giuridica di questi poteri, che si stanno trasformando in autorità di diritto, capaci di esprimersi con norme in grado di vincolare il destinatario, indipendentemente dal suo assenso o con un consenso solo apparente. La limitazione, la sospensione o la cessazione del servizio è un provvedimento che la piattaforma può adottare unilateralmente, mostrandosi come la parte contrattuale più forte se paragonata all’utente. A tal proposito, è necessario introdurre procedure speciali che garantiscano la posizione della parte più debole, assicurando una maggiore trasparenza rispetto all’operato delle piattaforme.

In conclusione, queste misure mostrano come la lotta all’hate speech, sia online che offline, sia diventata una priorità nell'agenda delle istituzioni. Combinando l'intervento legale con meccanismi di regolamentazione tecnologica - monitoraggio, accordi con gli IPS - è possibile ridurre i danni causati dall’odio online. Inoltre, grazie a un’attenta integrazione di legge, tecnologia ed educazione è possibile ridurre la diffusione e l’impatto dei discorsi d'odio online senza dover ricorrere all’uso di strumenti di comunicazione.

Infine, l’ultimo capitolo invita a considerare istituti giuridici provenienti da sistemi legali esteri al fine di dotare il proprio sistema di nuovi strumenti che possano offrire nuove prospettive risolutive.

Il primo istituto discusso è quello dei *punitive damages*, tipici dei sistemi di common law, intesi come forma di risarcimento con funzione deterrente e punitiva con lo scopo di

dissuadere il convenuto dal proseguire in futuro la condotta illecita. Più precisamente, lo scopo dell'istituto è visto nell'integrazione della funzione riparatoria-compensativa, tipica del risarcimento del danno, quando questa è ritenuta insufficiente a soddisfare una serie di esigenze. Alla funzione risarcitoria, tipica della sanzione civile, si sovrappone una funzione punitiva, tipica della sanzione penale. In Italia, la responsabilità civile è regolata dall'articolo 2043 e seguenti del Codice Civile che prevede che il danno sia riparato con un risarcimento pecuniario o, nei casi in cui ciò sia possibile, con risarcimento in forma specifica.

Con la sentenza della Corte di Cassazione a Sezioni Unite del 5 luglio 2017 n. 16601 si è affermato che essi non sono più incompatibili con l'ordine pubblico interno, prevedendo una natura polifunzionale della responsabilità civile e del risarcimento: accanto alla preponderante e primaria funzione riparatoria risarcitoria, basata sul principio dell'integrale riparazione del danno con l'obiettivo di riportare il patrimonio del danneggiato nella condizione originaria, anche in relazione al pregiudizio non patrimoniale, morale e soggettivo (onore, dignità), viene ora riconosciuta una funzione preventiva e punitiva. Va precisato che i beni giuridici difficilmente traducibili in denaro (dolore e sofferenza) tendono ad essere risarciti nel nostro Codice civile come danni non patrimoniali ai sensi degli artt. 2059 e 1226 c.c., solo se ne viene provata la consistenza e la gravità.

Molti lamentano che l'introduzione dei danni punitivi nel sistema italiano si scontrerebbe contro la necessità di prevedibilità o calcolabilità nonché di tipicità della pena dal momento che la determinazione di danni punitivi o ultracompensativi è a discrezione del giudice. Inoltre, il calcolo della sanzione risarcitoria richiede il riferimento non solo al principio di legalità, ma anche ad altri principi costituzionali come quelli di proporzionalità (su cui si veda anche l'art. 49 comma 3 CEDU) e di ragionevolezza. Inoltre, il riconoscimento delle sentenze straniere in Italia trova un limite se queste sono contrarie all'ordine pubblico interno.

Tuttavia, alcuni istituti civilistici della tradizione giuridica italiana presentano analogie con l'istituto anglosassone. Una prima analisi riguarda il danno non patrimoniale previsto dal combinato disposto dell'articolo 2059 del Codice civile e dell'articolo 185, comma 2, del Codice penale. Dal punto di vista giurisprudenziale non si può non notare che in molti processi i giudici tengono conto dell'elemento soggettivo del responsabile e delle sue

condizioni economiche. Pertanto, coloro che vedono con favore i danni punitivi nell'ordinamento giuridico italiano vedono nell'art. 2059 del Codice civile una punizione e deterrente. Infine, l'art. 12 della legge n. 47/1948 prevede che, in caso di diffamazione a mezzo stampa, la parte lesa può chiedere, oltre al risarcimento del danno ai sensi dell'art. 185 del Codice Penale, al risarcimento del danno patrimoniale ai sensi dell'art. 2043 del Codice Civile e al risarcimento del danno morale ai sensi dell'art. 2059 del Codice Civile, una somma a titolo di riparazione. La somma è determinata in relazione alla gravità del reato e alla diffusione dello stampato.

L'art. 2059 c.c., in sintesi, assegna al legislatore il compito di stabilire un elenco di illeciti che, oltre a quelli costitutivi di reato, richiedono un *surplus* di attenzione da parte del giudice nella fase di liquidazione del *quantum*, cioè dei diritti inviolabili della persona, che sono posti al di sopra di tutto e di tutti. Accertata quindi l'ingiustizia del danno, l'art. 2043 c.c. ha lo scopo di offrire un risarcimento per ogni alterazione *in pejus* oggettivamente riconoscibile, patrimoniale o meno, con l'unico vincolo che il *quantum* sia calibrato il più precisamente possibile sul peggioramento della condizione individuale del danneggiato. In altre parole, l'articolo 2043 agisce in funzione strettamente risarcitoria, mentre l'articolo 2059 si occupa della riparazione in funzione punitiva-deterrente; in combinato disposto, essi mirano a reprimere, disincentivare e offrire protezione contro i reati più gravi in caso di violazione dei diritti fondamentali.

Pertanto, tali disposizioni attestano l'esistenza nell'ordinamento italiano di fattispecie che pongono l'accento sulla condotta del danneggiante e che riconoscono un elevato risarcimento del danno non perché questo sia stato subito dalla vittima, ma per l'urgenza di punire la condotta che ha superato una certa soglia di illiceità.

I danni punitivi sono, quindi, configurabili nell'ordinamento italiano ma rappresentano comunque un'eccezione che, in quanto tale, deve essere legittimata da una specifica disposizione legislativa. La condanna al risarcimento deve assumere anche una funzione educativa, cioè deve rappresentare un deterrente da utilizzare non solo nei confronti del condannato ma anche dell'intera comunità.

Il secondo istituto straniero analizzato sono le *apologies*, ampliamente diffuse nelle culture asiatiche quando si tratta di controversie che comportano un risarcimento danni: è fondamentale e preliminare alla negoziazione offrire scuse e chiedere perdono alla

vittima, indipendentemente dall'accertamento della responsabilità. Ciò ha lo scopo di preservare l'armonia sociale e di facilitare la cooperazione.

L'Unione Europea, sotto l'influenza di legislatori che hanno promosso metodi di risoluzione alternativa delle controversie per i loro numerosi vantaggi, ha seguito questa tendenza attraverso l'adozione di varie direttive, raccomandazioni, regolamenti e codici di condotta. Anche i legislatori nazionali hanno incoraggiato la risoluzione delle controversie con metodi alternativi rispetti a quelli processuali.

Le scuse sono rimedi civili diversi dal risarcimento pecuniario, che potrebbe essere inadeguato per un danno emotivo, e che possono aiutare a ricostruire l'armonia sociale nella comunità. Gli studiosi prevedono molteplici vantaggi, come sensibilizzare gli interlocutori al danno che hanno causato, far sentire meglio la vittima, restituirle la dignità, inviare un messaggio forte alla società sul fatto che certi comportamenti non sono accettabili e svolgere un ruolo educativo. Inoltre, la legislazione comprende una combinazione di disposizioni di legge volte a ridurre il contenzioso e a rimuovere le conseguenze legali negative delle scuse, impedendo al querelante di utilizzare a suo vantaggio il fatto che il convenuto si sia scusato.

L'attuale mancanza di una legislazione sulle scuse nell'Europa continentale rispetto ai sistemi di common law non implica che le scuse siano totalmente assenti nei sistemi di civil law: i tribunali possono ordinare le scuse come rimedio per il danno non patrimoniale quando il convenuto non è disposto a scusarsi spontaneamente. In particolare, le scuse ordinate dal tribunale sono emesse soprattutto nei procedimenti civili che coinvolgono il diritto antidiscriminatorio: esse includono scuse pubbliche, pubblicazione della decisione del tribunale, diritto di replica, correzione pubblica e ritrattazione. Tuttavia, i tribunali sono riluttanti a emettere l'obbligo per l'accusato di scusarsi poiché si teme possa interferire con la libertà di espressione e di stampa del convenuto. Tuttavia, i tribunali devono bilanciare questa libertà con altri diritti protetti, poiché l'esercizio del diritto alla libertà di espressione comporta "doveri e responsabilità" e "può essere soggetto alle formalità, condizioni, restrizioni o sanzioni previste dalla legge e necessarie in una società democratica". Mentre l'azione legale prevede un risarcimento, le scuse sono in grado di soddisfare interessi non finanziari (come il bisogno di spiegazioni o il desiderio di evitare che incidenti simili accadano in futuro). In questo senso, la legislazione sulle scuse può anche essere percepita come un complemento - piuttosto che un sostituto – dell'azione

legale. Diversi studiosi sostengono che le scuse generano effetti positivi sull'esito di un caso. Le scuse sarebbero reciprocamente vantaggiose per i danneggiatori (in quanto permettono loro di mantenere il rispetto per se stessi) e per le vittime (in quanto le ispirano a riacquistare fiducia e a riparare il rapporto).

Per essere accettate, le scuse devono contenere tre componenti, anche quando l'accusato non ritiene che i fatti siano sbagliati, ma deve comunque riconoscere le conseguenze dannose delle sue azioni: a. una constatazione dei fatti o un'ammissione di colpa; b. rammarico o rimorso; c. la volontà di intraprendere azioni riparatrici, come un risarcimento.

La giurisprudenza in materia di hate speech può essere di aiuto nel delineare i confini del risarcimento del danno non patrimoniale, soprattutto perché i giudici prendono in considerazione molti elementi legati alla funzione della responsabilità civile: a. la gravità del comportamento; b. l'elemento psicologico (negligenza, colpa grave, intenzionalità); c. l'eventuale arricchimento ottenuto come conseguenza del comportamento illecito; d. la condizione economica del malfattore. Tutti questi elementi sembrano rivelare un'altra funzione del danno non patrimoniale, ovvero la sua portata punitiva.

Dal quadro appena delineato sembra quindi emergere una scarsità di strumenti giuridici, visto che la sanzione penale evoca scenari di limitazione della libertà di espressione e il principale rimedio civile, ovvero il risarcimento del danno subito dall'autore del discorso d'odio, non solo può scontrarsi con la difficoltà di quantificazione, ma soprattutto rischia di incidere solo in minima parte sul danno causato. Va sottolineato che il risarcimento monetario può sembrare inadeguato per questioni legate al benessere fisico e psicologico delle vittime. Per questo motivo le scuse rappresentano una forma di giustizia correttiva e una finalità riparativa.

In conclusione, si può affermare che l'ambito analizzato comporta varie problematiche e il bilanciamento di interessi contrapposti: da un lato, l'esigenza della vittima di veder riconosciuto il proprio dolore, dall'altro la delimitazione della libertà di espressione che, se eccessivamente oppressa, può portare a un'esacerbazione del problema. Tuttavia, gli impegni a livello nazionale e sovranazionale per tutelare tutte le libertà e gli interessi mostrano come tale problematica della diffusione di messaggi d'odio nei contesti informatici sia di vitale importanza.

In questo contesto, si stanno prendendo in considerazione tentativi di trapianti giuridici, dovuti al crescente fenomeno della globalizzazione, per far sì che l'ordinamento giuridico interno possa beneficiare di altri rimedi giuridici volti ad affermare i diritti, a riconoscere la dignità sociale e a ridurre la conflittualità del processo.

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