

# Fake News and the Challenges of Criminal Law

Giulia Lanza\*

## Abstract

*The spread of fake news online is a global and complex phenomenon. It can be considered a “virus” that must be actively fought at several levels (i.e., supranational level and domestic level) and by different actors (i.e., private and public). This phenomenon is challenging for both social media companies and states, and they are called on to work in a synergy to address it. Many mechanisms and legislative measures have been proposed and adopted in order to counter the diffusion of fake news online. Some countries have also relied on criminal law. However, due to the complexity of the phenomenon, the specificity of each domestic legal order and the variety of fake news, it is not an easy task and it is difficult to adopt a unique solution that applies in all circumstances. The situation in Italy reflects such a difficulty. Therefore, particular attention will be paid to the different approaches proposed in Italy in order to address the spread of fake news online. Can we be sure that criminal law is the only (or the best) solution to deal with such a growing phenomenon? I conclude that criminal law may be invoked only in exceptional circumstances and when non-criminal measures prove inadequate to protect legal goods (Rechtsgüter) of paramount importance. Nevertheless, criminal law and the fight against the diffusion of fake news cannot be used – as has been done in certain countries – neither as an excuse nor as a tool to violate the right to freedom of expression, and to limit pluralism and participatory democracy.*

**Keywords:** Fake news, global phenomenon, social media, criminal law, human rights, freedom of expression.

## I. Fake news as a global phenomenon

The problem of fake news is not a contemporary one. History has always witnessed the diffusion of “false stories”<sup>1</sup>. The only new factor is the means of communication (the Internet) used in the “digital era” to spread false or misleading

---

\* Postdoctoral researcher at the Department of Law, University of Verona. This is an elaborated version of the paper presented on 6 November 2020 at the *International Biennial Conference, 13<sup>th</sup> Edition*, organized by the Faculty of Law of the West University of Timisoara. The fake news phenomenon is very complex and presents several problematic issues that cannot be addressed here. The paper offers an updated overview of the measures adopted at supranational level to fight against this growing phenomenon, further increased during the Covid-19 pandemic. Moreover, it focuses on the different approaches developed at domestic level to address it and on the possibility of relying on criminal law to counter the diffusion of fake news.

<sup>1</sup> F. Safieddine, *History of Fake News*, in F. Safieddine, Y. Ibrahim (eds.), *Fake News in an Era of Social Media: Tracking Viral Contagion*, Rowman & Littlefield International, London, New York, 2020, p. 18 ff.; F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, p. 104; L. Canfora, *La storia falsa*, Rizzoli, Milano, 2008. See also: S. Casillo, F. Di Trocchio, S. Sica, *Falsi giornalistici. Finti scoop e bufale quotidiane*, Alfredo Guida Editore, Napoli, 1997.

information, accompanied by the speed and the low cost of its diffusion in cyberspace<sup>2</sup>. The global emergence of the Internet, the uncontrolled access to information available on it and the increasing usage of social media<sup>3</sup> in several countries – including less economically developed countries (LEDCs) – determined a massive wave of false and misleading information in several contexts. Consider, for example: the US presidential elections of 2016; the Brexit referendum that had taken place in the same year; the new pandemic disease (Covid-19) that plagued (and is still plaguing) the entire world and has been accompanied by an unprecedented ‘infodemic’<sup>4</sup>; the humanitarian crisis that afflicted Myanmar<sup>5</sup>. In all these scenarios, very different from each other, the spread of fake news had (and continues to have) a very negative impact.

Mass online disinformation campaigns are very frequent and sometimes may have a transnational character. They can be considered a “new weapon” of the “digital era”<sup>6</sup>. They take advantage of social media and are used in order to cause harm or social unrest, as well as to manipulate public opinion, jeopardizing the democratic principle<sup>7</sup>. They are among the most dangerous and subtle forms of aggression against

---

<sup>2</sup> P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milan, 2019, pp. 1257-1258; M. Bassini, G.E. Vigevari, *Primi appunti su fake news e dintorni*, in *Rivista di diritto dei media*, 1/2017, p. 15. On the specificity of cyberspace, *ex multis*: L. Picotti, *Diritto penale e tecnologie informatiche: una visione d'insieme*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, pp. 57-58.

<sup>3</sup> M. Monti, *Fake news e social network: la verità ai tempi di Facebook*, in *Rivista di diritto dei media*, 1/2017, p. 80 ff.; C.E. Paliero, *La maschera e il volto. (Percezione sociale del crimine ed 'effetti penali' dei media)*, in *Rivista italiana di diritto e procedura penale*, 2/2006, p. 470.

<sup>4</sup> This term was used by the World Health Organization (WHO) to target the proliferation of an excessive amount of information about Covid-19. It further specified that infodemics “can spread misinformation, disinformation and rumors during a health emergency [...] can hamper an effective public health response and create confusion and distrust among people”, <https://www.un.org/en/un-coronavirus-communications-team/un-tackling-infodemic-misinformation-and-cybercrime-covid-19>, accessed on 29 November 2020. The WHO considered such a phenomenon as one of the greatest threats to public health. On the impact of Facebook on the diffusion of fake news related to the pandemic: T. Guerini, *La tutela penale della libertà di manifestazione del pensiero nell'epoca delle fake news e delle infodemie*, in *discrimen.it*, 14 June 2020, pp. 14-15. Fake news also has a strong impact on the vaccination campaign, increasing hesitancy to vaccinate. On the impact of fake news on public health more recently, see: K. Mamak, *Do we need the criminalization of medical fake news?*, in *Medicine, Health Care and Philosophy*, 2021, p. 1 ff.

<sup>5</sup> As highlighted in the *Report of the detailed Findings on the Independent International Fact-Finding mission on Myanmar*, “Facebook has also widely been used to spread misinformation, including by government officials and the Tatmadaw”, A/HRC/39/CRP.2, 17 September 2018, para. 1346.

<sup>6</sup> M. Monti, *Italian Populism and Fake News on the Internet: A New Political Weapon in the Public Discourse*, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), *Italian Populism and Constitutional Law. Challenges to Democracy in the 21st Century*, Palgrave, Macmillan, London, 2020, p. 177 ff. (the author refers in particular to the use of fake news in politics); E. Perucchiotti, *Fake news. Dalla manipolazione dell'opinione pubblica alla post-verità. Come il potere controlla i media e fabbrica l'informazione per ottenere consenso*, Arianna Editrice, Bologna, 2018. See also: T. Nagasako, *Global disinformation campaigns and legal challenges*, in *International Cybersecurity Law Review*, 1/2020, p. 127 (the author refers to disinformation as a “new form of warfare created by the information society”).

<sup>7</sup> E. Van Wie Davis, *Shadow Warfare: Cyberwar Policy in the United States, Russia, and China*, Rowman & Littlefield, London, 2021, pp. 19-20; T. Nagasako, *Global disinformation campaigns and legal challenges*, in *International Cybersecurity Law Review*, 1/2020, pp. 126-127 (the author stated that disinformation “is a severe challenge to democracy, since it is executed by combining the leakage of information stolen by cyberattacks with information warfare in media and SNS to transform public opinion in individual countries and to influence democratic processes, such as the outcome of elections and demonstrations”).

individual and collective legal goods of primary rank, such as reputation, honour, public order, safety and health<sup>8</sup>.

The online word is a fertile ground for the propagation of all types of information<sup>9</sup> and debunking fake news is challenging. Most of the individual's life is spent online. This aspect has been further intensified by the Covid-19 pandemic. Social media platforms, such as Facebook, Instagram and Twitter, are the most common instruments used to spread both "false" and "truthful" information. Social media algorithms<sup>10</sup>, as well as mechanisms of sharing, reposting and retweeting, can contribute to the proliferation of fake news. In the "digital era", users are no longer mere consumers of online services, but they play an active role, sharing and producing content<sup>11</sup>. The use of bots and fakes profiles<sup>12</sup> further accelerates the diffusion of such news<sup>13</sup>. A role is also played by "filter bubbles"<sup>14</sup> and "echo chambers"<sup>15</sup> that may

<sup>8</sup> S. De Flammineis, *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, p. 131 ff.; T. Guerini, *La tutela penale della libertà di manifestazione del pensiero nell'epoca delle fake news e delle infodemie*, in *discrimen.it*, 15 June 2020, p. 4.

<sup>9</sup> F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, pp. 104-105; S. De Flammineis, *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, pp. 141-142; G. Pitruzzella, *La libertà di informazione nell'era di Internet*, in *Rivista di diritto dei media*, 1/2018, p. 30 ff.

<sup>10</sup> On the relationship between algorithms and fake news: G. Marchetti, *Le fake news e il ruolo degli algoritmi*, in *Rivista di diritto dei media*, 1/2020, pp. 29-36. The author examines the role of algorithms both as an instrument to create and spread fake news, and as an instrument to counter their diffusion. For example, Project Fandango, funded by the European Union's H2020 EU research and innovation program, is aimed at using artificial intelligence and, in particular, algorithms to counter fake news, for more details see: <https://fandango-project.eu/the-project/what-is-fandango/>, accessed on 15 January 2020.

<sup>11</sup> L. Picotti, *Diritto penale e tecnologie informatiche: una visione d'insieme*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, p. 43; F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, p. 104; P. Caretti, A. Cardone, *Diritto dell'informazione e della comunicazione nell'era della convergenza*, Il Mulino, Bologna, 2019, p. 254 ff. This aspect has been emphasized also by the Council of Europe in Resolution 2143 (2017), *Online media and Journalism: Challenges and Accountability*, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23455&lang=en>, accessed on 20 November 2020.

<sup>12</sup> On the impact of fake profiles and bots in the diffusion of fake news: A. Mazziotti di Celso, *Dal primo emendamento al bavaglio malese. Fake news, libertà di espressione e il rovesciamento delle categorie politiche tradizionali*, in *Rivista di Diritto dei Media*, 3/2018, p. 93 ff.

<sup>13</sup> F. Donati, *Fake News e libertà d'informazione*, in *Rivista di Diritto dei Media*, 2/2018, p. 440.

<sup>14</sup> The term "filter bubble" is used to describe a phenomenon that limits the exposure of the individual to a full range of information on the Internet by algorithmically prioritizing content that matches the user's profile, his or her online history, excluding content that does not. This term was coined in the following book: E. Pariser, *The Filter Bubble: What the Internet is Hiding from You*, Penguin Group, London, 2011. For further details: Sumpter D., *Outnumbered: From Facebook and Google to Fake News and Filter-bubbles. The Algorithms that Control our Lives*, Bloomsbury, Londra, 2018; F.J. Zuiderveen Borgesius, D. Trilling, J. Möller, B. Bodó, C.H. De Vreese, N. Helberg, *Should we worry about filter bubbles?*, in *Internet Policy Review*, 2016, p. 1 ff.

<sup>15</sup> The term online or social media "echo chamber" is used to describe an "environment" in which the same opinions are repeatedly promoted and voiced. As a result, users are not exposed to opposing views. G. Marchetti, *Le fake news e il ruolo degli algoritmi*, in *Rivista di diritto dei media*, 1/2020, p. 31; G. Ziccardi, *Tecnologie per il potere. Come usare i social network in politica*, Raffaello Cortina Editore, Milano, 2019, p. 78; G. Pitruzzella, *La libertà di informazione nell'era di Internet*, in *Rivista di diritto dei media*, 1/2018, p. 31 ff.; W. Quattrociocchi, A. Scala, C.R. Sustain, *Echo Chambers on Facebook*, in *ssrn.com*, 13 June 2016; W. Quattrociocchi, A. Vicini, *Misinformation: guida alla società dell'informazione e della credulità*, Franco Angeli, Milano, 2016, pp. 66-67.

contribute to the propagation of fake news. These phenomena have an increased impact on vulnerable users or on users with a low level of media literacy, and in regions where social media constitutes the sole (or principal) source of information. This is clear, for example, in the case of Myanmar.

## II. Defining fake news

Defining fake news is not an easy task<sup>16</sup>. The term “fake news” became particularly common during the Presidency of Donald Trump<sup>17</sup>. The former President of the United States is the first politician to have deployed it very often, also using it as a slur to counter his opponents<sup>18</sup>. In 2017, it became the term of the year<sup>19</sup>.

However, the term “fake news” is generally used to refer to a growing and widespread phenomenon, characterized by the circulation of news with a misleading or outright false content<sup>20</sup>. Therefore, it reflects a vast category, which includes different types of information.

In the context of this work, the term “fake news” is used in a broad sense and includes misinformation, disinformation and mal-information<sup>21</sup>. Nevertheless, it must

<sup>16</sup> Emphasizing the difficulty for institutions to define the concept of “fake news”: F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, p. 105.

<sup>17</sup> In the press there are those who refer to the “Trump’s era of ‘fake news’”: B. Stelter, *Analysis: Election Day is also a Referendum on Trump’s era of ‘fake news’*, 30 October 2020, <https://edition.cnn.com/2020/10/30/media/fake-news-age/>, accessed 29 November 2020.

<sup>18</sup> For example, the Parliamentary Assembly of the Council of Europe in Resolution 2255 (2019) recommended to member states to “avoid the term “fake news”, which has been excessively politicized and frequently used to negatively label independent critical journalists or media outlets”, but to use instead “the concept of “information disorder” to describe the content, the purpose and the extent of dissemination of misleading information”, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25406&lang=en>, accessed on 20 November 2020. Similarly, the High-Level Expert Group (HLEG) set up by the European Commission to advise on policy initiatives to counter fake news and disinformation spread online issued a report where it stated that the term “fake news” “has been appropriated and used misleadingly by powerful actors to dismiss coverage that is simply found disagreeable”: *A multi-dimensional approach to disinformation. Report of the Independent High Level Group on fake news and online disinformation*, Publication office of the European Union, Luxembourg, 2018, p. 5, <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>, accessed on 20 November 2020.

<sup>19</sup> S. Meza, “Fake News” Named Word of the Year, in *newsweek.com*, 11 February 2017 <https://www.newsweek.com/fake-news-word-year-collins-dictionary-699740>, accessed on 20 November 2020.

<sup>20</sup> F. De Simone, ‘Fake news’, ‘post truth’, ‘hate speech’: nuovi fenomeni sociali alla prova del diritto penale, in *Archivio penale*, 1/2018, p. 3.

<sup>21</sup> For example, for a different meaning assigned to these terms, see the Report of the Council of Europe DGI(2017)09: C. Wardle, H. Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy making*, Council of Europe, Strasbourg, 2017. The authors differentiate between: “mis-information: when the news spread is false but no harm is meant”; “dis-information, when news is false and shared to cause harm”; and, “mal-information, when genuine information is spread to cause harm” (p. 5), <https://edoc.coe.int/en/media/7495-information-disorder-toward-an-interdisciplinary-framework-for-research-and-policy-making.html>, accessed on 20 November 2020. See also the HLEG’s Report, where disinformation is defined “as false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. The risk of harm includes threats to democratic political processes and values, which can specifically target a variety of sectors, such as health, science, education, finance and more” and misinformation “as misleading or inaccurate information shared by people who do not recognize it as

be noted that there is not a uniform definition of these terms and they may be used and interpreted in different ways, in relation to the context in which they are considered<sup>22</sup>. Not all types of false or misleading information require the same treatment and the tools with which they need to be addressed may vary. This holds true in particular with regards to the feasibility of relying on criminal law. Therefore, in order to limit the scope of a possible intervention of criminal law to counter the phenomenon under examination, it is important to make a preliminary specification. Particular attention will be paid to fake news that may threaten or harm legal goods of paramount importance, such as public order, safety and health. Indeed, false information per se, as well as its diffusion, does not necessarily fall within the sphere of criminal law, except for where it harms or threatens a legal good, such as those previously mentioned<sup>23</sup>.

Before focusing on the possibility of relying on criminal law to address this specific type of fake news, it is important to examine the measures proposed and/or adopted at both supranational level and domestic level to combat the phenomenon under examination.

### III. The response of the United Nations

The continuous growth of the fake news phenomenon and its global dimension constitute one of the major problems of the modern, connected world and requires a global answer. This became particularly manifest in the face of the Covid-19 pandemic. The World Health Organization (WHO) defined the proliferation and the overabundance of information – including false information – as an “infodemic” and one of the greatest threats to public health. Consequently, it predisposed a reporting mechanism aimed at countering the spread of false and potentially harmful

---

such”, *A multi-dimensional approach to disinformation. Report of the Independent High-Level Group on fake news and online disinformation*, Publication office of the European Union, Luxemburg, 2018, p. 10. On the different types of “fake news” in academic literature, *ex multis*: T. Nagasako, *Global disinformation campaigns and legal challenges*, in *International Cybersecurity Law Review*, 1/2020, p. 125 ff.; F. Safieddine, *History of Fake News*, in F. Safieddine, Y. Ibrahim (eds.), *Fake News in an Era of Social Media: Tracking Viral Contagion*, Rowman & Littlefield International, London, New York, 2020, p. 1 ff. In Italian academic literature: T. Guerini, *La tutela penale della libertà di manifestazione del pensiero nell'epoca delle fake news e delle infodemie*, in *discrimen.it*, 15 June 2020, p. 11 ff.; M. Bassini, G.E. Vigevani, *Primi appunti su fake news e dintorni*, in *Rivista di diritto dei media*, 1/2017, pp. 11 ff. More specifically related to the different interpretation of false information in the Italian criminal legislation and case law: C. Perini, *Fake news e post-verità tra diritto penale e politica criminale*, in *archiviodpc.dirittopenaleuomo.org*, 20 December 2017, pp. 2-3.

<sup>22</sup> In this vein: F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, p. 105.

<sup>23</sup> In Italian academic literature: P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, p. 1256; A. Costantini, *Istanze di criminalizzazione delle fake news al confine tra tutela penale della verità e repressione del dissenso: verso un nuovo simbolismo penale?*, in *Rivista trimestrale di diritto penale contemporaneo*, 2/2019, p. 68; C. Perini, *Fake news e post-verità tra diritto penale e politica criminale*, in *archiviodpc.dirittopenaleuomo.org*, 20 December 2017, p. 3. See also: A. Pace, in A. Pace, M. Manetti (eds.), *La libertà di manifestazione del proprio pensiero (commento all'Art. 21 Cost.)*, in *Commentario della Costituzione*, Bologna – Roma, 2006, p. 89; P. Barile, *Diritti dell'uomo e libertà fondamentali*, Il mulino, Bologna, 1984, p. 229; C. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano*, Milano, 1958, p. 36.

information online<sup>24</sup>. Moreover, a team of the WHO “mythbusters” started to collaborate with social media platforms to limit the spread of fake news related to the virus<sup>25</sup>. Regardless of the mechanisms adopted, it is important to respect individual fundamental rights: in particular, the right to freedom of expression. Indeed, as stressed by the Special Rapporteur on Freedom of Opinion and Expression, Robert Kaye, in 2017, “fake news has emerged as a global topic of concern and there is a risk that efforts to counter it could lead to censorship, the suppression of critical thinking and other approaches contrary to human rights law”<sup>26</sup>.

The Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda signed on 3 March 2017 by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, contains the principles that should be aimed at balancing the different interests involved<sup>27</sup>. More precisely, the Declaration encouraged the promotion of pluralism in the media, identified the applicable human rights standards and highlighted the specific roles of the intermediaries, journalists and all stakeholders.

#### IV. The response of the European Union

One of the major challenges for the European Union is that of combatting fake news and online disinformation<sup>28</sup>. The European Commission has taken several actions in order to address the relevant actors, methods, tools and targets to give a prompt response and put an end to this growing phenomenon.

The first attempt of the European Commission to counter this phenomenon dates back to March 2015, with the establishment of the Task Force East StratCom in the European External Action Service (EEAS), following the disinformation campaign in Russia<sup>29</sup>.

<sup>24</sup> For more details on the mechanism developed by the WHO “How to report misinformation online”: [https://www.who.int/campaigns/connecting-the-world-to-combat-coronavirus/how-to-report-misinformation-online?gclid=EAlaIqobChMI6ZKfy7\\_x7gIVvSB7Ch2i6gD4EAAAYASAAEgJ46vD\\_BwE](https://www.who.int/campaigns/connecting-the-world-to-combat-coronavirus/how-to-report-misinformation-online?gclid=EAlaIqobChMI6ZKfy7_x7gIVvSB7Ch2i6gD4EAAAYASAAEgJ46vD_BwE), accessed on 3 December 2020. See also: J. Zarocostas, *How to Fight an Infodemic*, in *The Lancet*, Vol. 395, February 2020, p. 676.

<sup>25</sup> For more details: <https://www.un.org/en/un-coronavirus-communications-team/un-tackling-infodemic-misinformation-and-cybercrime-covid-19>, accessed on 20 November 2020.

<sup>26</sup> See: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>, accessed on 20 November 2020.

<sup>27</sup> The text of the Declaration is available at the following link: <https://www.osce.org/fom/302796>, accessed on 3 December 2020.

<sup>28</sup> For an overview of EU joint and coordinated action against disinformation: <https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation>, accessed on 3 December 2020. For a detailed analysis of the EU joint and coordinated action against disinformation: F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, p. 106 ff. This was an important issue not only for the European Union, but also for the Council of Europe, see in particular: Resolution 2143 (2017), Online media and journalism: challenges and accountability, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23455&lang=en>, accessed on 3 December 2020.

<sup>29</sup> For further details on the Task Force East StratCom: [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/2116/](https://eeas.europa.eu/headquarters/headquarters-homepage_en/2116/), accessed on 3 December 2020.

In 2018, the European Commission established a High-Level Expert Group (HLEG) on fake news and online disinformation with the aim of proposing initiatives to counter fake news and disinformation spread online<sup>30</sup>. The responses proposed by the HLEG were expressed in five pillars: 1) enhancing transparency of online news; 2) promoting media and information literacy; 3) developing tools for empowering users and journalists; 4) safeguarding the diversity and the sustainability of the European news media ecosystems; 5) promoting continued research on the impact of disinformation in Europe<sup>31</sup>.

In the Communication “Tackling Online Disinformation: a European Approach” of 26 April 2018, the Commission emphasized the importance of the private sector, and therefore of social media platforms, in tackling the problem of online disinformation<sup>32</sup>.

In an attempt to regulate the expansion of the phenomenon under examination and in view of the 2019 European elections, the European Commission published the “Code of Practice on Disinformation”<sup>33</sup>. It constitutes an important step in the fight against the spread of online fake news within the EU. It is the first time that players within the industry (i.e., Facebook, Twitter, Google, Mozilla, advertisers) agreed, on a voluntary basis, to adopt self-regulatory standards to fight against fake news online<sup>34</sup>. The aim of the Code is to achieve the objectives delineated in the Commission’s Communication “Tackling Online Disinformation: a European Approach”. In particular, it contributes to ensuring greater transparency on platforms’ policies against fake profiles and disinformation. However, all measures adopted must respect and guarantee freedom of expression. Throughout the entire text, particular attention is paid to this fundamental right<sup>35</sup>. Specifically, the Code reads that “the Signatories are mindful of the fundamental right to freedom of expression and to an open Internet, and the delicate balance which any efforts to limit the spread and impact of otherwise

---

<sup>30</sup> The work of the HLEG results in the following report: *A multi-dimensional approach to disinformation. Report of the Independent High-Level Group on fake news and online disinformation*, Publication office of the European Union, Luxembourg, 2018, p. 5.

<sup>31</sup> *Ibid.*, p. 35.

<sup>32</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling Online Disinformation: a European Approach, 26 April 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>, accessed on 3 December 2020.

<sup>33</sup> The text of the Code is available at the following link: <https://ec.europa.eu/digital-single-market/en/code-practice-disinformation>, accessed on 3 December 2020. In 2019, Facebook, Google, Mozilla, Twitter and trade associations representing the advertising sectors submitted their first reports on the measures taken to comply with the Code: *First results of the EU Code of Practice against disinformation*: [https://ec.europa.eu/digital-single-market/en/news/first-results-eu-code-practice-against-disinformation?fbclid=IwAR3WQmydZDdMH6uiUGQPDyERTC\\_4oTik7dI3H31rD07WsYq9-jKyBwYff4I](https://ec.europa.eu/digital-single-market/en/news/first-results-eu-code-practice-against-disinformation?fbclid=IwAR3WQmydZDdMH6uiUGQPDyERTC_4oTik7dI3H31rD07WsYq9-jKyBwYff4I), accessed on 3 December 2020.

<sup>34</sup> Self-regulation is defined as follows: “Self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organizations or associations to adopt common guidelines amongst themselves and for themselves. They are responsible for development, monitoring, compliance with and enforcement of those guidelines”, in *The Sounding Board’s Unanimous Final Opinion on the so-called Code of Practice*, 24 September 2018, <https://www.beuc.eu/documents/files/30OpinionoftheSoundingboard.pdf>, accessed on 3 December 2020.

<sup>35</sup> The right to freedom of expression is enshrined both in the Constitutions of democratic legal systems (e.g., art. 21 of the Italian Constitution) and in other supranational legal instruments, such as the Charter of Fundamental Rights of the European Union (art. 11), the European Convention on Human Rights (art. 10), the International Covenant on Civil and Political Rights (art. 19) and the Universal Declaration of Human Rights (art. 19).

lawful content must strike”<sup>36</sup>. The signatories of the Code also have to produce on a regular basis reports regarding the program for the monitoring and reporting of Covid-19, as well as, more recently, reports on the measures adopted to combat the spread of disinformation regarding Covid-19 vaccines.

In the context of the efforts made by the EU to combat online disinformation, we also find “The Action Plan Against Disinformation”, published in December 2019<sup>37</sup>. The Action Plan is also aimed at monitoring the actions of the *big players* of the information market, such as Google, Facebook and Twitter<sup>38</sup> and to urge platforms to implement the self-regulatory Code of Practice and Disinformation. As set out in the Action Plan, the response to disinformation is based on four pillars: i) improving the capacities of European Union institutions to detect, analyze and expose disinformation; ii) strengthening coordinated and joint responses to disinformation; iii) mobilizing the private sector to tackle disinformation; iv) raising awareness and improving societal resilience<sup>39</sup>. It emphasizes the requirement for a coordinated response in the fight against fake news, as well as for increased international cooperation and the involvement of society as a whole to cooperate in such a fight (i.e., online platforms, fact checkers, public authorities, researchers and social society). The approach adopted in the Action Plan was also followed to counter the disinformation wave during the Covid-19 pandemic<sup>40</sup>. Indeed, it had harmful consequences for public health and effective crisis communications. The same still holds true with regards to the vaccination campaigns.

---

<sup>36</sup> This aspect was previously stressed in the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda signed on 3 March 2017 by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

<sup>37</sup> Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Action Plan Against Disinformation, 5 December 2018, [https://ec.europa.eu/info/publications/action-plan-disinformation-commission-contribution-european-council-13-14-december-2018\\_en](https://ec.europa.eu/info/publications/action-plan-disinformation-commission-contribution-european-council-13-14-december-2018_en), accessed on 3 December 2020.

<sup>38</sup> The European Regulators Group for Audiovisual Media Service (ERGA) plays a fundamental role in the monitoring activities related to the implementation of the commitments by the signatories of the Code of Practice Signatories. At the same time, it has to guarantee the media pluralism. For a detailed analysis of the role played by the ERGA: F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, p. 118 ff.

<sup>39</sup> In the context of the Action plan against disinformation the European Digital Media Observatory (EDMO) was established. It was aimed at creating a European center for fact-checkers, academics and other relevant stakeholders with the purpose to: 1) map fact-checking organisations; 2) support and coordinate research activities; 3) build a public portal; 4) ensure secure and privacy-protected access to platforms’ data; 5) support public authorities. It started its activities on 1 June 2020. For more information on its activities: <https://edmo.eu>, accessed on 3 December 2020.

<sup>40</sup> Joint Communication of the European Commission and the High Representative the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling COVID-19 disinformation – getting the facts right (JOIN(2020) 8 final), 10 June 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0008>, accessed on 3 December 2020. This Communication focuses on the immediate response to disinformation around the coronavirus pandemic, responding to the Joint Statement of the Members of the European Council to resolutely counter disinformation of 26 March 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/03/26/joint-statement-of-the-members-of-the-european-council-26-march-2020/>, accessed on 3 December 2020.



The Commission particularly recalled the importance of combatting disinformation in the context of elections and in the democratic process in the European Democracy Action Plan (2 December 2020), which is built on three pillars: i) free and fair elections; ii) media freedom and pluralism; iii) fighting against disinformation<sup>41</sup>.

Finally, the appeal for online intermediaries and platforms to take more responsibility for the content they host, as set out in the Digital Service Act<sup>42</sup>, may also impact positively on the fight against the spread of fake news online.

## V. The response of domestic legal systems

Measures aimed at countering the phenomenon under examination are widely debated throughout the world<sup>43</sup>. At domestic level, three different approaches can be identified.

The first approach is that of relying on existing law which regulates the use of traditional media, anti-defamation and elections in order to address the phenomenon. The problem of this approach is that relying on existing law, as it may be based on rules adopted in the pre-Internet era (e.g., Italy), may not be adequate. The second approach is that of adopting specific legislation which imposes sanctions on individuals and social media platforms who spread fake news. The countries that have adopted this approach relying on criminal law<sup>44</sup> include China<sup>45</sup>, Malaysia<sup>46</sup>,

<sup>41</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. On the European Democracy Action Plan, 3 December 2020: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>, accessed on 20 December 2021.

<sup>42</sup> The Digital Service Act and the Digital Markets Act are two legislative measures proposed by the European Commission and part of the European Digital Strategy, aimed also at creating a safer digital place where users' fundamental rights of digital services are protected. For more details: <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>, accessed on 20 December 2020.

<sup>43</sup> For an overview: Report of the Library Congress Law, *Initiatives to counter fake news in selected countries*, April 2019, <https://www.loc.gov/law/help/fake-news/index.php>, accessed on 20 December 2020.

<sup>44</sup> For an overview: R.K. Helm, H. Nasu, *Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation*, in *Human Rights Law Review*, 2021, p. 21.

<sup>45</sup> In China the media environment is rigidly controlled. In 2015, art. 291 of the Penal Code of the People's Republic of China (PRC) was amended by the introduction of a criminal offense that punishes anyone who fabricates false information on dangerous situations, epidemics, disasters or alert situations, or intentionally disseminates such information by means of information networks or any other media, knowing that it is fabricated, and thereby seriously disturbing public order, with a penalty of up to three years of imprisonment. If the consequences are serious, the penalty varies from three to up to seven years imprisonment. The PRC Cybersecurity Law approved on 7 November 2016, which entered into force on 1 June 2017, further provides for the prohibition of fabricating or disseminating false information that may disrupt the economic or social order, also by means of social media. It also imposes several obligations on network operators (e.g., they have to monitor the content and, if it is found to be false, they have to record and report the information to the authority). For more details on the Chinese legislation, see: [https://www.loc.gov/law/help/social-media-disinformation/china.php#\\_ftnref13](https://www.loc.gov/law/help/social-media-disinformation/china.php#_ftnref13), accessed on 20 December 2020. In August 2018, the Illegal and Unhealthy Information Reporting Centre, affiliated to the Cyberspace Administration of China, set up a platform that refutes rumors at national level. This platform relies on artificial intelligence to identify misinformation (<http://www.piyao.org.cn/>). For more details on the measures adopted by the Chinese government to reduce and minimize fake news during the Covid-19 pandemic: U.M.

Singapore<sup>47</sup> and Burkina Faso<sup>48</sup>. These countries have been criticized for having used such an instrument in order to control information and suppress freedom of expression<sup>49</sup>. During the Covid-19 pandemic, several States have also adopted criminal measures to counter the diffusion of fake news (e.g., Russia<sup>50</sup>).

The third approach is that of addressing the issue in a more general way by educating citizens about the danger of fake news and thus emphasizing the importance of media literacy (e.g., Finland<sup>51</sup>).

In Europe, the first European States that have adopted legislation against fake news are Germany and France. Therefore, the following sections will focus on these countries. Particular attention will be paid to the situation in Italy as it represents an important example on the difficulty of finding the ideal solution to countering the fake news phenomenon.

### V.1. Germany

The Network Enforcement Act (in German *Netzwerkdurchsetzungsgesetz*, NetzDG)<sup>52</sup>, also known as the Facebook Act, entered into force on 1 October 2017. The

Rodrigues, J. Xu, *Regulation of COVID-19 Fake News Infodemic in China and India*, in *Media International Australia*, 2020, p. 127 ff.

<sup>46</sup> The Anti-Fake News Act was published in the Federal Gazette of Malaysia on 11 April 2018, <https://perma.cc/Y5H3-D6G8>, accessed on 20 December 2020. However, it was repealed in 2019 <https://perma.cc/VMT7-GAN4>, accessed on 20 December 2020. The Act provided for the punishment with the imprisonment of up to six years and/or with a fine of up to five hundred thousand ringgit for anyone “who, by any means, knowingly creates, offers, publishes, prints, distributes, circulates or disseminates any fake news or publication containing fake news”. For further details: A. Mazziotti di Celso, *Dal primo emendamento al bavaglio malese. Fake news, libertà di espressione e il rovesciamento delle categorie politiche tradizionali*, in *Rivista di Diritto dei Media*, 3/2018, p. 105 ff.; M. Monti, *Cronaca dell’emanazione e dell’abrogazione dell’Anti-Fake News Act malaysiano*, in *Rivista di Diritto dei Media*, 3/2018, p. 435 ff. The possibility of reviving the Anti-Fake News Act is under discussion of the Malaysia’s Parliament: <https://www.straitstimes.com/asia/se-asia/malaysia-to-discuss-the-revival-of-anti-fake-news-act-at-parliament>, accessed on 20 December 2020.

<sup>47</sup> The Parliament passed the Protection from Online Falsehoods and Manipulation Act (POFMA) on 8 May 2019, which came into force on 2 October 2019, <https://www.pofmaoffice.gov.sg/resources/>, accessed on 20 December 2020. In particular, Part II relates to the “Prohibition of Communication of False Statement of Fact in Singapore”. It provides for strict penalties. The text of the Act is available at the following link: <https://sso.agc.gov.sg/Act/POFMA2019#pr7->, accessed on 20 December 2020.

<sup>48</sup> The Burkina Faso’s Parliament with Loi N° 044-2019 amended the Penal Code (in particular artt. 313-12 ff.) by introducing specific offences related to the fight of fake news. For further details: [https://www.assembleenationale.bf/IMG/pdf/loi\\_044\\_portant\\_modification\\_du\\_code\\_penal.pdf](https://www.assembleenationale.bf/IMG/pdf/loi_044_portant_modification_du_code_penal.pdf), accessed on 20 December 2020.

<sup>49</sup> T. Nagasako, *Global disinformation campaigns and legal challenges*, in *International Cybersecurity Law Review*, 1/2020, p. 135.

<sup>50</sup> In 2019, Russia passed two laws banning fake news and disrespects of authorities, providing for administrative sanctions. However, on 31 March 2020, art. 207 of the Russian Penal Code was amended in order to counter false information related to serious issues of public safety, such as Covid-19, <https://ipi.media/new-fake-news-law-stifles-independent-reporting-in-russia-on-covid-19/>, accessed on 20 December 2020.

<sup>51</sup> *Finland’s Secret Weapon in the Fight against Fake News: its kindergarten children*, 16 February 2021, <https://www.telegraph.co.uk/global-health/climate-and-people/finlands-secret-weapon-fight-against-fake-news-kindergarten/>, accessed on 17 February 2021.

<sup>52</sup> Act to Improve Enforcement of the Law in Social Networks (Networks Enforcement Act), Bundestag, 17 July 2017. The text of the law is available in English at the following link: <https://www.bmjv.de/>

inadequacy of the self-regulatory mechanisms adopted by social media to counter illegal content online led to the establishment of this Act<sup>53</sup>. In order to define what must be considered “illegal content”, more strictly related to fake news, the Act explicitly refers to some of the offenses endorsed in the penal code, which include defamation (§ 187 StGB), treasonous forgery (§ 100 a StGB) and the forgery of data of probative value (§ 269 StGB).

According to § 1 of the Act only applies “to telemedia service providers which, for profit-making purposes, operate Internet platforms which are designed to enable users to share any content with other users or to make such content available to the public”, with more than two million registered users in Germany.

The Act imposes two types of obligations. Firstly, according to § 2, the provider of a social network that has received more than 100 complaints in a calendar year has to report, on a bi-annual basis, the complaints and the measures adopted in order to counter the illegal content on the platforms. This is required for reasons regarding public transparency and in order to determine whether the NetzDG is effective. Furthermore, on the basis of § 3, the provider of a social network has to handle complaints about unlawful content and follow the procedure provided by the provision (i.e., take note of and examine the complaint, remove or block access to unlawful content within a certain amount of time after receiving the complaint).

The violation of the obligations imposed by the NetzDG on social networks constitutes administrative offenses, punishable with a regulatory fine of up to five million euros (§ 4(2)). The peculiarity of the Act is that it can be applied even if the offense is not committed in the territory of the Federal Republic of Germany (§ 4(3)).

The NetzDG is not exempt from criticism<sup>54</sup>. The legal concerns relate in particular to the alleged limitation of the constitutional freedom of expression, the violation of the legality principle<sup>55</sup> and the contrast with the limits imposed by the E-Commerce Directive. The Act attributes excessive power to the platforms. The absence of an independent entity (e.g., a State authority) to control the content of information that is likely to be false could lead to private censorship, and thus jeopardize the right to freedom of expression. Moreover, the threat of applying such strict sanctions would lead to the risk that “suspicious” content would be removed if its reviewers had doubts about its veracity. The severity of the sanction poses some doubts also with regard to its effectivity administrative nature, as, substantially, it could be considered *matière pénale* as defined by the European Court of Human Rights (ECtHR)<sup>56</sup>.

---

SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG\_engl.pdf;jsessionid=E54C7EC36D9B604A237AFF2CF2965C9C.2\_cid289?\_blob=publicationFile&v=2, accessed on 20 December 2020.

<sup>53</sup> V. Claussen, *Fighting Hate Speech and Fake News. The Network Enforcement Act (NetzDG) in Germany in the context of the European Legislation*, in *Rivista di diritto dei media*, 3/2018, p. 117.

<sup>54</sup> V. Claussen, *Fighting Hate Speech and Fake News. The Network Enforcement Act (NetzDG) in Germany in the context of the European Legislation*, in *Rivista di Diritto dei Media*, 3/2018, p. 119 ff.; M. Liesching, *Die Durchsetzung von Verfassungs- und Europarecht gegen das NetzDG: Überblick über die wesentlichen Kritikpunkte*, in *Multimedia und Recht*, 1/2018, p. 27; G. Spindler, *Der Regierungsentwurf zum Netzwerkdurchsetzungsgesetz – europarechtswidrig?*, in *Zeitschrift für Urheber- und Medienrecht*, 2017, p. 481.

<sup>55</sup> Claussen V., *Fighting Hate Speech and Fake News. The Network Enforcement Act (NetzDG) in Germany in the context of the European Legislation*, in *Rivista di Diritto dei Media*, 3/2018, p. 119 ff.

<sup>56</sup> T. Guerini T., *La tutela penale della libertà di manifestazione del pensiero nell'epoca delle fake news e delle infodemie*, in *discrimen.it*, 15 June 2020, fn. 73.

### V.2. France

So far, France is the only European State to have adopted a penal legislation in order to combat fake news online. In 2018, France enacted the “Loi organique n° 2018-1201 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information” and the “Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information”, both related to the fight against the manipulation of information<sup>57</sup>. These laws were developed in order to better protect democracy and to adopt stricter rules to be applied to the media during the electoral campaigns, specifically in the three months before any election. Indeed, this period is considered especially delicate for the democracy of the country. According to Art. L163-1 of the Electoral Code, as modified by Loi n° 2018-1202, in the three months before the elections, platform operators have particular obligations concerning transparency, among which is the duty to provide users with “honest, clear and transparent content” regarding the identity of the natural person or the name of the company, the registered office and the purpose of the juridical person who pays to promote content related to a “debate of national interest”. Violation of the provision is punishable with the penalty of up to one year of imprisonment and a fine of 75.000 euros<sup>58</sup>.

Moreover, in the abovementioned period, a judge, upon request of a prosecutor, a candidate, a party, a political movement or anyone with an interest to act, may order “any proportional and necessary measure” to block the “deliberate, artificial and massive” dissemination of inexact allegations or imputations, or news that falsely report facts, with the intention of changing the genuineness of a vote<sup>59</sup>. The judge is required to decide within 48 hours. This aspect was criticized as such an evaluation would require more time and a deeper analysis, and would jeopardize the right to freedom of expression<sup>60</sup>. The legislative intervention is further criticized as it relates to specific circumstances and to a limited time frame. It only involves the political sphere and does not explore the broader context of the phenomenon examined.

### V.3. Italy

In Italy, the debate related to the introduction of measures aimed at countering the creation, sharing and spreading of fake news on the Internet is a burning

---

<sup>57</sup> The text of the laws are respectively available at the following links: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037847556> and <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037847559/>, accessed on 20 December 2021. For a detailed analysis: C. Magnani C., *Libertà d’informazione online e fake news: vera emergenza? Appunti sul contrasto alla disinformazione tra legislatori statali e politiche europee*, in *Forum di Quaderni Costituzionali*, 4 April 2019, p. 16 ff. It is also important to call attention to the 1881 Law on Freedom of the Press (“Loi du 29 juillet 1881 sur la liberté de la presse”), particularly art. 27 which punishes the publication, dissemination or reproduction of fake news in bad faith. Moreover, art. L.97 of the Electoral Code prohibits the dissemination of “fake news, defamatory rumors or other fraudulent schemes” that affect the result of an election. Another measure developed in France to address the phenomenon under evaluations is the Cross Check fact-checking project. For further details on the project: F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, p. 128 ff.

<sup>58</sup> Art. L112 of the Electoral Code as modified by Loi n° 2018-1202.

<sup>59</sup> Art. L163-2 of the Electoral Code as modified by Loi n° 2018-1202.

<sup>60</sup> In this vein, the Syndicat National des Journalistes (SNJ) in the press release entitled: “Fake news”: *un projet de loi liberticide*: <https://www.snj.fr/article/«fake-news»-un-projet-de-loi-liberticide-60222644>, accessed on 20 December 2020. See also the decision of the Conseil constitutionnel: Decision n. 2018-773 DC 20 décembre 2018. In academic literature: E. Lehner, *Fake news e democrazia*, in *Rivista dei Media*, 1/2019, pp. 6-7.

issue<sup>61</sup>. The Italian legal order does not have specific legislation related to the fight against fake news online<sup>62</sup>. However, it does provide for several provisions dealing with, or which are in some way related to, fake news. Examples include: false corporate communications ("*false comunicazioni sociali*", art. 2621 of the Italian Civil Code), market manipulation ("*manipolazione del mercato*", art. 185 of the Consolidated Law on Financial Intermediation), which refers to "anyone who spreads false news"; political defeatism ("*disfattismo politico*", art. 265 of the Penal Code, hereinafter referred to as c.p.); fraudulent price fluctuation on the public market or on the stock exchange ("*rialzo e ribasso fraudolento di prezzi sul pubblico mercato o nelle borse di commercio*", art. 501 of the Penal Code, i.e. agiotage); publication or dissemination of false, exaggerated or biased news, likely to disrupt public order ("*pubblicazione o diffusione di notizie false, esagerate o tendenziose, atte a turbare l'ordine pubblico*", art. 656 c.p.)<sup>63</sup>; raising false alarm for authority ("*procurato allarme presso l'Autorità*", art. 658 c.p.)<sup>64</sup>.

During the XVII Legislature, a number of legislative proposals were presented in order to address the fake news phenomenon<sup>65</sup>. Particular attention will be paid to the most relevant bills; the other initiatives will be only mentioned.

Before getting into the core of the analysis, it is important to recall what is stated in the Preamble of the Declaration of Internet Rights, elaborated by the Commission

---

<sup>61</sup> A bill (ddl n. 1900) on the establishment of a parliamentary committee of inquiry on the massive diffusion of fake news is under examination by the Senate. For more details see: <http://www.senato.it/leg/18/BGT/Schede/Ddliter/53197.htm>, accessed on 21 December 2020. A role in the fight against fake news is also played by the AGCOM ("*Autorità per le garanzie nelle comunicazioni*"). On the role played by the latter, see in particular: F. Sciacchitano, A. Panza, *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, p. 102 ff. See also the task force set up by the Prime minister's office to counter the spread of fake news on Covid-19 on the web and social networks ("*Unità di monitoraggio per il contrasto della diffusione delle fake news relative al Covid-19 sul web e sui social network*"), <https://informazioneeditoria.gov.it/it/notizie/unita-di-monitoraggio-per-il-contrasto-della-diffusione-di-fake-news-relative-al-covid-19-sul-web-e-sui-social-network-adottato-il-4-aprile-il-decreto-di-istituzione-presso-il-dipartimento/>, accessed on 21 December 2020.

<sup>62</sup> Pointing out the inadequacy of our legal system to face the technological evolution and the phenomenon under examination: T. Guerini, *La tutela penale della libertà di manifestazione del pensiero nell'epoca delle fake news e delle infodemie*, in *discrimen.it*, 15 June 2020, p. 50; S. De Flammineis, *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, p. 137. In a broader perspective: L. Picotti, *Diritto penale e tecnologie informatiche: una visione d'insieme*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, p. 42; L. Picotti, *La tutela penale della persona e le nuove tecnologie dell'informazione*, in L. Picotti (ed.), *Tutela penale della persona e nuove tecnologie*, Cedam, Padova, 2013, p. 29 ff.

<sup>63</sup> A similar provision is contained also in art. 440 of the Romanian Penal Code.

<sup>64</sup> For a more detailed analysis of art. 656 c.p.: S. De Flammineis, *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, p. 134 ff. (according to the author, art. 656 c.p. represents the main criminal law instrument against this phenomenon in the protection of collective legal goods, p. 136).

<sup>65</sup> For an analysis of the different bills on the topic: T. Guerini, *Fake news e diritto penale. La manipolazione digitale del consenso nelle democrazie liberali*, Giappichelli, Torino, 2020, p. 168 ff.; P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, pp. 1253-1271; A. Costantini, *Istanze di criminalizzazione delle fake news al confine tra tutela penale della verità e repressione del dissenso: verso un nuovo simbolismo penale?*, in *Rivista trimestrale di diritto penale contemporaneo*, 2/2019, p. 60 ff.; F. De Simone, 'Fake news', 'post truth', 'hate speech': nuovi fenomeni sociali alla prova del diritto penale, in *Archivio penale*, 1/2018, p. 1 ff.

for Internet Rights and Duties and published in 2015. It reads that the Declaration “is founded on the full recognition of the liberty, equality, dignity and unique diversity of each individual. Preserving these rights is crucial to ensuring the democratic functioning of institutions and avoiding the domination of public and private powers that may lead to a society of surveillance, control and social selection. The Internet is an increasingly important space for the self-organization of individuals and groups, and it is a vital tool for promoting individual and collective participation in democratic processes as well as substantive equality”<sup>66</sup>. Such a Declaration is particularly important also with regards to the topic under examination as, whatever the means used to counter the fake news phenomenon – including criminal law – it is not possible to limit the right of the individual to freedom of expression, which constitutes a cornerstone of our democratic system.

### V.3.1. *The Gambaro bill*

The Gambaro bill (“ddl Gambaro”), sponsored by senator Adele Gambaro, at the time a member of the Five Star Movement (M5S), was presented on 7 December 2017 (“Provisions to prevent the manipulation of online information, to ensure transparency on the web and to encourage media literacy”)<sup>67</sup>. It represents the first attempt aimed at countering fake news and followed the Resolution 2143 (2017) “Online media and journalism: challenges and accountability”, adopted by the Parliamentary Assembly of the Council of Europe on 25 January 2017<sup>68</sup>. The bill stems from the need to face the challenges presented by the technological developments and to regulate the individual’s online life with the same guarantees ensured in the offline life<sup>69</sup>. Its aim was to make online platforms liable for the dissemination of news which is false, exaggerated, biased or which has a propensity to disrupt public order, as well as to introduce specific offenses for the authors of such news and for the dissemination of hate campaigns<sup>70</sup>.

The bill under examination included three new offences in the Penal Code. More precisely, art. 1 of the ddl Gambaro provided for the introduction – after art. 656 c.p. – of art. 656 *bis* c.p. “Publication or dissemination of false, exaggerated or biased news likely to disrupt public order through IT platforms”, (“*Pubblicazione o diffusione di*

<sup>66</sup> The text in English of the Declaration of Internet Rights is available at the following link: [https://www.camera.it/application/xmanager/projects/leg17/commissione\\_internet/testo\\_definitivo\\_inglese.pdf](https://www.camera.it/application/xmanager/projects/leg17/commissione_internet/testo_definitivo_inglese.pdf), accessed on 21 December 2020. The Declaration is particularly important as it contains a number of provisions recognizing several rights to the users, such as the right to Internet access (art. 2), the right to online knowledge and education (art. 3), the right to one’s identity (art. 9), the right to be forgotten (art. 11), the rights and safeguards of people on platforms (art. 12).

<sup>67</sup> Atto Senato n. 2688, XVII legislature (ddl Gambaro) “Disposizioni per prevenire la manipolazione dell’informazione online, garantire la trasparenza sul web ed incentivare l’alfabetizzazione mediatica”. The text is available at the following link: [http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/0/1006504/index.html?part=ddlpres\\_ddlpres1-articolato\\_articolato1](http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/0/1006504/index.html?part=ddlpres_ddlpres1-articolato_articolato1), accessed on 21 December 2020. The bill remained a “dead letter” as it was never discussed and it did not proceed in the parliamentary procedure.

<sup>68</sup> The text of the Resolution is available at the following link: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23455&lang=en>, accessed on 21 December 2020.

<sup>69</sup> T. Guerini, *Fake news e diritto penale. La manipolazione digitale del consenso nelle democrazie liberali*, Giappichelli, Torino, 2020, p. 169. More in general: L. Picotti, *Diritto penale e tecnologie informatiche: una visione d’insieme*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, p. 42.

<sup>70</sup> M. Bassini, G.E. Vigevari, *Primi appunti su fake news e dintorni*, in *Rivista di diritto dei media*, 1/2017, p. 13.

*notizie false, esagerate o tendenziose, atte a turbare l'ordine pubblico, attraverso piattaforme informatiche*”), punishable with a fine of up to 5.000 euros<sup>71</sup>. This provision would not have been applied to professional journalism.

Art. 2 of the ddl Gambaro provided for the introduction respectively of art. 265 *bis* c.p. “Dissemination of false news that can raise public alarm or mislead sectors of public opinion”, (*“Diffusione di notizie false che possono destare pubblico allarme o fuorviare settori dell’opinione pubblica”*), punishable with at least twelve months of imprisonment or a fine of up to 5.000 euros, and art. 265 *ter* c.p. “Dissemination of hate campaigns or campaigns aimed at undermining the democratic process”, (*“Diffusione di campagne d’odio o volte a minare il processo democratico”*), punishable with at least two years of imprisonment or a fine of up to 10.000 euros<sup>72</sup>. However, the second part of art. 2 is more related to hate speech.

The bill further imposed a series of measures on IT platforms, such as registration requirements (art. 3), the obligation to rectify detrimental or fake content (art. 4) and the obligation to monitor online activity, determining the liability of the providers in the event that they did not remove unreliable and fake news (art. 7).

Finally, but equally importantly, the bill highlighted the importance of media literacy and the role played by schools within their functions of education and of encouraging public awareness (art. 6).

The bill faced fierce criticism for several reasons. It was criticized for violating the “principle of legality” (*principio di legalità*) and the “principle of offensivity” (*principio di offensività*)<sup>73</sup>. It jeopardized the right to freedom of expression as, for fear of punishment, the private individual would, firstly, have been discouraged from sharing his or her opinion and, furthermore, the platform would have further increased the controlling power<sup>74</sup>. This would have resulted in forms of private censorship. Such a

<sup>71</sup> With regard to the conduct, the offense endorsed in art. 656 *bis* c.p. seems to be very similar to the one contained in art. 656 c.p. with the exception of the means (IT platforms) required to carry out the conduct.

<sup>72</sup> These criminal offenses would have been introduced among the crimes against the personality of the State.

<sup>73</sup> T. Guerini, *Fake news e diritto penale. La manipolazione digitale del consenso nelle democrazie liberali*, Giappichelli, Torino, 2020, p. 172; E. Lehner, *Fake news e democrazia*, in *Rivista di diritto dei media*, 1/2019, p. 100; M. Fumo, *Bufale elettroniche, repressione penale e democrazia*, in *Rivista di diritto dei media*, 1/2018, p. 89; Cuniberti M., *Il contrasto alla disinformazione in rete tra logiche del mercato e (vecchie e nuove) velleità di controllo*, in *Rivista di diritto dei media*, 1/2017, p. 31. The bill lacks of a clear definition of “fake news”.

<sup>74</sup> The “interventionist” spirit of the bill is highlighted by Guercia, in particular where he highlights the use of the term “control”, adopted already in the bill’s presentation report: P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milan, 2019, p. 1258. Moreover, on p. 1259, the author points out the significance of the “chilling effect” according to which the ISP, for fear of incurring sanctions, could implement private censorship strategies and thus limit the circulation of information). More specifically on the “chilling effect”: J. Townend, *Freedom of Expression and the Chilling Effect*, in H. Tumber, S. Waisbord (eds.), *The Routledge Companion to Media and Human Rights*, Routledge, 2017, pp. 73 ff. In the same vein: M. Bassini, G.E. Vigevari, *Primi appunti su fake news e dintorni*, in *Rivista di diritto dei media*, 1/2017, p. 20, the authors refer to the “collateral censorship” effect. More generally, on the “collateral censorship” effect: J. Balkin, *Free Speech and Hostile Environment*, in *Columbia Law Review*, 99/1999, p. 2295 ff. In the case law, *inter alia*: dissenting opinion of judge Sajó and judge Tsotsoria appended to the judgment of the Grand Chamber of the European Court for Human Rights (ECtHR) in the *Delfi v. Estonia* case, App. 64569/09, 16 June 2015. According to the judges, if the ISPs were obliged to remove content or were considered

strong duty of control would have been in contrast with the law provided at European Union level and, more particularly, with the E-Commerce directive<sup>75</sup>. The bill was further criticized for being a selective and partial legislation (e.g., it was not applicable to the journalists)<sup>76</sup> and for mixing problems related to the spreading of fake news and to hate speech<sup>77</sup>.

### V.3.2. *The Zanda and Filippin bill*

The Zanda and Filippin bill (“ddl Zanda and Filippin”), sponsored by senator Luigi Zanda and Rossana Filippin, members of the Democratic Party<sup>78</sup> “General rules on social networks and combatting the dissemination of illegal content and fake news on the Internet” (“Norme generali in materia di social network e per il contrasto della diffusione su internet di contenuti illeciti e delle fake news”) was presented on 14 December 2017.

The bill was inspired by the model adopted in Germany (“NetzDG”)<sup>79</sup>. It targeted only social networks with an elevated number of users, more than one million (art. 1(2)). In contrast to the ddl Gambaro, it did not introduce new criminal offenses, but relied on the existing provisions contained in the Penal Code. As pointed out in the bill’s presentation, the aim of the law was to limit the publication and spread of content that constitutes crimes against the individual and crimes against the republic. Alongside the authors’ criminal liability for the illicit content constituting one of the criminal offenses listed in art. 1 (e.g., stalking, defamation), the bill provided for the administrative liability (of an omissive nature) of the social network providers for not fulfilling the obligations endorsed in the bill’s provisions. More precisely, art. 2 required the social network providers to adopt a very complex procedure with the

---

responsible for the content, for conditioned reflex they could implement strategies of private censorship for fear of penalties, which would probably have a negative effect on the circulation of information on the web.

<sup>75</sup> C. Magnani, *Libertà d’informazione online e fake news: vera emergenza? Appunti sul contrasto alla disinformazione tra legislatori statali e politiche europee*, in *Forum di quaderni costituzionali*, 4 April 2019, p. 4; F. Donati F., *Fake News e libertà d’informazione*, in *Rivista di diritto dei media*, 2/2018, p. 443 (the author goes even further stating that the bill constitutes a “surreptitious form of censorship”). In particular, art. 15 of the E-Commerce Directive 2001/31/EC does not impose a general obligation to monitor on ISPs. At domestic level, the legislative decree 70/2003 of 9 April 2003, implementing the EU E-Commerce Directive 2001/31/EC, establishes that the ISP does not have a general obligation to monitor information which is transmitted or stored, nor a general obligation to actively seek facts or circumstances indicating illegal activity (art. 16).

<sup>76</sup> C. Melzi D’Eril, *Fake news e responsabilità: paradigmi classici e tendenze incriminatrici*, in *Rivista di diritto dei media*, 1/2017, p. 62 (according to the author, if the aim of the bill is that of punishing the manipulation of the public opinion, the fact that the provision does not apply in the field of professional journalists seems inconsistent with the premise); M. Cuniberti M., *Il contrasto alla disinformazione in rete tra logiche del mercato e (vecchie e nuove) velleità di controllo*, in *Rivista di diritto dei media*, 1/2017, pp. 30-31.

<sup>77</sup> M. Bassini, G.E. Vigevani, *Primi appunti su fake news e dintorni*, in *Rivista di diritto dei media*, 1/2017, fn. 20.

<sup>78</sup> Atto Senato n. 3001, XVII legislature (ddl Zanda-Filippin) “Norme generali in materia di social network e per il contrasto della diffusione su internet di contenuti illeciti e delle fake news”. The text is available at the following link: <http://www.senato.it/leg/17/BGT/Schede/Ddliter/48538.htm>, accessed on 21 December 2020. For an analysis in academic literature: P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milan, 2019, p. 1263 ff.

<sup>79</sup> *Supra*, para. 5.2.



aim of handling complaints and removing illicit content within a certain amount of time<sup>80</sup>. In case of violation of the obligations required by the bill, social network providers would have been sanctioned with a fine of up to five millions euros (art. 7).

This bill has also been the subject of criticism. More particularly, the quantitative requirement was criticized for at least two reasons: firstly, it is difficult to determine the exact number of users; secondly, the number of users does not seem to constitute a fundamental requirement as content could be shared and relaunched, and could jump from one platform to another, thus obtaining a level of dissemination with the potential to influence public opinion<sup>81</sup>. The bill was further criticized for leaving private subjects to determine whether a specific piece of content may constitute a crime<sup>82</sup>. This could have led to the implementation of private censorship strategies, which may have resulted in the limitation of the circulation of information<sup>83</sup>. This also holds true in light of the sanctions set out in the bill. It is notable how criticism that emerged against this bill is similar to the criticism of the Facebook act<sup>84</sup>.

### V.3.3. *The De Girolamo bill*

Although it does not strictly refer to fake news, it is important to at least mention bill n. 4692, "Introduction of the ban on the anonymous use of the Internet and provisions on the right to be forgotten" (*"Introduzione del divieto dell'uso anonimo della rete internet e disposizioni in materia di tutela del diritto all'oblio"*)<sup>85</sup> presented by Nunzia De Girolamo and other parliamentarians of Forza Italia on 10 October 2017. The bill was aimed at adopting measures to combat online anonymity. It was composed of only two articles. The first article prohibited the uploading of online content of any kind anonymously and obliged all IT platforms to register users via username, password and e-mail address. The second was strictly related to the right to be forgotten, to its exercise and to the obligations imposed on the operators of search engines and websites related to the removal of certain content.

### V.3.4. *The red button*

In 2018, around the time of the elections, the Italian Government launched an online service (named "red button") aimed at repressing and combatting the spread of

---

<sup>80</sup> The social network provider, which received more than 100 complaints in a calendar year, should have reported it on a bi-annual basis. Moreover, such a report should have been published in the official gazette and in the social network's homepage. See art. 4.

<sup>81</sup> F. De Simone, 'Fake news', 'post truth', 'hate speech': nuovi fenomeni sociali alla prova del diritto penale, in *Archivio penale*, 1/2018, p. 18.

<sup>82</sup> T. Guerini, *Fake news e diritto penale. La manipolazione digitale del consenso nelle democrazie liberali*, Giappichelli, Torino, 2020, p. 175.

<sup>83</sup> P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, p. 1263 ff. In this vein, see also: M. Monti, *La proposta del ddl Zanda-Filippin sul contrasto alle fake news sui social network: profili problematici*, in *diritticomparati.it*, 7 December 2017, <https://www.diritticomparati.it/la-proposta-del-ddl-zanda-filippin-sul-contrasto-alle-fake-news-sui-social-network-profil-problematici/>, accessed on 10 January 2021.

<sup>84</sup> *Supra*, para. 5.2.

<sup>85</sup> Camera dei deputati n. 4692, XVII legislature (ddl De Girolamo et al.) *"Introduzione del divieto dell'uso anonimo della rete internet e disposizioni in materia di tutela del diritto all'oblio"*, the text of the bill is available at the following link: <https://www.camera.it/leg17/126?tab=2&leg=17&idDocumento=4692&sede=&tipo=> For a deep analysis: F. De Simone F., 'Fake news', 'post truth', 'hate speech': nuovi fenomeni sociali alla prova del diritto penale, in *Archivio penale*, 1/2018, pp. 35 ff.

fake news<sup>86</sup>. This initiative was aimed at countering the proliferation of fake news, particularly during the electoral period. Indeed, as mentioned above, the spread of fake news is particularly common in periods such as this one.

This service allowed people to report the alleged fake news through the use of a red button on the website of the Postal and Communication Police. The task of verifying the warnings received through the reporting mechanism was assigned to a team of experts from the National Anti-Computer Crime Centre for Critical Infrastructure Protection ("Centro nazionale anticrimine informatico per la protezione delle infrastrutture critiche", Cnaipic), within the Postal and Communications Police. In order to verify the information, the experts made use of specific fact-checking software and techniques<sup>87</sup>. If the information was found to be fake, the Postal and Communications Police would have had to demand that the platform withheld such content and give prominence to the denial on the website of the Postal and Communications Police, as well as on other institutional channels.

The criticism raised against the red button mechanism led to the closure of the page on the portal shortly after it had been activated. One point of criticism made against this mechanism related to the power attributed to the police and the adoption of such a simplistic solution to face a very thorny issue, which requires the balancing of different protected rights, one of which is the right to freedom of expression<sup>88</sup>.

## VI. The role of criminal law in the fight against the fake news phenomenon

Criminal law has a subsidiary character. It should be invoked as a last resort and thus when non-criminal measures have proven inadequate in tackling a specific phenomenon. The same holds true with regard to the fake news phenomenon.

The role of criminal law in the context under examination would not be that of safeguarding the truth of information itself, since false information and its spread per se are not relevant under criminal law<sup>89</sup>. In contrast, it would intervene to prevent the potential harm that false information and its diffusion may cause to protected legal goods of paramount importance, such as public order, safety and health<sup>90</sup>.

<sup>86</sup> More information is available on the Government's website: <https://www.interno.gov.it/it/notizie/progetto-red-button-contro-fake-news>, accessed on 15 January 2021.

<sup>87</sup> Belonging in particular to the "Centro nazionale anticrimine informatico per la protezione delle infrastrutture critiche" (Cnaipic). For further details: P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, p. 1268 ff.

<sup>88</sup> P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milan, 2019, pp. 1269-1270; Magnani C., *Libertà d'informazione online e fake news: vera emergenza? Appunti sul contrasto alla disinformazione tra legislatori statali e politiche europee*, in *Forum di quaderni costituzionali*, 4 April 2019, p. 6. See also the Communication of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on the red button protocol, Mr. David Kaye, of 20 March 2018.

<sup>89</sup> *Supra*, para. 2.

<sup>90</sup> In this vein: P. Guercia, *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, p. 1256. Similarly: Melzi D'Eril C., *Fake news e responsabilità: paradigmi classici e tendenze incriminatrici*, in *Rivista di diritto dei media*, 1/2017, p. 64.

Criminal regulation should not be used widely. A regulation that is too strict would determine the chilling effect<sup>91</sup> and thus excessively limit the free flow of information. Moreover, the reliance on criminal law to counter the diffusion of fake news can be used neither as an excuse nor as a tool to violate the right to freedom of expression<sup>92</sup>. The choice to criminalize conduct inevitably requires a balance between fundamental rights and protected legal goods. However, when the spread of false information jeopardizes protected legal goods such as public order or public health, it seems likely that freedom of expression may (proportionately) be limited<sup>93</sup>.

In the fight against the phenomenon of fake news, it is important to avoid using criminal law in a way that is merely symbolic<sup>94</sup> and that may weaken the specific function of this branch of law. This risk is particularly high in light of the fact that the fake news phenomenon is among the most widespread problems faced by the entire world, further increased by the spread of fake news about Covid-19 and, more recently, on vaccination campaigns. Criminal law could, therefore, be used inappropriately<sup>95</sup>, as a tool to placate the widespread concerns of the majority, flowing into the so-called “penal populism”<sup>96</sup>.

Another risk is that of anticipating excessively the intervention of criminal law<sup>97</sup>. This approach, for example, would have the effect of determining a merely symbolic intervention of criminal law<sup>98</sup>.

What is of fundamental importance is to establish whether the spread of false or misleading information has a negative impact on the aforementioned legal goods. This

<sup>91</sup> *Supra*, fn. 74.

<sup>92</sup> This aspect is highlighted in: A. Costantini, *Istanze di criminalizzazione delle fake news al confine tra tutela penale della verità e repressione del dissenso: verso un nuovo simbolismo penale?*, in *Rivista trimestrale di diritto penale contemporaneo*, 2/2019, p. 76.

<sup>93</sup> This is particularly manifest with regard to the criminal offense provided in art. 656 of the Italian penal code. The prevalence of the protection of public order respect to the exercise of the right to freedom of expression has been highlighted also by the Italian Constitutional Court: Corte Cost., n. 19/1962, in *Giurisprudenza costituzionale*, 1962, p. 189 ff., annotated by Esposito, *La libertà di manifestazione del pensiero e l'ordine pubblico*. See also Corte Cost. n. 199/1972 and n. 210/1976. For a further analysis: S. De Flammineis, *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, p. 135 ff.

<sup>94</sup> On the symbolic use of criminal law: A. Manna, *Alcuni recenti esempi di legislazione penale compulsiva e di ricorrenti tentazioni circa l'utilizzazione di un diritto penale simbolico*, in *archiviodpc. dirittopenaleuomo.it*, 21 December 2016, pp. 7-13; S. Bonini, *Funzione “strumentale” e funzione “simbolica” del diritto penale, fra discorsività “critica” e discorsività “dialogica”*, in *archiviodpc. dirittopenaleuomo.it*, 21 December 2016, pp. 27-31.

<sup>95</sup> On the use of criminal law during the emergency period: S. De Flammineis, *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, pp. 138-139; R. Bartoli, *Il diritto penale dell'emergenza “a contrasto del coronavirus”: problematiche e prospettive*, in *sistemapenale.it*, 24 April 2020, p. 1 ff.

<sup>96</sup> On this concept, *ex multis*: N. Selvaggi, *Populism and Criminal Justice in Italy*, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), *Italian Populism and Constitutional Law. Challenges to Democracy in the 21st Century*, Palgrave, Macmillan, London, 2020, p. 291 ff.; M. Donini, *Populismo penale e ruolo del giurista*, in *sistemapenale.it*, 7 September 2020, p. 1 ff.; M. Donini, *Populismo e ragione pubblica. Il post-illuminismo penale tra lex e ius*, Mucchi, Modena, 2019; E. Amati, *Insorgenze populiste e diritto penale*, in *discrimen.it*, 3 June 2019, p. 1 ff.; G. Fiandaca, *Populismo politico e populismo giudiziario*, in *Criminalia*, 2013, p. 95 ff.; D. Pulitanò, *Populismi e penale. Sull'attuale situazione spirituale della giustizia penale*, in *Criminalia*, 2013, pp. 123-148; J. Pratt, *Penal populism*, 1st ed., Routledge, London, 2006.

<sup>97</sup> De Flammineis S., *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, p. 132 ff., p. 138.

<sup>98</sup> *Ibid.*, pp. 144-145.

approach would contribute to further determining which fake news warrants intervention by means of criminal law and which does not. Particular attention must be paid to the threshold of harm and to the proportionality of the reaction. Indeed, the high level of interference determined by criminal law must be proportionate to the levels of threat and harm to the protected legal good<sup>99</sup>. Only in this case is the intervention of criminal law justifiable. For example, it appears reasonable to criminally punish an individual who intentionally or knowingly creates and spreads fake news that results in a public health crisis or in the incitement of violence that disrupts the legal order<sup>100</sup>. In this case, it is manifest how the diffusion of such information could provoke collective reactions, as well as distorted or even violent behavior. Furthermore, particular attention must be paid to the subjective element, as it is less plausible to assume that the unconscious spreading or sharing of false information should fall within criminal law.

In conclusion, in limited cases and circumstances, it would be possible to rely on criminal law. However, it cannot be ignored that this approach may pose some difficulties with regards to particular aspects, some of which are specifically related to the domestic legal system in which a criminal offense related to the creation and diffusion of fake news online has to be introduced. Firstly, it has to be coherent with the legal system in which the proposition is introduced. Moreover, the criminal offense should be determined with specific precision and, as mentioned above, the criminal sanction should be proportionate to both the legitimate aims pursued and the legal goods protected by the provision.

Criminal law is one of the instruments that could help to fight against the diffusion of fake news, but alone it is not sufficient to counter the phenomenon. Prevention plays a fundamental role in this battle. As was recently demonstrated in Finland, the educational aspect is fundamental to countering the spread of fake news. This aspect was emphasized at both supranational and national levels (e.g., Finland, ddl Gambaro). The promotion of critical media literacy is a key factor. It is a tool to empower citizens, to help them to critically understand and assess information divulged by all types of media. This holds true in particular in an era characterized by the predominance of social media and the crisis of traditional media. Furthermore, it cannot be ignored that, in spite of being the principle means by which fake news is spread, social media plays a central role in both the prevention and repression of fake news. In light of this, given that the harmful consequences of fake news warrant multi-level action with the objective of limiting or reducing its negative impact on society –

---

<sup>99</sup> R.K. Helm, H. Nasu, *Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation*, in *Human Rights Law Review*, 2021, p. 23.

<sup>100</sup> In this vein: R.K. Helm, H. Nasu, *Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation*, in *Human Rights Law Review*, 2021, p. 23 ff. Similarly, but more specifically related to medical fake news: Mamak K., *Do we need the criminalization of medical fake news?*, in *Medicine, Health Care and Philosophy*, 2021, pp. 1-11. More specifically related to the Italian system: M. Fumo, *Bufale elettroniche, repressione penale e democrazia*, in *Rivista dei Media*, 1/2018, p. 90. Open to the possibility of relying on criminal law: De Flammineis S., *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, p. 144. *Contra*: A. Costantini, *Istanze di criminalizzazione delle fake news al confine tra tutela penale della verità e repressione del dissenso: verso un nuovo simbolismo penale?*, in *Rivista trimestrale di diritto penale contemporaneo*, 2/2019, pp. 76-77 (the author rejects the possibility of relying on criminal law mainly for two reasons: the potential limitation of the right to freedom of expression and the lack of effect of the reliance on criminal law in the limitation of the diffusion of fake news online).

including democratic political processes and values – social media is one of the indispensable players involved in such a fight.

### References

1. Adinolfi M., *Hanno tutti ragione? Post-verità, fake news, big data e democrazia*, Salerno Editrice, Roma, 2019.
2. Amati E., *Insorgenze populiste e diritto penale*, in *discrimen.it*, 3 June 2019, pp. 1-34.
3. Balkin J., *Free Speech and Hostile Environment*, in *Columbia Law Review*, 1999, pp.2295-2320.
4. Bartoli R., *Il diritto penale dell'emergenza "a contrasto del coronavirus": problematiche e prospettive*, in *sistemapenale.it*, 24 April 2020, pp. 1-15.
5. Bassini M., Vigevari G.E., *Primi appunti su fake news e dintorni*, in *Rivista di diritto dei media*, 1/2017, pp. 11-22.
6. Bonini S., *Funzione "strumentale" e funzione "simbolica" del diritto penale, fra discorsività "critica" e discorsività "dialogica"*, in *archivioldpc.dirittopenaleuomo.it*, 21 December 2016, pp. 27-31.
7. Canfora L., *La storia falsa*, Rizzoli, Milano, 2008.
8. Caretti P., Cardone A., *Diritto dell'informazione e della comunicazione nell'era della convergenza*, Il Mulino, Bologna, 2019.
9. Casillo S., Di Trocchio F., Sica S., *Falsi giornalistici. Finti scoop e bufale quotidiane*, Alfredo Guida Editore, Napoli, 1997.
10. Claussen V., *Fighting Hate Speech and Fake News. The Network Enforcement Act (NetzDG) in Germany in the context of the European Legislation*, in *Rivista di diritto dei media*, 3/2018, pp. 110-136.
11. Costantini A., *Istanze di criminalizzazione delle fake news al confine tra tutela penale della verità e repressione del dissenso: verso un nuovo simbolismo penale?*, in *Rivista trimestrale di diritto penale contemporaneo*, 2/2019, pp. 60-80.
12. Cuniberti M., *Il contrasto alla disinformazione in rete tra logiche del mercato e (vecchie e nuove) velleità di controllo*, in *Rivista di diritto dei media*, 1/2017, pp. 26-40.
13. De Flammineis S., *Diritto penale, beni giuridici collettivi nella sfida delle fake news: principio di offensività ed emergenze*, in *Sistema penale*, 6/2020, pp. 131-146.
14. De Simone F., *'Fake news', 'post truth', 'hate speech': nuovi fenomeni sociali alla prova del diritto penale*, in *Archivio penale*, 1/2018, pp. 1-49.
15. Donati F., *Fake News e libertà d'informazione*, in *Rivista di diritto dei media*, 2/2018, pp. 440-446.
16. Donini M., *Populismo e ragione pubblica. Il post-illuminismo penale tra lex e ius*, Mucchi, Modena, 2019.
17. Donini M., *Populismo penale e ruolo del giurista*, in *sistemapenale.it*, 7 September 2020, pp. 1-22.
18. Fiandaca G., *Populismo politico e populismo giudiziario*, in *Criminalia*, 2013, pp. 95-121.
19. Fumo M., *Bufale elettroniche, repressione penale e democrazia*, in *Rivista di diritto dei media*, 1/2018, pp. 83-91.
20. Giusti S., Piras E. (eds.), *Democracy and Fake News: Information Manipulation and Post-Truth Politics*, Routledge, London, 2021.
21. Guercia P., *I progetti di legge sulle fake news e la disciplina tedesca a confronto*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, pp. 1253-1271.

22. Guerini T., *Fake news e diritto penale. La manipolazione digitale del consenso nelle democrazie liberali*, Giappichelli, Torino, 2020.
23. Guerini T., *La tutela penale della libertà di manifestazione del pensiero nell'epoca delle fake news e delle infodemie*, in *discrimen.it*, 15 June 2020, pp. 1-66
24. Helm R.K., Nasu H., *Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation*, in *Human Rights Law Review*, 2021, pp. 1-21.
25. Lehner E., *Fake news e democrazia*, in *Rivista di diritto dei media*, 1/2019, pp. 93-122.
26. Liesching M., *Die Durchsetzung von Verfassungs- und Europarecht gegen das NetzDG: Überblick über die wesentlichen Kritikpunkte*, in *Multimedia und Recht*, 1/2018, pp. 26-30.
27. Magnani C., *Libertà d'informazione online e fake news: vera emergenza? Appunti sul contrasto alla disinformazione tra legislatori statali e politiche europee*, in *Forum di quaderni costituzionali*, 4 April 2019, pp. 1-29.
28. Mamak K., *Do we need the criminalization of medical fake news?*, in *Medicine, Health Care and Philosophy*, 2021, pp. 1-11.
29. Manna A., *Alcuni recenti esempi di legislazione penale compulsiva e di ricorrenti tentazioni circa l'utilizzazione di un diritto penale simbolico*, in *archiviodpc.dirittopenaleuomo.it*, 21 December 2016, pp. 7-13.
30. Marchetti G., *Le fake news e il ruolo degli algoritmi*, in *Rivista di diritto dei media*, 1/2020, pp. 29-36.
31. Mazziotti di Celso A., *Dal primo emendamento al bavaglio malese. Fake news, libertà di espressione e il rovesciamento delle categorie politiche tradizionali*, in *Rivista di diritto dei media*, 3/2018, pp. 90-109.
32. Melzi D'Eril C., *Fake news e responsabilità: paradigmi classici e tendenze incriminatrici*, in *Rivista di diritto dei media*, 1/2017, pp. 60-67.
33. Monti M., *Fake news e social network: la verità ai tempi di Facebook*, in *Rivista di diritto dei media*, 1/2017, pp. 79-90.
34. Monti M., *La proposta del ddl Zanda-Filippin sul contrasto alle fake news sui social network: profili problematici*, in *diritticomparati.it*, 7 December 2017.
35. Monti M., *Cronaca dell'emanazione e dell'abrogazione dell'Anti-Fake News Act malaysiano*, in *Rivista di diritto dei media*, 3/2018, pp. 435-438.
36. Monti M., *Italian Populism and Fake News on the Internet: A New Political Weapon in the Public Discourse*, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), *Italian Populism and Constitutional Law. Challenges to Democracy in the 21st Century*, Palgrave, Macmillan, London, 2020, pp. 177-197.
37. Nagasako T., *Global disinformation campaigns and legal challenges*, in *International Cybersecurity Law Review*, 1/2020, pp. 125-136.
38. Paliero C.E., *La maschera e il volto. (Percezione sociale del crimine ed 'effetti penali' dei media)*, in *Rivista italiana di diritto e procedura penale*, 2/2006, pp. 467-538.
39. Pariser E., *The Filter Bubble: What the Internet is Hiding from You*, Penguin Group, London, 2011.
40. Perini C., *Fake news e post-verità tra diritto penale e politica criminale*, in *archiviodpc.dirittopenaleuomo.org*, 20 December 2017, pp. 1-14.
41. Perucchietti E., *Fake news. Dalla manipolazione dell'opinione pubblica alla post-verità. Come il potere controlla i media e fabbrica l'informazione per ottenere consenso*, Arianna Editrice, Bologna, 2018.

42. Picotti L., *La tutela penale della persona e le nuove tecnologie dell'informazione*, in L. Picotti (ed.), *Tutela penale della persona e nuove tecnologie*, Cedam, Padova, 2013, p. 29-75.
43. Picotti L., *Diritto penale e tecnologie informatiche: una visione d'insieme*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (eds.), *Cybercrime*, Utet, Milano, 2019, pp. 33-95.
44. Pitruzzella G., Pollicino O., Quintarelli S., *Parole e potere. Libertà di espressione, hate speech e fake news*, Egea, Milano, 2017.
45. Pitruzzella G., *La libertà di informazione nell'era di Internet*, in *Rivista di diritto dei media*, 1/2018, pp. 19-47.
46. Pitruzzella G., Pollicino O., *Disinformation and Hate Speech: A European Constitutional Perspective*, Bocconi University Press, Milan, 2020.
47. Pratt J., *Penal populism*, 1<sup>st</sup> ed, Routledge, London, 2006.
48. Pulitanò D., *Populismi e penale. Sull'attuale situazione spirituale della giustizia penale*, in *Criminalia*, 2013, pp. 123-148.
49. Quattrociocchi W., Scala A., Sustein C. R., *Echo Chambers on Facebook*, in *papers.ssrn.com*, 13 June 2016.
50. Quattrociocchi W., Vicini A., *Misinformation: guida alla società dell'informazione e della credulità*, Franco Angeli, Milano, 2016.
51. Rodrigues U.M., Xu J., *Regulation of COVID-19 Fake News Infodemic in China and India*, in *Media International Australia*, 2020, pp. 125-131.
52. Safieddine F., *History of Fake News*, in F. Safieddine, Y. Ibrahim (eds.), *Fake News in an Era of Social Media: Tracking Viral Contagion*, Rowman & Littlefield International, London, New York, 2020.
53. Sciacchitano F., Panza A., *Fake News e disinformazione online: misure internazionali*, in *Rivista di diritto dei media*, 1/2020, pp. 104-105.
54. Selvaggi N., *Populism and Criminal Justice in Italy*, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), *Italian Populism and Constitutional Law. Challenges to Democracy in the 21th Century*, Palgrave, Macmillan, London, 2020, pp. 291-310.
55. Spindler G., *Der Regierungsentwurf zum Netzwerkdurchsetzungsgesetz – europarechtswidrig?*, in *Zeitschrift für Urheber- und Medienrecht*, 2017, pp. 473-487.
56. Sumpter D., *Outnumbered: From Facebook and Google to Fake News and Filter-bubbles. The Algorithms that Control our Lives*, Bloomsbury, London, 2018.
57. Townend J., *Freedom of Expression and the Chilling Effect*, in H. Tumber, S. Waisbord (eds.), *The Routledge Companion to Media and Human Rights*, Routledge, London, 2017, pp. 73-82.
58. Van Wie Davis E., *Shadow Warfare: Cyberwar Policy in the United States, Russia, and China*, Rowman & Littlefield, London, 2021.
59. Zarocostas J., *How to Fight an Infodemic*, *The Lancet*, Vol. 395, February 2020.
60. Zhuk D., Tretiakov A., Gordeichuk A., Puchkovskaia A., *Methods to Identify Fake News in Social Media Using Artificial Intelligence Technologies*, in D.A. Alexandrov et al. (eds.) *Digital Transformation and Global Society*, Springer, 2018, pp. 446-454.
61. Ziccardi G., *Tecnologie per il potere. Come usare i social network in politica*, Raffaello Cortina Editore, Milano, 2019.
62. Zuiderveen Borgesius F.J., Trilling D., Möller J., Bodó B., De Vreese C.H., Helberg N., *Should we worry about filter bubbles?*, in *Internet Policy Review*, 2016, pp. 1-16.