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FREEDOM OF EXPRESSION AND THE EUROPEAN APPROACH TO DISINFORMATION AND HATE SPEECH: THE IMPLICATION OF THE TECHNOLOGICAL FACTOR

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1. *The Technological and Constitutional Factor*

From the perspective of a constitutional scholar, the issue of combatting the spread of fake news and hate speech touches the essence of the Böckenförde dilemma, according to which «the liberal, secularized state lives by prerequisites which it cannot guarantee itself». The model chosen to protect freedom of expression is one of the distinctive features of the liberal state, which faces a decisive challenge in this area.

For some, the decision to intervene to filter hate speech and fake news from the web evokes the adoption of a series of limitations that restrict freedom of speech within confines that are probably stricter than those codified by the liberal constitutions. So, in order to avoid the spread of hate and lies online, and in the name of the protection of constitutional rights, we could end up indirectly limiting freedom. To return to the dilemma cited above, this is exactly the prerequisite that the liberal state is unable to stably guarantee over time.

These initial observations are sufficient to show that the arguments that have recently appeared in the political debate for the need to introduce legislative tools to combat the spread of fake news and hate speech, and the consequent harmful effects on public opinion, directly touch issues and concepts (democracy and freedom, above all), that are at the heart of constitutional law.

This makes necessary, for whoever intends to join this debate going beyond a merely superficial analysis, to address the constitutional statute of freedom of expression. This is a complex paradigm with that varies in different legal systems, despite the common liberal matrix that characterizes Europe and the United States. Thus, in different contexts, it entails more or less space, and thus a different attitude, towards the circulation of content that does not fulfill a true interest in information.[1]

To simplify, we could then outline a dichotomy that with respect to the circulation of ideas and opinions, presents the option of a militant democracy, committed to the strenuous defense of a value system that the exercise of protected constitutional rights actually risks jeopardizing[1], and the model of a tolerant democracy, where the idea of an ethical state, or in any event of a greater control over the exercise of freedom by individuals, seems to disappear.

These different approaches are increasingly subject to comparison today, in light of the advent of a means of communication, Internet, that has allowed for connecting users and their ideas, opinions, and expressions of thought in various parts of the world. The discussions that involve activists on the web and from non-governmental organizations often evoke the idea of self-regulation on the web (which tends to be recessive, in light of the unquestioned ability of public authorities to interfere with the functioning of Internet) or those of supranational charters of rights. However, this is hard to reconcile with the constitutional pluralism that characterizes some areas, especially that of freedom of expression.

[1] K. LOEWENSTEIN, *Militant Democracy and Fundamental Rights*, in *American Political Science Review*, 31, 1937, 417 ss.

This is not happening by chance. Prof. Costanzo had already foreseen the role of technology for constitutional law. He clearly taught us that the "technological factor" (and its consequences) is interrelated with phenomena which challenges how we traditionally define the notion of sovereignty, territory and exercise of powers[2]. In other words, technology is also an important vehicle to interpret constitutional and democratic developments in a globalized society.

[2] P. COSTANZO, *Il ruolo del fattore tecnologico e le trasformazioni del costituzionalismo*, in *Rass. Parlam*., 2012, 811-853 (v. anche in *Costituzionalismo e globalizzazione*, a cura dell'Associazione Italiana dei Costituzionalisti. Atti del 27. Convegno annuale, Salerno, 22-24 novembre 2012, Jovene, Napoli, 2014, 43-82). Among the works of Prof. Pasquale Costanzo, see *Contributi al* Forum *Le Sfide della Democrazia Digitale*, in *Rivista del Gruppo di Pisa*, 2019/03, 233, 239, 249, 255, 265, 270 e 278; *La "democrazia digitale" (precauzioni per l'uso),* in *Diritto Pubblico*, 2019, 71-88; *Internet e giustizia costituzionale* in P. Ivaldi e S. Carrea (curr.), *Lo spazio cibernetico. Rapporti pubblici e privati nella dimensione nazionale e transfrontaliera* (Quaderni del corso di Dottorato in Diritto dell'Università di Genova), Genova University Press, 2018, 3-20; *Quando la Corte di Strasburgo in internet continua a navigare a vista*, in *DPCE Online*, [S.l.], v. 31, n. 3, oct. 2017; *L'impatto della tecnologia sui diritti fondamentali,* in T. E. Frosini, O. Pollicino, E. Apa, M. Bassini (curr.), *Diritti e libertà in internet,* Le Monnier Università, Milano, 2017, 3-18; *Osservazioni sparse su nodi, legami e regole su Internet,* in P. Passaglia e D. Poletti (curr.), *Nodi virtuali, legami informali: Internet alla ricerca di regole*, UPI, Pisa, 2017, 17-29; *Quale tutela del diritto d'autore in internet? (Osservazioni a margine della sentenza n. 247 del 2015 della corte costituzionale), in Giurisprudenza Costituzionale*, 2015, 2343-2357; *Internet e libertà d'informazione dentro le mura carcerarie,* in *Diritto dell'informazione e dell'informatica,* 2015, 939-956; *Audizione in merito ai d.d.l. costituzionali 1317 e 1561 sul diritto di accesso a internet,* in *Federalismi.it* (FOCUS - Comunicazioni, media e nuove tecnologie N. 4 - 27/02/2015), 1-11; *Corte di giustizia e videosorveglianza multivello,* in *Giurisprudenza italiana* 2015, 29-33; *Note preliminari sullo statuto giuridico della geolocalizzazione (a margine di recenti sviluppi giurisprudenziali e legislativi),* in *Il diritto dell'informazione e dell'informatica*, 2014, 331-344; *Quali garanzie costituzionali per gli interventi rimediali in Rete,* in *Il diritto dell'informazione e dell'informatica*, 2013, 17-26; *La* governance *di internet in Italia,* in E. Bertolini, V. Lubello, O. Pollicino (curr.), *Internet: regole e tutela dei diritti fondamentali*, Aracne, Roma, 2013, 41-58, ed in Scritti in onore di Antonio D'Atena, Giuffré, Milano, 2015, 713-728; *Miti e realtà dell'accesso ad internet (una prospettiva costituzionalistica,* in P. Caretti (cur.), *Studi in memoria di Paolo Barile*, Passigli Editore, Firenze, 2013, 9-26 (e in *Consulta OnLine*, 2012); *Contributo ad una storia della libertà d'informazione: le origini di internet (1969-1999),* in AA.VV. *Studi in onore di Aldo Loiodice,* Cacucci, Bari, 691-710. 2012); *Quale partecipazione politica attraverso le nuove tecnologie comunicative in Italia,* relazione alle III Jornadas internacionales de Derecho Constitucional Brasil/España/Italia, Segovia, 30 settembre e venerdì 1° ottobre, in *Il diritto dell'informazione e dell'informatica*, 2011, 19-46, ed in E. Pajares (cur.), *Nuevas dimensiones de la participaciòn politica*, Valencia, 2015, 175-209; *I diritti nelle "maglie" della Rete*, in AA.VV. *Diritto pubblico e diritto privato nelle rete delle nuove tecnologie*, Edizioni Plus, Pisa, 2010, 5-19; *Videosorveglianza e Internet*, in AA.VV., *Videosorveglianza e Privacy*, Angelo Pontecorboli Editore, Firenze, 23-32); *Una conversazione mondiale continua (recensione al portale http://www.teutas.it,* in CNEL, *Il diritto governa la tecnica?*, doc. n. 12, Roma, 2009, 46-51, e in *Tecniche normative* 29.IV.2010; *La regolazione della Rete tra libertà di navigazione ed uso sicuro delle tecnologie telecomunicative* (Safer Internet), in G. Brunelli - A. Pugiotto - P. Veronesi (curr.), *Scritti in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere*. Joverne, Napoli, 2009, 961-977; con Marina Pietrangelo, *Theory and Reality of the Official Publication of Legal Acts on Internet*, in G. Peruginelli, M. Ragona (eds), *Proceedings of the IX International Conference "Law via the Internet"* (Firenze, 30- 31/10/2008), Florence, European Academic Publishing Press, 111-122; *Il* blog *tra vocazione libertaria della Rete e limiti costituzionali della manifestazione del pensiero,* in *Informatica e Diritto (*numero speciale*: Studi in memoria di Isabella D'Elia Ciampi),* 2008, nn. 1/2, 57-71; *Nomi di dominio della Pubblica Amministrazione*, in *Federalismi.it N. 12 - 11/06/2008; La pubblicazione delle leggi approda ufficialmente su internet (osservazioni a margine della legge regionale toscana n 23 del 2007)*, in *Rivista dell'informazione e dell'informatica*, 2007, n. 3, 479-495; *Nuove tecnologie e "forma" dell'amministrazione*, in P. Costanzo, G. De Minico e R. Zaccaria, *I tre "codici" della società dell'informazione,* Atti del convegno di Firenze del 9 giugno 2006, Giappichelli, Torino, 3-12; con G. De Minico e R. Zaccaria, *I tre "codici" della società dell'informazione,* Atti del convegno di Firenze del 9 giugno 2006, Giappichelli, Torino, VII-415; *La pubblicazione normativa al tempo di internet, in* AA.VV., *Le fonti del diritto, oggi*, Giornate di studio in onore di Alessandro Pizzorusso, Edizioni Plus, Pisa, 2006, 203-219; *Motori di ricerca: un altro campo di sfida tra logiche del mercato e tutela dei diritti?*, in *Diritto dell'internet*, 2006, 545-549; *The impact of new technologies, fundamental liberties and the Italian legal system: an Overview*, relazione all'International conference "*E-Democracy*", Athens, 3-4 June 2005, in S. Flogaitis, U. Karpen e A. Masucci, *E- Government and E-Democracy*, Esperia Publications Ltd, London, 2006, 251-260; *La* privacy *tra Stato e Regioni: la Corte costituzionale fissa i paletti*, in *Diritto dell'internet*, 2005, 555-562; *Introduzione* a G. Cassano, *Diritto dell'internet*, Giuffrè, Milano, 2005, XII-XII; *Note minime in tema di tutela dei dati personali in internet e* Privacy Enhancing Technologies, in *Studi in onore di Fausto Cuocolo*, Milano, Giuffrè, 2005, 289-306; *L'accesso ad internet in cerca d'autore*, in *Diritto dell'internet*, 2005, 247-251; *Diritto e informatica: questo matrimonio non s'ha da fare!* in *Forum10 Società dell'informazione, il futuro*

This work explains how the analysis of the protection of freedom of expression constitutes an indispensable and necessary step to recognize the criticalities linked to every plan that aims to regulate the matters of hate speech and fake news. This approach, which considers the "pre-digital" age and the "digital" age allows the recognition of possible antibodies in different constitutional systems, to engage in a battle that today, thanks to the potential of the web, seems to endanger some cornerstones of constitutional democracies.

2. *European Constitutionalism Put to the Test by Hate Speech and Fake News*

From the beginning, with the birth of the liberal state and the guarantee of negative liberties, enshrined in basic charters, European constitutionalism has placed the freedom of expressing one's thoughts in a central position, making it one of the cornerstones of every democratic society and the distinctive feature of this model. The centrality of freedom of expression is due not only to the symbolic importance of this freedom, which has risen to be a distinctive trait of all democratic systems, but also its close connection with many of the rights and freedoms given constitutional protection. Conscious political participation, for example, both active and passive, assumes that citizen-voters have a store of knowledge, and at the same time, requires citizen-candidates not to

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dei diritti, il diritto del futuro, in *InterLex* 06.06.05*; Già avvenuto secondo il Tribunale di Roma lo* switch off *negli studi legali, ma sono in pochi ad essersene accorti ...*, in *Diritto dell'internet*, 2005, 149-152; *Da Giovenale a internet:* satura tota nostra est, in *Diritto dell'internet*, 2005, 27-32; *La comunicazione giuridica alla prova della Rete,* in B. Caravita (cur.), *I percorsi del federalismo*, Milano 2004, 168-183, e in *Federalismi.it*, 13 maggio 2004; *Aprire "i confini degli Stati" al messaggio cristiano: il ruolo di Internet nel pensiero di Giovanni Paolo II,* in A. Loiodice e M. Vari (curr.), *Giovanni Paolo II Le vie della giustizia, Omaggio dei giuristi a SS. Giovanni Paolo II in occasione del XXV anno di Pontificato*, Roma-Bari, 2003; *Profili costituzionali di internet*, in E. Tosi (cur.), *Diritto di internet e dell'e-business*, 3° ed., Milano, Giuffrè, tomo I, 53-97; *La democrazia elettronica*, relazione al Convegno di studi in ricordo di Ettore Giannantonio, Roma 6 dicembre 2002, in *Il diritto dell'informazione e dell'informatica*, 2003, 465-486; *Traccia per uno studio dei profili di diritto pubblico dell'economia nelle nuove tecnologie dell'informazione,* in F. Gabriele, G. Bucci e C.P. Guarini (curr.), *Il mercato: le imprese, le istituzioni, i consumatori*, Bari, Cacucci, 2002, 91-115; *L'internet et le droit. Droit européen et comparé de l'internet (réponses à un questionnaire),* Risposte al questionario-intervista per il Convegno Parigi, 25-26 settembre 2000, in *Annali della Facoltà della Giurisprudenza di Genova*, XXXI, 2001-2002, 343-367; *La protection des droits fondamentaux a l'heure du numerique. La situation italienne*, relazione al Congresso mondiale di diritto comparato, Brisbane, luglio 2002, Milano, 2002, 565-600; *La magistratura sfida Internet. A proposito di una caso francese, ma non solo...,* in *Il diritto dell'informazione e dell'informatica*, 2001, 208-230; *Ancora a proposito dei rapporti tra diffusione in Internet e pubblicazione a mezzo stampa,* in *Il diritto dell'informazione e dell'informatica*, 2000, 653-664; *Internet e forme evolutive della libertà di comunicazione* in *Rivista delle radiodiffusioni e delle telecomunicazioni*, 1999, n. 4, 141-150; *Profili costituzionalistici del commercio elettronico,* relazione al Convegno di Camerino, 29-30 ottobre 1999, in V Rizzo (cur.), *Diritto e tecnologie dell'informazione,* Atti del Convegno di Camerino, 11-12 ottobre 1996, Napoli, Novene, 1998 e in *Rivista delle radiodiffusioni e delle telecomunicazioni*, 1999, n. 3, 89-102; *Internet (diritto pubblico),* in *Digesto Quarta Edizione (Discipline pubblicistiche),* Appendice, UTET, Torino, 2000, 347-371; *La circolazione dell'informazione giuridica digitalizzata (fenomenologia e profili problematici),* in *Il diritto dell'informazione e dell'informatica*, 1999, 579-590; *Ascesa (e declino?) di un nuovo operatore telecomunicativo (aspetti giuridici dell'internet service provider),* in *Rivista delle radiodiffusioni e delle telecomunicazioni*, 1999, n. 2, 83-102; *La circulation des informations juridiques informatisées en Italie,* in AA.VV., *L'information juridique: contenu, accessibilité et circulation. Défis politique, juridique, économique et technique*, Actes du colloque des 22-23 octobre 1998, ADIJ , Paris, 1998, 6; *Recensione* a I. D'Elia Ciampi, *Diritto e nuove tecnologie dell'informazione,* Napoli, ESI, 1998, in *Diritto dell'informazione e dell'informatica*, 1998, 707- 710; I *newsgroups* al vaglio dell'Autorità giudiziaria (ancora a proposito della responsabilità degli attori d'*Internet*) in *Il diritto dell'informazione e dell'informatica,* 1998, 807-817; *Libertà di manifestazione del pensiero e "pubblicazione" su* Internet, in *Il diritto dell'informazione e dell'informatica,* 1998, 370-378; *Intervento* in V. Rizzo (cur.), *Diritto e tecnologie dell'informazione*, ESI, Napoli, 1998, Atti del Convegno, Camerino, 10/11 settembre 1996, 107-109. *Le nuove forme di comunicazione in rete:* Internet, in *Informatica e Diritto*, 1997, n. 2, 1-40, e in R. Zaccaria (cur), *Le telecomunicazioni*, in G. Santaniello, *Trattato di diritto amministrativo*, Padova, CEDAM, 32 ss. *Aspetti e problemi dell'informatica pubblica*, in *Scritti in onore di Victor Uckmar*, I, Padova, CEDAM, 291-317; *Aspetti evolutivi del regime giuridico di Internet* in *Il diritto dell'informazione e dell'informatica,* 1996, 831-846; *Aspetti problematici del regime giuspubblicistico di Internet* in *Problemi dell'informazione*, 1996, n. 2, 183-195.

encounter obstacles to the exercise of freedom of speech. But many other freedoms are based on the recognition of freedom of expression in a democratic society: freedom of research, so sadly disrupted in some recent situations (Turkey and Hungary); freedom of association, that assumes a common consociational bond based on shared core values; and religious freedom, a fundamental element of which involves free adherence to visions of the transcendental.

The central position occupied by freedom to express thoughts must not lead to believing that the field of application of this fundamental right cannot be subject to limitations or restrictions due to the need to prevent abuses or to balance its exercise with other rights, which equally deserve constitutional protection.

From the time of its solemn affirmation, found in art. 11 of the Declaration of the Rights of Man and of the Citizen of 1789, freedom of expression has had a intrinsically malleable nature, that can be inferred from its very formulation: «The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law».

This characteristic is not an isolated feature but represents the essence of European "DNA" on freedom of expression. This essence was perfectly and fully expressed when the Member States of the Council of Europe adopted a common instrument for the protection of human rights, divided into two levels: on the one hand, the solemn affirmation of freedom; on the other, the statement of a series of limitations that reflect the typical guarantees of the liberal state: the necessary establishment of a legislative foundation; respect for the criteria of proportionality (necessary in a democratic society); the protection of constitutionally relevant interests.

All of the European states model themselves on this paradigm, as by definition they conceive the protection of freedom of expression as a right susceptible to being balanced with others; thus, at times it is malleable, when it becomes necessary to guarantee the protection of other rights. This is true in Italy, for example, where art. 21 of the Constitution establishes the specific limit of public morality (a concept that by its nature and due to a far-sighted choice by the country's founding fathers is permeable to the evolution of time). Less well-known in Italy are the various provisions of the legal system that incorporate "implicit" limits on the exercise of this freedom, such as those that punish defamation[3]. What are the specific instruments that European constitutionalism sets out to govern the exercise of the freedom to express thought, and in particular, to combat the spread of fake news and hate speech? There are at least two levels of analysis on which to parameterize the degree of tolerance (or to the contrary, of "intolerance") that European constitutionalism exhibits in this regard.

3. *The Convention on Human Rights and Fundamental Freedoms*

The European Convention on Human Rights (ECHR) expresses two crucial "parameters" to understand the margin of protection of actions that constitute an exercise of freedom of expression. On the one hand, freedom of expression is protected by art. 10 of the ECHR which presents a paradigm based on a rule-exception relationship. After the solemn affirmation of freedom of speech, the provision then indulges in providing three requirements that every limitation of the freedom in question must respect. More precisely, as anticipated, the limitations must be established by a law, they must be proportionate (necessary in a democratic society) and they must be aimed at reaching one of the objectives expressly set by the same second paragraph of art. 10.

Moving from the analysis of the legislative criterion to the ways in which this criterion operates in jurisprudence, it must be stressed that the activity of interpretation carried out by the European Court in applying art. 10 provides comforting outcomes with respect to the possibility to actually

[3] See J.F. FLAUSS, *The European Court of Human Rights and the Freedom of Expression*, in *Indiana Law Journal*, 84, 3, 2009, 809 ss.

guarantee this freedom[4]. In particular, it must be recognized that the perimeter of protection guaranteed to this right was defined broadly by the Strasbourg Court, which pointed out some important fixed points, starting with the *Handyside* and *Jersild* cases.

In *Handyside*,[5] a historic decision from 1976, the Court explained that the protection granted in art. 10 is applicable not only to the "information" or the "ideas" that are favorably received by the public or are regarded as inoffensive or as a matter of indifference; the scope of coverage offered by this provision also extends to expressions that offend, shock, or disturb the state or any part of the population. In a subsequent passage, the European Court emphasized that the scope of this area of protection responds to the needs of pluralism, tolerance, and broadmindedness without which it would not be possible to have a democratic society. This decision indeed greatly expanded the borders of freedom of expression, stating that even content that would have difficulty being approved by most members of the public as it is shocking or offensive cannot for that reason only be stripped of the guarantees that accompany freedom of expression. Thus, it is not the level of acceptance or social approval of content that justifies access to the guarantees of freedom of speech. These assertions seem to confirm the assumption that the more varied the panorama of ideas and opinions is, the more the democratic character of a democracy will benefit. However, this assumption must be measured with the variety of features of fake news, that do not have any specific value from an informational point of view, but rather achieve an effect contrary to the aims of freedom of expression, spreading untruthful messages among the public. Thus the question that needs to be posed is if that news entirely lacking social utility, that does not make any contribution to the information of individuals as it is false and tendentious, is equally deserving of circulation as content that, to the contrary, satisfies an interest of information according to the conventional parameter.

In *Jersild*,[6] one of the first hate speech cases, the Strasbourg Court showed its appreciation for the peculiar context in which offensive expressions are formulated, finding that the contracting state involved (Denmark) had violated art. 10 of the ECHR by convicting a journalist who had interviewed a group of extremist youths, who during the radio broadcast had made offensive and racist statements.

The case law panorama cited above clearly provides indications in favor of an expansive scope of freedom of expression, whose perimeter, according to the European Court's interpretation, seems to also include those expressions that do not offer a significant contribution to the democratic development and formation of public opinion, and that have horrifying and disturbing contents. Nevertheless, the European Court provided some important clarifications in relation to the different cases of negationism in which the limits applied on freedom of speech from time to time have been submitted for its examination. In this direction, the instruments used by the Strasbourg Court were enriched by art. 17 of the Convention, which prevents the abuse of rights, at least in this case adopting a tone reflecting militant democracy.[7]

While the application of art. 10 fits into a logic of balancing freedom of speech with some interests deserving protection (to be carried out by the Strasbourg Court), ensuring that the freedom is compatible with those interests, the use of art. 17 punishes the abuse of a right sanctioned by the Convention as a tool used strictly to destroy other rights or freedoms or to limit them in a more severe manner than as provided for by the Convention.

On this point, the Strasbourg Court has at times invoked art.17 to exclude the possibility of balancing from the start. This happened in the following cases, among others: *Garaudy v. France*

[4] C. PINELLI, *"Postverità" verità e libertà di manifestazione del pensiero*, in *mediaLAWS - Rivista di diritto dei media*, 1, 2017, 41 ss.

[5] ECtHR, *Handyside*, decision 7 December 1976, A No. 5493/72.

[6] ECtHR, *Jersild*, decision 23 September 1994, A No. 15890/89.

[7] See H. CANNIE-D. VOOHROOHF, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*, in *Netherlands Quarterly of Human Rights*, 29, 1, 2011, 54.

(negationism),[8] *Ivanonv v. Russia* (racial hate),[9] and *Norwood v. United Kingdom* (religious hate).[10] In other cases of hate speech, the Court addressed the possible harm of art. 10: *Perinçek v. Switzerland,*[11] *Lehideux and Isorni v. France,*[12] verifying compliance with the criteria established by art. 10.

If we seek to identify some general trend lines, we must first of all note a particular attention by the European Court to the dimension of the public debate and the existence of a general interest (conditions in which we can speak of political speech), that legitimize and justify a greater degree of protection than those manifestations of thought that respond exclusively to the label of commercial speech. The trend shown by the Strasbourg Court fits into the perspective of an expansion of the reading of these criteria and the definition of the contents covered by public debate that respond to a general interest. This reading is also linked to the indication contained in par. 2 of the art. 10 of the ECHR, that subordinates the conventional conformity of any restrictive measures adopted by the contracting states to respect for necessity in a "democratic society".

Particular attention has also been dedicated to freedom of information, a declination of freedom of speech that, among all freedoms, most intensely corresponds to its essence as the watchdog of the democratic character of the legal system. From this perspective, the Strasbourg Court showed particular sensitivity regarding the impact of any limitations established by the contracting states, focusing on the so-called "chilling effects", meaning the possible imbalances deriving from the adoption of measures that excessively limit the legitimate exercise of rights protected by constitutions and conventional documents as well. Above all, we should mention the efforts made in the jurisprudence of the Strasbourg Court with respect to the application of disproportionate or excessive penalties to journalists guilty of the crime of libel.[13] It is important to immediately stress the importance of the reference that art. 10 of the ECHR makes to both the freedom to spread information ("active" conduct), and the freedom to receive it ("passive" conduct). The latter cannot avoid a critical comparison with the unique model of protection in the United States is based exclusively on the citizen's demand to exercise his or her freedom of speech without any state interference (abridgment of speech). In fact, if we protect citizens' right to receive information, we inevitably imply a reference to the need for non-polluted information that is correctly oriented towards a virtuous formation of public opinion, which appears to support a view that identifies a limit to the expansive capacity of the phenomenon of fake news. This is exactly one of the interpretations that allows us to explain the choice made by the European Commission, that in entrusting to a group of experts the development of appropriate initiatives, shifted the focus away from the very ambiguous and difficult-to-delimit concept of fake news[14] to the less slippery concept of "disinformation", finding in this notion a common nucleus that corresponds to the harm generated by false or tendentious information for the formation of public opinion and the healthy conduct of electoral competitions.[15]

With respect to the picture we have described with reference to the protection provided by the Strasbourg Court to freedom of expression and information in the world of atoms, what attitude

[8] ECtHR, *Garaudy*, decision 24 June 2003, A No. 65831/01.
[9] ECtHR, *Ivanov*, decision 15 October 2009, A No. 40450/04.
[10] ECtHR, *Norwood*, decision 16 November 2004, A No. 23131/03.
[11] ECtHR, *Perinçek*, decision 15 October 2015, A No. 27510/08.
[12] ECtHR, *Lehideux and Isor*, decision 23 September 1998, A No. 24662/94.
[13] On this subject, see *ex multis,* also M. OROFINO, *La libertà di espressione tra Costituzione e Carte europee dei diritti*, Giappichelli, Torino, 2014. *Inter alia*, we note the convictions of Italy in this direction in the cases ECtHR, *Belpietro*, decision 24 September 2013, A No. 43612/10; *Sallusti*, decision of 7 March 2019, A No. 22350/13.
[14] See the attempts at definition in M. BASSINI-G.E. VIGEVANI, *Primi appunti su fake news e dintorni*, in *mediaLAWS - Rivista di diritto dei media*, 2017, 11.
[15] European Commission, *A multi-dimensional approach to disinformation*, Report of the independent High Level Group on Fake News and Online Disinformation, 2018, where the concept of disinformation, expressly referred to that of fake news, includes «all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit».

seems to emerge when the same freedom is exercised in the world of bits? Looking at the decisions in which the European Court was asked to rule on lawsuits linked to presumed violations of freedom of expression on Internet, we note an inclination to remodulate the expansive scope that had characterized the prior case law of the European Court on the application of art. 10 in similar areas. This new definition of the area and scope of freedom of expression on the web seems to be rooted in the assumption that the use of digital technologies presents a greater degree of "danger" with respect to other interests with which the exercise of freedom of speech must be compared.[16] Of course, the "relative" and "malleable" character with respect to operations for balancing the fundamental rights protected by the European Convention on Human Rights is certainly not new, but this character seems to be noticeable in cases that deal with Internet.

Early signs of this "restrictive" reading were present in the *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* decision of 2011,[17] in which the Court argued «Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press».

Unlike the Supreme Court of the United States, which, in *ACLU v. Reno*,[18] immediately highlighted the potential for a "phenomenal" expansion of the room for the exercise of freedom of thought, in this decision the European Court appeared to be worried above all by the critical aspects of the use of Internet and the risks linked to more significant harm to the other fundamental rights that could clash with the freedom of expression and information. The match is taking place not in the world of atoms, but in that of bits. The difference with the US approach is not insignificant, if we consider that in the decision just cited the Supreme Court had observed «As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship». The two courts seem driven by opposite assumptions: the US court presumes that content regulation and thus control do not lead to greater benefits (i.e. the need to guarantee the "marketplace of ideas"); the European court, which is more distrustful of the new technologies, finds it likely that the medium will generate danger for other rights and thus assumes the need, and the legitimacy, of correctives that can limit the exercise of free speech.

It should then be recalled, as highlighted previously, that the European Court has always pointed to freedom of expression, and in particular freedom of the press, as a sort of litmus test for the level of democracy of a system. It seems that this consolidated orientation in the Strasbourg Court's jurisprudence has also been revisited. First, in *Stoll v. Switzerland*,[19] the Court appeared to endorse the imposition of stricter obligations for journalists when using Internet than in the case of print media: «The safeguard afforded by art. 10 to journalists in relation to reporting on issues of general interest is subject to the provision that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism [...]. These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is

[16] O. POLLICINO-M. BASSINI, *Free speech, defamation and the limits to freedom of expression in the EU: a comparative analysis*, in A. SAVIN- J. TRZASKOWSKI (eds), *Research Handbook on EU Internet Law*, Cheltenham-Northampton, 2014, 508 ss.

[17] ECtHR, *Editorial Board Pravoye Delo*, decision 5 May 2011, A No. 33014/05.

[18] *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

[19] ECtHR, *Stoll*, decision 10 December 2007, A No. 69698/01.

confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance».

A similar orientation is confirmed in *KU v. Finland*: «Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others».[20]

Naturally, we must not forget that the European Court's decisions are for the most part based on the specific nature of the individual situations that triggered the lawsuits. These elements allow for reducing or in any event correctly weighing the significance of rulings that appear to be radical. This is true, for example, in the case of *Delfi v. Estonia*,[21] a decision of the Grand Chamber that confirms the trend line described to this point, tending to look more favorably on possible limitations on freedom of expression online. The following quote shall suffice: «Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online». The Court decided that to order the operator of an online information portal to pay a sum - although a small one (320 euros in this case) - as compensation for damages suffered by a person due to some defamatory remarks that remained accessible for approximately six weeks accompanying an article published on the site, does not represent a disproportionate restriction on freedom of expression, due to the need to balance that freedom with the protection to be granted to other personality rights of the defamed person (such as honor and reputation).

It should be said that the same matter would very likely have been judged differently by the Court of Justice. That Court's examination would probably be based on different criteria than those adopted by a judge of fundamental rights such as the Strasbourg Court, concentrating on the issue of potential liability of the operator of the online portal and thus on the application of Directive 2000/31/CE (that governs the releases of liability applicable to suppliers of services for contents published by third parties on their sites). This decision is unquestionably problematic and difficult to reconcile with European Union law. Apart from the need to adopt a perspective which is not misleading (the issue here is whether the imposition of pecuniary compensation, of a small amount, could represent an unjustified violation of Art.. 10 of the ECHR, and the non-compatibility of that option with Directive 2000/31/EC), the decision opens up the possibility to attribute to the publisher of a portal liability for unlawful content published by third parties in certain circumstances.

Those indications emerge above all if we compare the scope of the *Delfi* decision with one from a few months later, which saw the Strasbourg Court again take a position on a similar case, but with a different outcome, in *MTE v. Hungary*.[22] The case was not substantially different, since the lawsuit was aimed at provoking an examination of the compatibility with Art.. 10 of the ECHR of the conviction of the operator of an information portal due to defamatory comments entered by third parties through the use of pseudonyms, below a news item published in the newspaper. As stated, the Strasbourg Court reached an opposite decision, since it found a violation of art. 10, thus deviating from the precedent in *Delfi*. According to the Court, the two cases are different due to the nature of the offensive comments and their different negative value. In *Delfi*, the contents entered by third parties was particularly offensive, to the point of representing a form of "hate speech", being characterized by a tone which incited violence and racial hate. That character, which to the Court seemed to heighten the attraction for users, is not found in the *MTE* case, and it is precisely the absence of this attribute of manifest illegality that justifies a different attitude towards the Internet Service Provider. The Strasbourg Court thus revised its orientation. Moreover, in this case

[20] ECtHR, *KU*, decision 2 December 2008, A No. 2872/02.
[21] ECtHR, *Delfi AS*, decision 16 June 2015, A No. 64569/09.
[22] ECtHR, *MTE*, decision 2 May 2016, A No 22947/13.

there was no issue of a delay in removing the comments as had taken place in *Delfi* (this time the content was removed promptly); rather, the question was the liability of the operator of the platform for offensive comments published by third parties. In this sense, we seem to see an attempt by the Court to come closer to European Law than in the *Delfi* case, and to the principles of liability for Internet Service Providers.

This attitude by the Strasbourg Court, without going too far or translating into consent for any tendency towards censure, is not aimed at diminishing the importance of Internet as a means of information, and the resulting need to ensure that the public has free access to various sources through the web. This is demonstrated by *Cengiz v. Turkey*,[23] in which the European Court expressly recognized the value of YouTube as a medium for receiving and spreading information and ideas, which furthermore are not always available through traditional media, thanks to the contribution of so-called participatory journalism, which is driven precisely by the availability of new technologies. In that decision, the Court found the generalized blocking of access to YouTube by the national authorities to be contrary to the Convention. According to the Court: «YouTube was a unique platform on account of its characteristics, its accessibility and above all its potential impact, and there were no equivalents that could replace it».

Previously, Turkey had already been convicted in the *Ahmet Yildirim* case for violation of art. 10 of the ECHR due to having blacked out all of the sites hosted by the Google platform, ordered in an entirely disproportionate way in the context of a criminal proceeding for the prosecution of some crimes of opinion committed on the web.[24] The measure, which was generalized and not intended to affect only the individual sites involved, was considered to lack the character of proportionality, having made inaccessible many Internet sites that were completely uninvolved in the matter and that contributed to satisfying the needs of the public in the exercise of their right to search for and receive information.

4. *The Charter of Fundamental Rights of the European Union*

In European Union law, the relevant provision is the parameter set in art. 11 of the Charter of Fundamental Rights, that now represents a reference on a constitutional level, with the same weight as the treaties, and is binding for all of the secondary legislation that the European Institutions may adopt (i.e. regulations, directives and decisions). There is more: the presence of a document protecting fundamental rights, which has been binding since the day of entry into force of the Lisbon Treaty, strongly characterizes the identity of Europe, allowing it to take at least a partial step forward that had remained incomplete due to the failure of the project for a constitutional treaty. This involved adopting a charter of rights, which in addition to being binding on the activity of the legislature, allows the Court of Justice to review the legal acts of the Union that existed before the Charter, to verify their compatibility with the fundamental rights.[25] It must be said that the innovative contribution of the Charter will probably be limited to the formal sphere, since on the merits, the legal situations that are currently protected by the Charter already received protection in the construction of the European Community first, and then the Union, through the filter of the general principles and constitutional traditions of the Member States. It is certain, however, that the choice to codify a true "bill of rights" cannot but have systemic implications.

The European Union suffers from the limit of its genesis being linked to economics more than the protection of fundamental rights, unlike the system of the European Convention on Human Rights. Therefore, the area of fundamental rights has for a long time represented an exception that the Court of Justice could recognize with respect to the unmolested exercise of the economic

[23] ECtHR, *Cengiz*, decision 1 March 2016, A Nos. 48226/10 and 14027/11.

[24] ECtHR, *Yildirim*, decision 18 December 2012, A No. 3111/10.

[25] See O. POLLICINO, *Internet nella giurisprudenza delle Corti europee: prove di dialogo?*, in *Forum di Quaderni Costituzionali*, 31 December 2013.

freedoms proclaimed by the treaties. From time to time, the Court could be called on to decide whether the limitations on those freedoms established by the Member States in the name of the protection of fundamental rights were justified or not.

As a consequence, the decisions of the Court of Justice that deal more directly with the protection of freedom of expression are very rare, while the recent decisions that involve balancing this right with other rights of an economic origin are more frequent, such as copyrights and data protection. One case, among others, that is symptomatic of this attitude on the part of the judges in Luxembourg is *Omega*,[26] in which the Court of Justice was asked to rule on the compatibility with EU law of a measure by which in Germany, the practice of certain games, which constituted economic activity, was prohibited in the name of the protection of human dignity. Those games implied acts of simulated homicide and violence, such as to threaten public safety and order. According to the Court of Justice, an economic activity can be prohibited in accordance with European Union law when the aims of the measure correspond to the protection of public safety. Here we see the room for protection reserved to fundamental rights (in this case, the right is at the top of the system, i.e. human dignity).

Faced with the evolution of digital, some important rulings have come that regard the relationship between freedom of expression and other rights, in particular personal data protection and copyright rights. It is important to acknowledge these decisions, more for their specific contribution "on the merits" (which is in fact limited, given that no specific decisions are directed at the issue of preventing fake news) than for the "method", i.e. for the conceptual and procedural tools that the Court has developed in considering the possible restrictions of freedom of expression on the web. This is an important step, because any national laws against disinformation and hate speech would ultimately have to deal with this sensitivity, if the "hard law" path were chosen.

The panorama of case law relating to balancing freedom of expression with the right to personal data protection and copyrights provides a "parametric" indication of the staying power of the paradigm of freedom of expression in the face of the spread of digital technologies.

First of all, it is useful to understand the relationship with personal data protection. The *Lindqvist* judgment of 2003 represents the first time that the Court of Justice had to deal with the new technological scenario.[27] The matter had begun with the publication by a Swedish citizen of an Internet site in which she had indicated the particulars of some parishioners and some details on their private and family lives, without their consent. These activities led to her conviction in the first instance, representing an unlawful processing of data. The Court of Justice was thus asked to specify if the limits set by the personal data protection directive were incompatible with the protection of freedom of expression, with which the privacy of individuals must be balanced. Despite remanding the evaluation on the point to the national court based on its internal regulations, the Court of Justice excluded the possibility that Directive 95/46 establishes restrictions incompatible with freedom of expression.

The ruling that more clearly indicates the search for a presumed equilibrium between freedom of expression and protection of personal data dates to 2014, when the Court of Justice pronounced the *Google Spain* decision.[28] The parties to the original dispute, held before the Spanish Data Protection Authority ("AEPD"), were Mr. Costeja González and Google. The former requested that the search engine cancel some links to the web pages of a publication, *La Vanguardia,* that contained details of a legal proceeding against him years earlier. The latter objected that such an intervention was not possible for a search engine, and that the request should be addressed to the party managing the source site.

The Court of Justice stated that EU law offers a secure foundation for the right to de-indexation of personal data and also specified that search engines operators are responsible for conducting an assessment regarding the presence of the conditions for the exercise of that right and the

[26] ECJ, *Omega*, decision 14 October 2004, case C-36/02.
[27] ECJ, *Lindqvist*, decision 6 November 2003, case C-101/01.
[28] ECJ, *Google Spain*, decision 13 May 2014, case C-131/12.

compatibility with freedom of information.

The Court of Justice reached this conclusion by following a varied path with multiple steps, whose outcome is the recognized possibility to apply to search engines the same obligations established for those who process personal data "on their own account" (as "controllers", such as a journalistic publication, for example). This includes deleting personal information (in the specific case this meant news reported by third-party sites) when that information is no longer exact, up-to-date, pertinent, or relevant. The decision thus assigns the search engine operator the duty to decide, on a case-by-case basis, if the information deserves to stay on the web or is destined for "erasure" (in reality, more than being erased, we should speak of "de-indexation", given that the information is removed only from search results, without affecting the possibility to find it on the web through direct access to the hosting site). In truth, without mentioning other critical aspects, the decision proposes a genetically asymmetric balance between the right to be informed and the protection of privacy, since the rule is the prevalence of the second over the first, and the contrary is allowed only in exceptional situations. Confirmation of that asymmetry is found in the disparity, in the Court's reasoning, between the many references to arts. 7 and 8 of the Charter of Fundamental Rights, dedicated to the protection of privacy and personal data, and the absence of any reference to art. 11 of that same Charter, which as we have said repeatedly, deals with the protection of freedom of expression. This is a purely aesthetic point, but not insignificant.

The rulings just recalled seem to describe a paradigm in which freedom of expression on the web is often "malleable" with respect to the protection of other competing interests. That approach also does not seem to be immune from the characterization that is found in the jurisprudence of the European Court of Human Rights, where it is clearly stated that demanding this freedom in a new technological environment leads to the multiplication of possible cases of danger, and thus a conflict with respect to other rights. It is therefore a "malleable" freedom because in the world of bits, it constitutes a more dangerous weapon than what it would in the world of atoms.

The second level of analysis is centered on balancing freedom of expression with copyright rights. There are in fact various rulings of the Court of Justice that have dealt with this difficult path, that is hard to travel in light of the multiple tensions that digitalization has produced in making protected works available for free to users.

Two decisions, triggered by the same events, must be recalled above all: in *Sabam* and *Netlog*,[29] the Court of Justice criticized the measure by the authorities of Belgium that had required the suppliers of Internet services to adopt a filtering system at their own expense to determine the presence of content spread illegally and to block its sharing. The methods by which that mechanism was structured were such as to represent an activity of surveillance by the operators, which is prohibited by European Law (art. 15 of Directive 2000/31/EC). In addition, the characteristics of this filtering system led to an unjustified primacy of copyright rights over other fundamental rights in question, including the freedom of economic initiative (of operators), the protection of personal data (of users), and the freedom of expression. Yet it should be specified that in the decisions in question the Court of Justice was not entirely contrary to the application of screening or filtering systems, finding that those mechanisms must however respect an equilibrium between the fundamental rights in play, according to an approach consistent with the principle of proportionality. Moreover, looking at the document on which the Court of Justice based its scrutiny of the respect of the rights (the Chart.er of Fundamental Rights) we see that the document does not incorporate an axiological hierarchy, but positions the rights listed there based on at least apparently equal logic. This is an important point, because the freedom of expression, despite being the cornerstone value of the democratic system, finds itself being balanced with various other interests that are relevant from time to time.

If we look carefully, in the case of fake news, only in certain cases do we see a conflict with the other rights protected by the legal system. Rather, we must ask whether groundless and unproven

[29] ECJ, *Scarlet*, 24 November 2011, case C-70/10; *Netlog*, 16 February 2012, case C-360/10.

assertions can be classified as part. of the realm of the exercise of freedom of expression, i.e. if they benefit from "constitutional" coverage or not; or, if we wish to reverse the perspective, if the right of the public to receive information assumes an information diet that is "filtered" of fake news.

A joint consideration of the attitude of the Strasbourg Court and the Court of Justice seems to show that freedom of expression can certainly run into limits, and thus that its extension is not boundless. The crucial problem, however, regards the definition of this perimeter. Although it does not reach the point of embracing the space for protection recognized by the First Amendment to the United States Constitution, that is truly broad in both textual terms and in the interpretation given by the Supreme Court, the European conception incorporated in the conventional documents and developed by case law is also inspired by liberal origins. Specifically, in the European Convention on Human Rights, the border is marked by those restrictions that pass the test of "necessity in a democratic society" for the pursuit of specific purposes, that include multiple, very different objectives, that affect both the position of individuals (the protection of reputation) and general interests of the collectivity (the protection of national security). Certainly, in the European context, the threshold at which possible limitations can be triggered is much lower, as legitimate restrictions on freedom of expression can be imposed without necessarily facing "clear and present danger".

Perhaps the litmus test that indicates the "internal" margin of tolerance of freedom of expression derives from the consideration of the jurisprudence that has developed on hate speech. Nevertheless, a fundamental qualifier is needed: apart. from situations in which there are points of contact and identification between the two categories, fake news and hate speech present characteristics that tend to be different.

It is definitely possible for the intrinsic negative value of some obviously groundless news to imbue that content with the same character of hate speech; what is the dissemination of the so-called "Auschwitz lie", like any negationist theory, if not a gigantic case of fake news? Yet not all fake news can rise to the level of hate speech, which derives from the different nature that the many-sided category of fake news can take on.

Aiming to conclude this initial photograph of the European panorama, it must be said that however much the Member States of the European Union, that are bound to observe the European Convention on Human Rights, have a constitutional tradition that tends to be homogenous with respect to protection of freedom of expression, specific legislation on such content is lacking, except for limited exceptions that regard part.icular sectors, such as that of audiovisual media services (where in any case, EU law does not address the merits of the qualification of the contents and balancing choices that remain under the discretion of the Member States). Only Decision 2008/913/JHA deserves to be pointed out, since it was the first measure focused on combatting some forms and expressions of racism and xenophobia through criminal law, whose implementation by the relevant Member States has in any event been differentiated, and not always consistent.[30] Nor do the competences attributed to the European Union by the Member States seem to promise the adoption of measures that could directly affect the subject of fake news.

Whatever initiatives are eventually adopted in the future by the Member States or by the European Union itself (that is waiting to verify the medium-term impact of the Code of practice against disinformation, which incorporated the work of the High-Level Expert Group), the principal actors in the spreading of fake news on the web, i.e. the operators of social media platforms and search engines, will certainly be at the center of the fight against disinformation. The proposals made, among which we must mention the German law approved in June 2017, indicate the attention for the role of Internet Service Providers. Even though this is a crucial hub for the functioning of the information ecosystem on the web, it is important not to forget the need to avoid the tendency to attribute too much responsibility, as that would transform, and ultimately distort, the role of platforms and the legal rules applicable to them, deviating from the understandable and justified spirit of defending people's rights. Otherwise, the choices made by the single Member States could

[30] L. SCAFFARDI, *Oltre i confini della libertà di espressione. L'istigazione all'odio razziale,* CEDAM, Padova, 2010.

run the risk of distorting the very reasoning underlining, for example, the rules for Internet Service Providers, contained in Directive 2000/31/EC and based on the goal of not preventively vesting the platforms with responsibility for content and illegal activities of users, but actively involving them in the subsequent process of removal. Moreover, in this scenario, we must not forget the initiatives increasingly moving towards co-regulation, in which the operators of online platforms are playing a leading role. The reform of the Audiovisual Media Service Directive (AVMSD) seems to go in that direction. As the result of the changes made by Directive 2018/1808, the Directive expressly governs the role of video sharing platforms in relation to part.icular categories of harmful content (including some types of hate speech); a similar attitude can also be seen in the recent Directive on copyright and related rights in the Digital Single Market (Directive 2019/790). We also must not forget that, the forms of self-regulation that have taken hold to date at the European level seem to tend to similar results; a leading example is the pre-existing code of conduct on hate speech already adopted by Facebook, Microsoft, Twitter, and YouTube in summer del 2016.

5. *A new paradigm for the Internet?*

Given this overview of the constitutional paradigm regarding the protection of the freedom of expression in Europe, we must ask if there is a margin to argue that "something has changed", especially in the courts' approach to Internet, understood as the vehicle for the spread of ideas, thoughts, and opinions. This will allow us to verify what options can be pursued, on the level of positive law, in the field of combatting disinformation. It is known that the path chosen by the European Commission is that of self-regulation, which has led to the adoption of a code of conduct that some stakeholders have joined. This is a first step that however has not marked a point of arrival, since on the one hand, the European institutions themselves have promised to verify the effects of this initial form of cooperation, without excluding the possibility of "raising the bar" with different types of interventions. On the other hand, there has been discussion of initiatives that, whether through soft law or hard law, aim to introduce different types of remedies.

This is not a secondary issue, since the coordinates that in the real world allowed us to decipher the sovereignty of states are now strongly called into question, faced with the eruption of a technology which breaks down regulatory fences and crosses borders, at times thwart.ing the attempts of each state to impose laws reflecting their own peculiar sensitivities. The protection of freedom of expression represents one of the most important and emblematic battlegrounds between Europe and the United States. The respective paradigms imply different levels of constitutional protection. Yet the web exposes these different sensitivities to more frequent and likely clashes; such an intersection was certainly not impossible in the past (think of the circulation of a periodical in a state other than where it is published, or the relative ability to affect another person's reputation outside of a specific jurisdiction), but simply less frequent and simple. For example, the web allows a user located in the United States to publish content that, despite not exceeding the perimeter of protection guaranteed by the state of origin, could nevertheless be found offensive and illegal in the system of another state, such as one in Europe, in which the same content becomes visible. The rise of "forum-shopping" is no coincidence, i.e. the possibility to publish certain contents in the country where the legal system guarantees the broadest protections. Internet risks fueling a short circuit in which it would be impossible to decipher the standard of protection applicable to various phenomena that materialize on the web, creating a scenario in which the discretion of the judges would represent the decisive factor for resolving the constitutional conflicts that would emerge from time to time.

An emblematic case of the difficulties that can arise due to this ontological diversity in the paradigm of protection when it is considered in the context of Internet, is that offered by the *Yahoo!*

Licra case.[31] This is one of the oldest and most important cases in the field, which originated with the publication of a website that hosted auctions of Nazi relics, hosted by Yahoo! and managed by third parties in the United States. Some anti-discrimination organizations, including LICRA (*Ligue Internationale Contre le Racisme et l'Antisémitisme*), sued to obtain the black out of the site in France, considering that such activities were expressly prohibited by the French Criminal Code. The case brings to light at least two critical aspects: on the one hand, it marks the latent conflict in the conceptions of freedom of expression in the constitutional paradigms of Europe and the United States (not to mention other countries). On the other, it shows that - in the absence of a "common" standard for Internet or of international conventions that establish what level of protection to apply to online speech - the determination is de facto left to the discretion of the courts, that although they certainly have greater "proximity" to the questions raised from time to time, on the other hand they risk concentrating an almost legislative power in their own hands and generating uncertainty on the legal consequences of the conduct that individuals can follow on Internet and in the exercise of freedom of speech.

The case just referenced is one which provides a head-on clash, a probably unresolvable rift between the culture of the United States and that of Europe concerning freedom of expression. On this ground, the divide has been deepened even further as a result of the advent of new information technologies provoked opposite reactions in the interpretation of constitutional guarantees by the courts: a more suspicious attitude by the European courts, that tend to confirm restrictions on free speech necessary to protect other rights; a more favorable and "expansive" view on the part of the Supreme Court of the United States. This divergence of views has been at the center of attention for commentators and activists, whose reflections are generally located in two opposite poles. On the one hand, the recognition of the impossibility of establishing a uniform standard of protection of freedom of expression on Internet, which at times has led to conceiving forms of self-regulation of the web that would suggest the abandonment of the pretension of states to apply their laws on the web. On the other, there is the attempt to develop tools such as Internet Bill of Rights, which despite preserving the unrepeatable peculiarities of each constitution, would raise the debate on the need for *ad hoc* protections for the freedom of expression on Internet to a supranational level, while leading, mostly to soft law instruments, lacking a mandatory character.[32] Nonetheless, these proposals, recently embraced by institutional actors as well, find their efficacy diminished by the impossibility to reconcile the different sensitivities that are exercised on some of these rights in Europe and the United States in particular.[33]

Beyond the debate just referenced here, which involved many participants, this clash cannot but affect the search for uniform and shared solutions to the common goal among different legislatures in this particular period of history, that is, the prevention and repression of fake news and hate speech.

It must be said that this issue undoubtedly lends itself to some preliminary observations, not only of a juridical nature, that go beyond the area of this discussion, but that certainly must be taken into consideration with respect to the *de jure condendo* perspective on which we intend to concentrate. First of all, there is the issue of identification of the truth, and even before that, of the criteria necessary to define it and to separate the truth from what can be cataloged as fake. The Commission went beyond this operation, exerting its efforts in a different direction from merely defining what is false, and elevating a series of "contextual" characteristics as well in order to define the phenomenon of disinformation. Another central issue regards the opportunity to impose restrictions on content designed to circulate on the web and to introduce mechanisms for limiting that content. Is this a political option, that the lawmaker can embrace, or a choice necessitated by the existence of a hierarchy of interests that demand protection?

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[31] J.R. REIDENBERG, *Yahoo and Democracy on Internet*, in *Jurimetrics*, 42, 2001, 261 ss.

[32] See D. REDEKER-L. GILL-U. GASSER, *Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights*, in *International Communication Gazette*, 80, 4, 2008, 302.

[33] See O. POLLICINO, M. BASSINI (a cura di), *Verso un Internet bill of rights?*, Aracne, Roma, 2015.

In other words, can the European framework rely on constitutional antibodies that allow for reacting to a phenomenon that, despite formally presenting itself under the false name of a form of freedom of expression, in essence actually attacks multiple interests? This is a problem adjacent to, and not coincidentally associated with, that of combatting hate speech, that despite representing a form of expression, perpetually raises questions about the actual connection to the paradigm of freedom of expression. It is also no coincidence that from the perspective of those who deal with academic speculation, the outcomes reached by the examination of the constitutional systems of European countries and the United States with respect to the possibility to intervene on fake news are uniform with respect to the orientation that these states have regarding hate speech.

6. *The Role of Internet Service Providers and the Problem of Collateral Censorship*

It is also important not to neglect an inevitable effect of any hypothetical initiative by the legislature in this direction: the removal of information from the web very likely implies an intervention on search engines or social media sharing platforms, thus involving not only the "fabricators" of fake news, but also those who involuntarily contribute to its dissemination in response to inputs from users. The question of liability of digital platforms, and of social networks in particular, for the spreading of fake news (and also for hate speech) should be kept separate and distinct from that regarding the possible involvement of operators themselves as concerns removing content. Nevertheless, it is also true that we increasingly see, on the one hand, attempts by jurisprudence to enhance the "active" nature of these operators (conceived by current laws as mere passive intermediaries), including based on the possible proceeds deriving from the indirect exploitation of content, in order to attribute them liability in relation to content spread by users; on the other hand, the lawmakers themselves, in some cases, appear to be oriented towards identifying forms of "vicarious liability", directly sanctioning operators in the case of failure to remove (or to promptly remove) content.

The direct or indirect involvement of Internet Service Providers raises more than one problem, especially (although not exclusively) in North America: every form of vesting intermediaries with responsibility, especially when concerning forms of filtering content, is viewed with particular suspicion, as it can lead to forms of collateral censorship, meaning private censorship, as Balkin has clearly argued.[34] This is a danger which the European courts would also like to "shield" Internet operators from. Justices Tsotsoria and Sajò themselves pointed out this danger in a brilliant dissenting opinion in *Delfi*. If, in fact, the assumption on which the functioning of content sharing platforms lies is the absence of direct liability for unlawful acts committed by third parties (for example in relation to the publication of defamatory comments), imposing a selection of content and what is essentially an activity of filtering under the threat of punishment (even if in the form of potential compensation for failure to remove) risks feeding a race to the bottom in the activity of moderation that would imply a tendency to remove due to the fear of incurring liability. In this way, each web operator would become a sort of private censor, likely transforming into a person who exercises editorial responsibility, and element that, on the contrary, generally identifies those who operate as providers of content.

From the perspective of constitutional law, this scenario raises a problem to the extent that it places on private entities, oriented towards business aims, the duty of ensuring the balancing between different interests, which is generally entrusted to jurisdictional authorities. In this situation, a problem arises which is analogous to that caused by the *Google Spain* decision, which concentrated in the hands of search engine operators the power to reconcile the need for personal data protection with the right to freedom of information.

On this issue, the uniquely American sensitivity to free speech appears to be an obstacle to a

[34] J.M BALKIN, *Free speech and Hostile Environments*, in *Columbia Law Review*, 99, 8, 1999, 2295.

structure in which the margin of actual freedom in question depends on the role exercised by private operators. European constitutionalism, on the other hand, seems to provide less resistance: not only because the jurisprudence of the Court of Justice appears to have backed the idea that these subjects exercise balancing functions, but also because different experiences see the corroboration, especially in the field of copyright protection, of "notice and takedown" systems, in which providers occupy a crucial position.

A look at the same problem from a different angle may lead to a partially different interpretation: in the United States, the state action doctrine binds only public actors to respect constitutional guarantees, such as freedom of expression. This means that private operators may in any event, voluntarily, exercise forms of moderation that can also exceed the threshold of the dichotomy between lawful and unlawful content; the moderation of content is actually made available by the non-applicability of the First Amendment.

7. *A Marketplace of Ideas 2.0? The Role of the Technological Factor*

The lesson of Prof. Costanzo about technological factor is evident when focusing on the challenges of fake news and hate speech online, especially concerning its impact on constitutionalism. European constitutionalism exercises greater tolerance towards the possibility of a state regulatory intervention that can limit freedom of expression. In this case, the question is the extent of that limitation, and ultimately, following the north star represented by the second paragraph of Art. 10 of the Convention, the proportionality of that limitation. Here the impression is strengthened that, in the absence of a strong constraint for public authorities, including ideological terms, the European ground seems more fertile for the implementation of forms of prevention of fake news and hate speech, also in forms that entail active involvement of Internet Service Providers, although some critical aspects are certainly present.

The European Convention on Human Rights and the constitutions of the European states recognize, for example, freedom of information as a qualified part of freedom of speech; and they present that freedom in three different modes: active (freedom to inform, or to spread information), passive (freedom to receive information), and medium (freedom to search for information). None of this is found in the United States system, and it is entirely evident that the existence of explicit or in any event consolidated constitutional coverage for freedom to be informed argues in favor of mechanisms that allow for "filtering" the *mare magnum* of the web from content incapable of providing a contribution to information because it is entirely false or groundless or because it is not qualified or verified. If European constitutionalism considers freedom of expression as functional to the informational needs of the public, and thus indirectly to the formation of public opinion and the functioning of democracy, the recognition of the right to be informed translates into providing for the right to *correct* information. It is precisely this recognition, at times explicit and at times implicit, that allows for finding European constitutionalism to have the antibodies to combat the spread of bad information, starting with fake news.

Even if we disregard the historical background just recalled, there are probably other solid reasons that support the possibility to introduce mechanisms of controlling content published by users in the context of the fight against fake news and hate speech. Very often, in order to shield the web from these hypothetical forms of control, the metaphor of the marketplace of ideas is cited. This concept was developed by Justice Holmes and has its roots in an era that came well before that of Internet and new digital technologies.[35] Today this metaphor seems to be given credit even when faced with the new technological horizon, as testified by the "expansive" jurisprudence of the Supreme Court, that tends to recognize a scope of application for freedom of expression on Internet

[35] *Abrams v. United States*, 250 U.S. 616 (1919).

that is even vaster than what distinguishes the "world of atoms" as shown in the *Packingham* case.[36] Yet the validity of this metaphor, which has long been present in the language of commentators and courts, should probably be reconsidered. As observed elsewhere,[37] this metaphor must first of all be reconciled with the conception of freedom of expression in European constitutionalism also offers coverage to the freedom of information and the right to receive information. Since constitutions protect information as a legal good aimed to satisfy a specific aim, thus excluding from its perimeter that which does not represent *correct* information, the metaphor of the free marketplace seems destined to be rejected if it is transplanted into this framework. To the contrary, if the references to freedom of information of citizens were not so clearly engraved in the constitutions and present in the interpretation offered by the courts, this mercantilist vision of the free competition of ideas could also take hold in Europe.

Holmes's elaboration oozes with the spirit of *laissez faire*, when in the full capitalist era, it was thought that the "open" logic of the market could be extended to the dialectical confrontation of ideas; in 1997, the Supreme Court borrowed Holmes' interpretation when faced with a radically new medium, that appears to open up a new marketplace of ideas. Yet we must pay attention to a detail: Holmes's metaphor postulated a free marketplace of ideas, and thus a market of ideas that was *free* and characterized, just like in the field of economics, by an ability to self-correct. Only in the absence of factors conditioning the market could the free competition that arises there perform the function of testing the validity of ideas and opinions. That indeed was the case of Internet at the beginning, when it was not conditioned by dominant, oligopolistic, or even monopolistic positions. In this scenario, the metaphor certainly could have made sense. Today, however, it appears entirely out of context: the market of ideas, on Internet, is anything but "free", as is well-known to both European and US institutions, that are increasingly focusing attention on digital markets. So, if the field on which fake news and hate speech compete is no longer a free market, applying that same test, which entrusts the identification of consent and marginalization of less authoritative opinions to the spontaneous and free dialectic of competition, is no longer a good idea.

Having said that the metaphor of the marketplace has become unsatisfactory, perhaps even in the United States, other aspects exist that shed light on the advisability of controlling the circulation of fake news. First of all, we need to link the concept of pluralism with the issue of scarcity of resources. The need to regulate pluralism becomes more pressing in markets characterized by scarcity of resources; it is here that those who occupy a dominant or oligopolistic position can influence or distort the functioning of the market. The experience of the Italian radio and television system documents and photographs this relationship precisely. When the character of scarcity of a resource is lost, the scenario changes; thus, the issue of pluralism, today, does not appear to raise the same criticalities as in the past. In the information system, the advent of Internet allows small and large operators to emerge in a market framework that tends to be fragmented and varied. We could thus imagine that the presence of rules aiming to ensure resistance against fake news would no longer make sense in this new ecosystem, in which the metaphor of the marketplace would apparently seem to fit perfectly. Yet even with the advent of Internet the condition of scarcity persists, that no longer regards frequency resources but rather an even more precious resource: the attention of the user. We can no longer depend on a simple abstraction to believe that with the increase of Internet sites the use of information resources by users has also multiplied automatically. The attention of readers has probably remained the same, such that if European constitutionalism cares about the goal of safeguarding correct information for individuals, lawmakers must not allow themselves to be deceived and believe that the mere superabundance of media is sufficient to fulfill that goal.

This definitely non-negligible element is buttressed by the illuminating reflections of Cass Sunstein, who has theorized the existence of logics of polarization between individuals in access to

[36] *Packingham v. North Carolina*, 582 U.S. ___ (2017).

[37] O. POLLICINO, *Fake News, Internet and Metaphors (to be handled carefully),* in *mediaLAWS - Rivista di diritto dei media*, 1, 2017, 23 ss.

information, that would lead to a sort of confirmation bias[38]. This scenario leads to a true radicalization of the dialectical clash rather than to a hypothetical reconciliation. According to Sunstein, in the presence of constant information flows, the user shows a predisposition that tends to confirmation, maintaining loyalty to his or her original opinion group. Statistically, says Sunstein, the change of position after a public debate with information flows is very rare and unlikely. The presence of an element of bias thus represents an immanent factor that is also fueled through the spread of fake news. Sunstein himself documents a process of tendential "resistance" of individuals who adopt a specific position with respect to the demonstration of the groundlessness of certain news items. That factor actually tends to further radicalize the clash.

While Sunstein does not consider this scenario sufficient to entirely remove the doubts about the functioning of the metaphor of the free marketplace of ideas, it is however true that from the viewpoint of European constitutionalism, it raises considerable doubts and leads to the conviction that, especially referring to the scarcity of attention by users and the constitutional need for correct information, an intervention by the public authorities is needed, in whatever form, with the aim of restricting the circulation of fake news.

Even Milton, in his *Aeropagitica*[39], lashed out against censure of the press, citing the concept of truth and comparing knowledge to water and the truth to a gushing foundation. What must be avoided, in this paradigm, is whatever can block the free flow of ideas that leads to progress towards truth. For Milton, censure could thus affect that process of approaching the truth by impeding or restricting the emergence of new ideas. According to Milton, the truth prevails in a free and open context of ideas. This is why those ideas cannot be subject to limitations ahead of time that can "compete" in the battle against dogmas. But Milton's experience is emblematic: despite this strenuous opposition, he accepted the role of censor based on the law he had so strongly challenged[40]. This passage marks the connection between trust in the search for truth and the possibility to enforce sanctions when after appropriate investigations, it is possible to distinguish truth from falsehood, denying protection for the latter. Freedom of expression is thus enhanced by a conception based on the notion of truth: free and open flow is the key concept of this paradigm, that has not become a true model of freedom of speech.

[38] C.R. SUNSTEIN, *#Republic: Divided Democracy in the Age of Social Media*, Princeton University Press, 2017.

[39] J. MILTON, *Areopagitica: A speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England*, London, 1644.

[40] See S.L. WINTER, *A Clearing in the Forest: Law, Life, and Mind*, The University of Chicago Press, 2001.