

Discrimination and Hate and Sexist Speech in the Italian Law

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Abstract Sexist language is an incitement to the stigmatization of women as women or of sexual orientation so that it contributes to maintaining the discriminatory situation of these categories. It can be included as a part of conduct in different crimes, but sexist language *per se* isn't criminalized in Italy (freedom to manifest one's thought is a right constitutionally guaranteed). Criminal law has a subsidiary function with respect to the ways in which the phenomena of hate and sexist speech must be combatted. Communication on the Web must be carefully regulated, with the involvement of managers in the processing of self-regulation, in particular the managers of the social networks.

Keywords Sexist Language. Hate Speech. Criminalization in Italy. Jurisdiction.

Summary 1 Introduction. – 2 Sexist Language. – 3 Words Are Swords. – 4 Criminal Illegality of Hate Speech. – 5 Cyberspace and Hate / Sexist Speech. – 6 Possibility of Exercising Criminal Jurisdiction in Computer Crimes.

1 Introduction

The premise for the analysis of the criminal response to the phenomenology of hate and sexist language is primarily composed by international legal instruments,¹ adopted at multilateral and European level, to combat sexu-

¹ Among international sources, the following should be mentioned: art. 14 of the European Convention on Human Rights (ECHR); art. 20 International Covenant for Civil or Political Rights; art. 21 Nice Card; art. 19 of the Treaty on the Functioning of the European Union (TFEU); Convention of New York 12/21/65 for the elimination of racial discrimination, Conv. on the elimination of all forms of discrimination against women (CEDAW) of 1979; Rec. no. 20 of 30/10/1997 of the Council of Europe, on the "hate

al discrimination, globally, through the protection of human rights.

Significant criminal cases are art. 604 bis of the Italian Criminal Code which criminalizes propaganda and incitement to commit crime on the grounds of racial, ethnic and religious discrimination,² as well as the crime of association with the purpose of incitement to discrimination and violence on ethnic national racial or religious basis.³

The area of criminalization only includes ethnic, nationality and religious discrimination, not discrimination on the basis of sex or sexual orientation.

The requirements for the crime are: a) incitement to hatred by any means of communication; b) intentionality; c) concreteness of the risk of the occurrence of acts of violence or discrimination.

The components of hate speech are multiple and concern not only the medium, the content, as well as the context, but also the impact on the recipient. It is essential to verify the effects of this language used in the hate speech to limit the degree of offensive.⁴

The punishment of hate speech constitutes a limit to the freedom of manifestation of thought: the respect for human dignity must always prevail in balancing of the constitutional values (principle attributable to articles 2, 3, 19 and 21 of the Italian Constitution)

The existing criminal offenses - such as defamation, insult - repress opinions damaging to the real dignity of a person. Today, there are discussions of 'new' crimes of opinion (on the subject of denial of holocaust, homophobia, xenophobia) calling into question the protection of a collective human dignity, detached from the individual dimension.

speech"; Convention of Budapest on Cybercrime 2001 - protocol on racism and xenophobia 2003; Convention of Istanbul for the prevention and elimination of violence against women 2011; Rec. no. 15 of the European Commission against Racism and Intolerance (ECRI) (Commission in the Council of Europe) of 21/3/2016 relating to the fight against hate speech.

2 Introduced with the Law no. 654/1975, of ratification of the 1966 New York Convention on the elimination of all forms of racial discrimination (first modified with the so-called "Mancino law" and then with Law no. 85/2006) and now, following the legislative decree no. 21 of 2018.

3 And the art. 604 ter of the Italian Criminal Code governs the aggravating circumstance of the purpose of discrimination or hatred of the same content.

4 MEANS: written and oral communication (offline), behaviours; written or audio-visual communications (online).

CONTENT (opinion versus instigation).

RECIPIENT (single/public).

CONTEXT (satire/news/political criticism/interpersonal relationship).

EFFECTS / OFFENSIVENESS (human dignity/privacy/personal and/or digital identity/sexual freedom; in particular with regard to minors).

2 Sexist Language

Sexist language can be defined as follows in its requirements: a) incitement to the stigmatization of sexual orientation and of women as women; b) intentionality; c) offense to dignity or a concrete contribution to maintaining the discriminatory situation of women or the different sexual orientations.

The sexist language *per se* is not criminalized. To be so, it must take into account the so-called crimes of opinion. It is important to note that the freedom to manifest one's own thought is a right constitutionally guaranteed by art. 21 of the Italian Constitution and, according to scholars, freedom of expression includes any assertion and opinion, true or false.

3 Words Are Swords

Can the expression of one's thoughts of hatred against a person always be called 'hate speech'? What offense can be potentially prejudice that statement?

The harm on honour, dignity and reputation also depends on whether such language is expressed in the presence of the victim, in his/her absence, in public, publicly in the media, or on the web.

A verbal or written communication integrates the hate speech when it is able to instigate a behaviour of aggression or to denigrate the dignity of a person or a community or group of people.

The jurisprudence of the Supreme Court of Cassation considers:

1. That there are insurmountable limits set by art. 2 of the Italian Constitution and that there are expressive methods which, objectively, by intrinsic charge of contempt and mockery, are therefore only offensive and therefore to be considered unacceptable in any context (Cass. Section 5, no. 11632 of 2008).
2. That for the purposes of discrimination or ethnic, racial or religious hatred, it is not necessary for the offensive and discriminatory phrase to be perceived by third parties (Cass. Section 5, no. 22570 of 2013).
3. That it is sufficient that the expression highlights "a manifest prejudice of inferiority of a race" (Cass. Sect. 5, no. 13530 of 2017, case in which the offended person had been called a "black whore").

According to Constitutional judgments, the manifestation of thought is no longer such (that is, it cannot logically be traced back to this category) when it resolves into an action, where the relationship between word and material conduct is so direct and immediate that it no longer complies with the guarantee of art. 21 of the Constitution, as in instigation, apology and subversive propaganda.

4 Criminal Illegality of Hate Speech

By reviewing the Italian criminal system we must consider:

1. the administrative offense of injury: offense to the honour and dignity of the person (crime decriminalized with Legislative Decree no. 7 of 15/1/2016).
2. The crime of defamation (art. 595 of the Criminal Code) punishable on lawsuit: anyone who communicates with several people offends the reputation of another (paragraph 2: attribution of a specific fact; paragraph 3: in the press; paragraph 4: to political body, administrative or judicial or its representative). The individual who committed the offense is not punishable in a state of anger determined by an unjust fact of others (art. 599, paragraph 2 of the Criminal Code).
3. The offense of threat (art. 612 of the Criminal Code) offense to the honour and dignity of the person; it can be prosecuted on demand, but that it could be prosecuted *ex officio* if the threat is made in one of the ways referred to in art. 339 of the Italian Criminal Code (“[...] or with anonymous writing, or in a symbolic way, or by means of the intimidating force deriving from secret associations existing or supposed”).
4. The offense (violence or) threat against a public official (art. 336 of the Criminal Code) “[...] to force him [or her] to perform an act contrary to official duties can be punished with the penalty from six months imprisonment to five years”.
5. The offense (violence or) threat against a political body, administrative or judicial office or its individual components (art. 338 of the Criminal Code) “[...] to prevent even temporarily its activity or to disturb it, punished from one to seven years imprisonment”.
6. The offense of harassment (art. 660 of the Criminal Code): “Whoever, in a public place or place open to the public, or by means of telephone, petulance or otherwise objectionable reason, bears harassment or interference, be liable to imprisonment up to six months or with a fine of up to 516 euros”.
7. The crime of stalking (persecutory acts) (art. 612 bis of the Criminal Code, punished in a complaint, unless it has been committed to the detriment of a minor, or a person with a disability or is connected with another offense that can be prosecuted *ex officio*): anyone with conduct that is reiterated, threatening or harassing, so as to cause a serious state of fear or generate a well-founded fear of one’s own safety or that of one’s family member.
8. The crime of mistreatments in the family (art. 572 of the Criminal Code). Anyone who mistreats a person in the family or in any case cohabiting partner or a person subject to his [or her] authority or entrusted to him [or her] for reasons of educa-

tion, instruction, care, supervision or custody or for the exercise of a profession or an art; punished from two to six years of imprisonment.

9. Incitement crimes: crime incitement (art. 414 of the Criminal Code), to disobey laws (art. 415 of the Criminal Code), to paedophilia or child pornography practices (art. 414 bis of the Criminal Code, introduced with the ratification of the Lanzarote Convention, Law no. 172 of 2012), that is to instigate to commit sexual crimes to the detriment of minors.
10. Incitement conduct as a moral contribution to the crime. Instigation of the public official to commit torture (art.613 ter of the Criminal Code, introduced by Law no. 110 of 2017) of the Criminal Code.
11. Incitement to suicide (art. 580 of the Criminal Code).

5 Cyberspace and Hate / Sexist Speech

Technological development has changed the way in which we communicate. New technologies have surpassed professional information producers (mass media). The Web and social networks in particular have created the space of shared information, in real time, with rapid diffusion beyond national borders.

The features of **online hate speech** are clear:

1. Permanence.
2. Unpredictable re-enactment on platforms other than the one used.
3. Anonymity of the authors.
4. Transnationality.
5. Possible circumvention or difficulty of guaranteeing jurisdictional protection for victims.

In truth, sexist language could be included in the notion of sexual harassment as defined by the Istanbul Convention but not incorporated in the Italian criminal system.

See art. 4 of the Istanbul Convention:

The Parties shall take the legislative or other measures necessary to ensure that any form of unwanted, verbal, non-verbal or physical behaviour, of a sexual nature, with the aim or effect of violating a person's dignity, in particular when such behaviour creates an intimidating, hostile, degrading, humiliating or offensive climate, is subject to criminal or other legal sanctions.

Also in the special legislation for the protection of personal data (Legislative Decree no. 196 of 2003 for the protection of privacy, updated-

ed with the Legislative Decree no. 101 of 2018) on the measures to prevent and combat cyberbullying (Law no. 71 of 2017, which concerns subjects of a minor age) there are no incriminating cases of sexist language. Moreover, this law defined hate speech on the web as:

any form of pressure, aggression, harassment, blackmail, insult, denigration, defamation, identity theft, alteration, illegal acquisition, manipulation, illegal treatment of personal data in harm of minors, carried out electronically, as well as the dissemination of online content also concerning one or more members of the minor's family whose intentional and predominant purpose is to isolate a minor or a group of minors by implementing serious abuse, malicious attack, or ridicule. (Law no. 71 of 2017, art. 1, c. 2)

6 Possibility of Exercising Criminal Jurisdiction in Computer Crimes

In truth, the Italian criminal system allows criminal jurisdiction to be exercised in computer crimes, once a crime has been introduced. In fact, jurisprudence has affirmed the principle that the crime is perfected, that is, committed, where the offense is perceived. This makes it possible to exercise jurisdiction also in relation to websites registered abroad or conduct established from abroad (see, for all, Cass. Section 5, 27/12/2000). It is also possible to implement the seizure of websites: forums, blogs, newsletters, newsgroups, mailing lists and social networks, although they are an expression of the right to express one's thoughts, they cannot enjoy the constitutional guarantees relating to the limitation on the seizure of the Press (Cass. Pen. no. 31022 of 2015).

Certainly, there are difficulties in identifying the user of the address connected to the IP who carried out the aggressive communication or shared an offensive content. It could be provided to criminalize the conduct of the web-manager for the persistence of disparaging posts, considering the obligation to remove posts or communications that have illicit content (pursuant to article 40 of the Italian Criminal Code).

From this brief summary it is clear that criminal law has a subsidiary function with respect to the ways in which the phenomena of hate and sexist speech must be against.

In conclusion, communication on the Web must be carefully regulated, with the involvement of managers in the processing of self-regulation, in particular the managers of the social networks.

Every scholar of social phenomena and criminology has the task of analysing and monitoring the phenomenon of hate speech and sexist language on the web, in order to promptly report the obsolescence of regulatory tools.