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Hate Crimes, Social Media and Criminal Law.  
Hints on the Recent Italian Legislative Proposal  
Against Incitement to Discrimination and Hate

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# **Hate Crimes, Social Media and Criminal Law. Hints on the Recent Italian Legislative Proposal Against Incitement to Discrimination and Hate**

## **Summary**

1. Premise. – 2. The criminological perspective. Hate crimes, hate speeches and social media. – 3. The Italian legislative panorama. – 4. The recent bill approved in the Italian Chamber of Deputies: a needed reform. – 5. Conclusion. A useful discipline also for online hate crimes?

## **Abstract**

The essay thematizes the category of hate crimes, to which, beyond racial and religious hate crimes, homotransphobic, gender-based and disability-based hate crimes are also ascribed, as shown by the comparative perspective. Dealing deeply with the criminological profiles with particular reference to the relationship between hate crimes and hate speeches and the reality of social media, the essay develops some reflections on the recent Italian legislative proposal, approved in the Chamber, aimed at amending Articles 604-bis and ter of the Criminal Code, on violence or discrimination on grounds of sex, gender, sexual orientation, gender identity or disability. The reform introduces measures to prevent and combat these forms of discrimination, alongside the measures already envisaged for racial, ethnic and religious discrimination, and is aimed at combating two similar phenomena such as homophobia and misogyny (or rather sexism), phenomena no longer acceptable for modern societies, nor for contemporary criminal law, as well as to complete the frame of protection of disabled persons. The essay concludes wondering about the effectiveness of the reform with regard to online hate crimes.

*Il saggio tematizza la categoria dei crimini d'odio, alla quale vanno ascritti, oltre ai crimini d'odio razziale e religioso, anche i crimini d'odio omotransfobico, di genere e per disabilità, come dimostra la prospettiva comparata. Svolta una attenta analisi dei profili criminologici con particolare riferimento al rapporto fra crimini nonché discorsi d'odio e realtà dei social media, il saggio sviluppa alcune riflessioni sulla recente proposta di riforma legislativa italiana, attualmente approvata alla Camera, volta a modificare gli artt. 604-bis e ter c.p., in materia di violenza o discriminazione per motivi di sesso, di genere, di orientamento sessuale, di identità di genere o per disabilità. La novella introduce misure di prevenzione e di contrasto a tali forme di discriminazione, accanto alle misure già previste per le discriminazioni razziali, etniche e religiose, ed è finalizzata a combattere due fenomeni assimilabili quali l'omofobia e la misoginia (o meglio il sessismo), fenomeni non più accettabili per le società mo-*

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derne, così come per il diritto penale contemporaneo, nonché a completare il quadro di tutela dei soggetti disabili. Il saggio si conclude interrogandosi sull'effettività della riforma rispetto ai crimini d'odio in rete.

## 1. Premise

Accepting the most accredited definition of hate crime<sup>1</sup>, which emerged in Europe thanks to the proactivity of the Organization for Security and Cooperation (the classification in criminological and criminal law doctrine is much more uncertain), these are crimes that are made up of two elements: first of all, a conduct that constitutes a crime (any type of crime); secondly, the commission of such conduct must be inspired by a reason of prejudice (bias) against a “protected characteristic” belonging to a group, such as race, language, religion, ethnicity, nationality or other similar characteristics, which include gender, sexual orientation and gender identity, as well as, sometimes, disability. Homotransphobic hate crimes must therefore also be ascribed to this category, as well as hate crimes based on gender, which include gender violence, subject to an obligation of criminalization, as is well known, following the ratification of the Istanbul Convention by Italy with law n. 77/2013<sup>2</sup>. Disability-based hate crimes are also included in the category, according to a part of the hate crime doctrine.

To corroborate this last conclusion about the omnicomprehensive nature of hate crimes contributes the opening towards the *comparative perspective* where there are many European and extra-European legislations that contemplate criminal law, as well as in the matter of racial and religious hate crimes, also in the matter of homotransphobic hate crimes, gender hate crimes and, sometimes, disability hate crimes<sup>3</sup>.

From the comparative study we also obtain a second valuable indication: among the criminal instruments to combat hate crimes, the recourse to the provision of an aggravating circumstance appears to be extremely effective, where the crime is inspired by hatred on the basis of race, religion,

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1 Osce, *Hate Crime Laws. A Practical Guide*, Odihir, 2009, p. 16. See, *funditus*, L. Goisis, *Crimini d'odio. Discriminazioni e giustizia penale*, Napoli, Jovene, 2019, *passim*.

2 For a broad thematization of gender-based violence, also in the light of international documents on the subject, as well as gender analysis in criminal law, reference is made to *Id., cit.*, p. 339 ss., 348 ss., 353 ss. Although, unlike homophobic hate crimes, the existence of an international obligation to incriminate gender hate crimes from the well-known Istanbul Convention is indisputable, the figure of the so-called gender-based hate crime is particularly controversial. There seems no doubt in any case that crimes committed for a gender motive must be framed within hate crimes, as forms of gender hate crimes. In this direction, it also pushes comparative experience, where gender hate crimes, gender hate speeches are envisaged, in addition to the common aggravating circumstance of “gender hatred”.

3 The comparative experience allows, in fact, to conclude, in the first place, in the sense of the inalienability and urgency of a law to contrast homophobia – law present in almost all European countries as well as in the common law countries overseas: a look at foreigner legislations leads us to affirm that a country that wishes to call itself civil cannot renounce to the imperative of enhanced protection of sexual minority groups due to their vulnerability, confirmed by statistical data and by the empirical and criminological reality of hate crimes, as well as by reason of the greater criminal value of conduct inspired by homophobic motives. See, on vulnerability of the LGBT group, E. Dolcini, *Omosessualità, omofobia, diritto penale. Riflessioni a margine del volume di M. Winkler e G. Strazio, L'abominevole diritto. Gay e lesbiche, giudici e legislatori*, 2011, in *Stato, Chiese e pluralismo confessionale*, 2012, p. 1. See, on the criminal disvalue of homophobic hate crimes, M. Pelissero, *Omofobia e plausibilità dell'intervento penale*, in *GenIUS*, 2015, 1, p. 24. On vulnerability of female victims, see L. Goisis, *Crimini d'odio, cit.*, p. 373 ss.

gender, sexual orientation, gender identity, disability, a solution considered preferable by a part of the criminal law doctrine<sup>4</sup>. Particularly, many legal systems resort to the common aggravating circumstance: significant is the disposition of Articles 132-76 and 132-77 of the French Penal Code, which provide for the aggravating circumstance of racial, xenophobic, anti-Semitic, sexist and homotransphobic hatred; we also point out Art. 22, par. 4 of the Spanish Criminal Code which similarly provides for the common aggravating circumstance where there is a racist, anti-Semitic, ideological motive or linked to personal beliefs, religious, homophobic, transphobic, sexist, or in relation to the disability or infirmity of the victim; similarly, the Croatian Penal Code envisages for the common aggravating circumstance, in Art. 89, par. 20, of racial, religious, ethnic, national hatred, due to disability, gender, sexual orientation or gender identity. Sanctioning aggravations of this type are also provided for in the Anglo-Saxon legal systems.

The formulation of the aggravating circumstance is characterized, in almost all the systems referred to, through the use of traditional factors, like race and religion, jointly with the formula “sexual orientation”, to which is added the reference to “gender identity”, to understand the transphobic motive, in addition to gender (and sometimes to sex) and disability.

Note how these four protected categories “run”, so to speak, on complementary tracks: homophobic, transphobic and gender-based violence, and also disability-based violence, are united in all legislations<sup>5</sup>.

It should be noted, however, that the comparative experience – that of France as well as that of Spain, that of common law countries, as well as that of Germany, as well as Belgium, Croatia and other European countries – allows us to believe, in the presence of provisions respectful of the principle of precision, in the opportunity also of autonomous crime figures: a reinforced protection for the contrast of hate crimes and in particular of hate speeches, on which we will return ahead – recognized as crimes of particular gravity by the unanimous criminological doctrine – can only pass through a political-criminal strategy that makes use of both legislative techniques, even if the repression of hate crimes must be accompanied by a strategy to prevent them: a task that cannot fail to pass through the mediation of culture<sup>6</sup>.

Ultimately, in the main common law systems as well as of civil law, a detailed discipline of hate crimes is envisaged and racial, religious, but also homophobic, transphobic, sexist, sometimes disability-based hate crimes are indicted and even, widely, speeches of racial, religious, homotransphobic, sexist, by disability hatred, with some clauses protecting freedom of expression in the Anglo-Saxon legal systems in homage to free speech<sup>7</sup>. The comparative lesson is clear in this sense. A mapping that signals the backwardness, as we will say, of the Italian legislation on the protection against homotransphobic, gender and disability hate crimes<sup>8</sup>.

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4 E. Dolcini, *Omofobia e legge penale. Note a margine di alcune recenti proposte di legge*, in *Rivista italiana di diritto e procedura penale*, 2011, p. 28.

5 L. Goisis, *Crimini d'odio*, cit., p. 456 s.

6 See, on the theme, Id., *Crimini*, cit., *passim*. For the legislations of common law and civil law countries, see Id., cit., p. 45 ss. See also Id., *Hate Crimes in a Comparative Perspective. Reflections on the Recent Italian Legislative Proposal on Homotransphobic, Gender and Disability Hate Crimes*, in *GenIUS*, 2020, 1, p. 79 ss.

7 Interesting is the clause to safeguard freedom of expression envisaged in Australian legal system, in the *Federal Racial Anti-Discrimination Act*, which provides a clause of lawfulness of the fact for any declaration with academic, artistic or scientific purposes or with any other genuine purpose of public interest. See L. Goisis, *Crimini*, cit., p. 132 ss.

8 See Camera dei deputati, *Norme per la tutela delle vittime di reati per motivi di omofobia e transfobia*, Roma, 2009, at <http://documenti.camera.it>; see also L. Goisis, *Omofobia e diritto penale: profili comparatistici*, in *Diritto penale contemporaneo*, 2012, p. 14 ss.

## 2. The criminological perspective. Hate crimes, hate speeches and social media

It is now necessary to investigate the criminological profiles relating to hate crimes. Once we have questioned ourselves about the *quomodo* of the use of criminal law in contrasting hate crimes, also in light of the variegated comparative panorama, and given a legal definition of hate crimes – which can be framed, we recall, as those crimes committed against certain persons due to a prejudice against their belonging to a group, a group identified on the basis of race, ethnicity, religion, gender, sexual orientation, gender identity, disability – it is necessary to outline the criminological scenario, which – in this matter – is particularly rich: it is in our opinion an essential starting point for a full understanding of the phenomenon under study and a source of suggestions for the criminal legislator that must be chosen as a criminal policy in relation to hate crimes. In particular, it is necessary to investigate the relationship between hate crimes, as well as hate speeches and social media as it emerges in the empirical research of a criminological nature.

The first question that criminology has asked itself, studying hate crimes, is the following: how do hate (or prejudice) crimes differ from ordinary crimes and whether, and if so, why they are more serious crimes than ordinary ones.

The question is of crucial importance and deserves to be deepened.

The harmfulness of hate crimes in criminological research is well established. Criminological research has made it possible to paint a clear picture of the difference between hate crimes and ordinary crimes: the first criminological acquisition, although not undisputed<sup>9</sup>, concerns, as previously mentioned, the greater violence that characterizes hate crimes compared to ordinary crimes. Hate crimes manifest themselves in attacks on the physical integrity of the person more often than happens for ordinary crimes in general<sup>10</sup>.

These are crimes committed more frequently than ordinary crimes by groups assembled against single and unknown victims<sup>11</sup>. These crimes also generate intense psychological and emotional distress in the victim as the victim is affected not only physically, but also in the depths of his identity<sup>12</sup>. It is also affected due to one of its characteristics, often unchanging (e.g. the race), so that it will not be able to avoid further attacks of this nature and this creates in it a sense of vulnerability that is higher than what normally happens in the case of ordinary aggressions<sup>13</sup>. So much so that the psychological effects of the victim of a hate crime are equated with those suffered by the victim of sexual violence: post-traumatic stress disorder, depression, deep sense of anxiety and isolation. These factors therefore seem to show in the sense of a greater incidence in terms of psychological damage of hate violence compared to common violence<sup>14</sup>. The consideration that the victims of hate crimes suffer a stigmatiza-

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<sup>9</sup> Negative opinion in J. B. Jacobs-K. Potter, *Hate Crimes. Criminal Law & Identity Politics*, Oxford, Oxford University Press, 1998, p. 81 ss.

<sup>10</sup> According Levin e McDevitt, hate crimes tend to be “*excessively brutal*”. See J. Levin, J. McDevitt, *Hate Crimes: the Rising Tide of Bigotry and Bloodshed*, New York, NY Plenum, 1993, p. 11.

<sup>11</sup> As the profile of the single offender, mainly, is not an extremist who acts with premeditation, but a common citizen who commits the crime in ordinary life, moved by bias or by other motives.

<sup>12</sup> See P. Iganski, J. Levin, *Hate Crime. A Global Perspective*, New York-London, Routledge, 2015, p. 40 s.

<sup>13</sup> As the profile of the victim of hate crimes, statistical data say that is more often a black male or a white woman. Victims are of variable age, but young victims are subject to violent hate crimes. See F. S. Pezzella, *Hate Crime Statutes. A Public Policy and Law Enforcement Dilemma*, New York, Springer, 2017, p. 37 s.

<sup>14</sup> J. McDevitt, J. Balboni, L. Garcia, J. Gu, *Consequences for Victims: A Comparison of Bias and Non-Bias Motivated Assaults*, in *Am.*

tion rooted in a social prejudice that characterizes historically discriminated groups would contribute to this conclusion: this stigmatization brings with it a sense of humiliation, isolation and self-esteem for the group to which they belong.

This is the second aspect to consider: the impact that hate crimes have on the victim's community or group. Far from exhausting their effects on the individual victim, hate crimes also seem to have a strong negative impact on the group, identified on the basis of race, ethnicity, language, religion, sexual orientation, disability or gender identity, in which the victim identifies himself. In fact, the group feels intimidation and the threat represented by hate crime and this creates fear and anxiety in the attacked group: also in this sense it is believed that hate crimes differ profoundly from ordinary crimes, revealing themselves more harmful to society<sup>15</sup>.

Not only. In this last regard, it is emphasized that hate crimes are harmful for the victim and for the group to which they belong, but also for society as a whole. This is because such crimes damage the value of the security of the members of society, but above all the value of equality between citizens and harmony within a heterogeneous society. Therefore, there is no doubt that such crimes undermine at the root (more than ordinary crimes) the foundations of a democratic society based on the principle of the equal dignity of all human beings<sup>16</sup>.

The thesis of the greater negative impact in psychological and emotional terms of hate crimes was, among other things, the subject of investigation by the Supreme Court of the United States in the case of *Wisconsin v. Mitchell* in 1993, where some *amicus curiae* opinions were put forward in support of this assumption<sup>17</sup>.

These opinions, collected by the Supreme Court, highlighted the greater harmfulness of hate crimes for the victim, compared to common crimes, underlining that such crimes "constitute an attack on the victim's right to participate on an equal basis in society and can induce a serious and lasting damage to the dignity of the victim"<sup>18</sup>. In particular, there is evidence of how hate speeches, in the

*Behavioral Scientist*, 2001, 45, p. 697 ss.; E. A. Dragowski et Alii, *Sexual Orientation Victimization and Posttraumatic Stress Symptoms Among Lesbian, Gay, and Bisexual Youth*, in *J. of Gay & Lesbian Social Services*, 2011, 23 (2), p. 226 ss. See also two studies of the *National Institute Against Prejudice and Violence* (NIAPV) of 1986 and of 1989, the first titled *Striking Back at Bigotry: Remedies Under Federal and State Law for Violence Motivated by Racial, Religious, and Ethnic Violence*, Baltimore, the second titled *National Victimization Survey*, Baltimore.

- 15 Agree: P. Iganski, *Hate Crimes Hurt More*, in *Am. Behavioral Scientist*, 2001, 45, p. 626 ss.; A. M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, in *Northwestern Univ. L. R.*, 1997, 91, p. 1015 ss.; B. Weisburd-B. Levin, *On the Basis of Sex: Recognizing Gender-Based Bias Crimes*, in *Stanford Law and Policy Rev.*, 1994, 5, p. 21 ss.; B. Levin, *Hate Crimes: Worse by Definition*, in *J. of Contemporary Criminal Justice*, 1999, 15 (1), p. 6 ss.; L. Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, in *Southern Cal. L. R.*, 1997, 71, p. 47 ss. See also M. Noelle, *The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group*, in *Am. Behavioral Scientist*, 2002, 46, p. 27 ss.; B. Perry, S. Alvi, *We are All Vulnerable: the In Terrorem Effects of Hate Crimes*, in *Int. R. of Victimology*, 2012, 18 (1), p. 57 ss.
- 16 See F. M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Cambridge, Harvard University Press, 1999, p. 41 ss.; S. Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, in *UCLA L. R.*, 1991-2, 39, p. 333 ss.; B. Levin, *Hate Crimes: Worse by Definition*, in *J. of Contemporary Criminal Justice*, 1999, 15 (1), p. 1 ss.; S. B. Weisburd-B. Levin, *On the Basis of Sex: Recognizing Gender-Based Bias Crimes*, cit., p. 21 ss.; F. S. Pezzella, cit., p. 29 ss. Different opinion in J. B. Jacobs-K. Potter, *Hate Crimes*, cit., p. 81 ss.; nonché P. B. Gerstenfeld, *Hate Crimes. Causes, Controls, and Controversies*, Los Angeles-London, Sage, 2018, p. 13 ss.
- 17 *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).
- 18 Similar thinking in opinions rendered by *American Civil Liberties Union* and *NAACP Legal Defense and Educational Fund*. See *Id.*, op. cit., p. 13 s.

same conception of Jeremy Waldron<sup>19</sup>, are able to arouse feelings of humiliation, isolation and disdain, when they do not lead to mental disorders and antisocial conduct, which leads to the belief that where the hate crime is not limited to hate speech, but is materialized in acts violent inspired by hatred and prejudice, the harmful effects on the victim are amplified<sup>20</sup>.

A *definition of hate speech*, in relation of *species* to *genus* with hate crime, is therefore required, also by reason of its diffusion, as we will say, online and on social media. The definition of the concept is particularly difficult. However, it can be defined, according to the indications of the Council of Europe, as “any form of expression that spreads, incites, promotes or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance”<sup>21</sup>.

The doctrine, as emerges from the most recent contributions on the subject, specifically questions the appropriateness of using the criminal instrument in contrasting such phenomena, capable, according to criminological research, of creating a climate favorable to hate violence. In fact, criminological research underlines the danger and harmfulness of these particular criminal phenomenologies, also highlighting how these are crimes that create the cultural ground that encourages and legitimizes violent hate crimes<sup>22</sup>. The use of criminal law for the protection of victims often risks generating a conflict with fundamental rights such as, in the emblematic case of hate speech, freedom of expression<sup>23</sup>. From a specifically criminal point of view, then, problems arise with regard to compliance with the principle of offensiveness, where such incriminations involve the risk of creating new crimes of opinion<sup>24</sup>. The knot is so problematic that there is no lack of dissonant voices in the literature: in the face of those who suggest an approach that appeals, albeit under certain conditions, to criminal law<sup>25</sup>, there is no

- 19 J. Waldron, *The Harm in Hate Speech*, Harvard, Harvard University Press, 2012, p. 4 ss., 9 s., p. 122. According to Waldron, the discriminatory speech exploits the group’s membership as degrading factor of the person.
- 20 R. Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in M. J. Matsuda, C. R. Lawrence III, R. Delgado, K.W. Crenshaw, (Eds.), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Boulder, CO, Westview Press, 1993, p. 91 ss.
- 21 Recommendation No. (97) 20 of the Council of Europe. See A. Weber, *Manual on Hate Speech*, Council of Europe, 2009, p. 3. See also R. C. Post, *La disciplina dell’hate speech tra considerazioni giuridiche e sociologiche*, in D. Tega, (a cura di), *Le discriminazioni razziali ed etniche. Profili giuridici di tutela*, Roma, UNAR, 2011, p. 97. On negationist speech see M. Spatti, *Hate Speech e negazionismo tra restrizioni alla libertà d’espressione e abuso del diritto*, in *Studi sull’integrazione europea*, 2014, IX, p. 341 ss., A. S. Scotto Rosato, *Osservazioni critiche sul nuovo “reato” di negazionismo*, in *Riv. Trim. Dir. Pen. Cont.*, 2016, 3, p. 280 ss.; E. Fronza, A. Gamberini, *Le ragioni che contrastano l’introduzione del negazionismo come reato*, in *Diritto penale contemporaneo*, 2013, p. 1 ss.; D. Pulitanò, *Di fronte al negazionismo e al discorso d’odio*, in *Riv. Trim. Dir. Pen. Cont.*, 2015, 4, p. 325 ss., A. di Martino, *Assassini della memoria: strategie argomentative in tema di rilevanza (penale) del negazionismo*, in *Per un manifesto del neoilluminismo penale*, G. Cocco (ed.), Padova, Cedam, 2016, p. 193 ss. The address expressed in the aforementioned Recommendation is significant regarding the need for the press, the mass media and politicians to refrain from making statements that can be understood as hate speech, running on the contrary the obligation on their part to condemn such expressions. Criminal judges, on the other hand, must respect the principle of proportionality of the sanction with respect to the conduct. It should also be taken into consideration that hate speeches can also be configured as crimes against humanity where they consist of incitement to the commission of acts of genocide and violence against civilians, as sanctioned by the International Criminal Court for crimes committed in Rwanda, who condemned journalists who, through radio and print media, incited hatred and genocide against the Tutsis. See M. Spatti, *cit.*, p. 344.
- 22 See F. M. Lawrence, *Punishing*, *cit.*, p. 80 ss.; P. B. Gerstenfeld, *op. cit.*, p. 35.
- 23 See E. Dolcini, *Omofobia e legge penale. Note a margine di alcune recenti proposte di legge*, *cit.*, p. 24 ss., p. 25.
- 24 *Ibidem*. See A. Spena, *Libertà d’espressione e reati di opinione*, in *Rivista italiana di diritto e procedura penale*, 2007, p. 689 ss.; in foreign literature C. Yong, *Does Freedom of Speech Include Hate Speech?*, in *Res Publica*, 2011, 17, 385 ss.
- 25 See E. Dolcini, *last cit.*, p. 28 ss., L. Goisis, *Omofobia e diritto penale*, *cit.*, pp. 3-4. Osce, *Hate Crime Laws. A Practical Guide*, Osce

shortage of scholars who, due to the peculiarities of hate speech, deny the opportunity to provide criminal protection, others still invoke the use of tools inspired by restorative justice<sup>26</sup>.

The lesson of Waldron appears to us as a guide: “*dignity (...) is precisely what hate speech laws are designed to protect – not dignity in the sense of any particular level of honor or esteem (or self-esteem), but dignity in the sense of a person’s basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction. That is what hate speech attacks, and that is what laws suppressing hate speech aim to protect*”. “*The harm that expressions of racial hatred do is harm in the first instance to the groups who are denounced or bestialized in pamphlets, billboards, talk radio, and blogs. It is not harm (...) to the white liberals who find the racist invective distasteful. Maybe we should admire some (...) lawyer who says he hates what the racist says but defends to the death his right to say it, but...[t]he [real] question is about the direct target of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by this material? Those are the concerns that need to be answered when we defend the use of the First Amendment to strike down laws prohibiting the publication of racial hatred*”<sup>27</sup>.

Among the criminological studies on hate crimes, those that have tried to outline a profile of the perpetrator of hate crimes stand out. Although it is unthinkable to identify an invariable type of the *hate crime offender*, some traits common to many offenders have been identified. Often these are young subjects, mostly represented by white males, followed by black males and white women. It is debated whether these are subjects who come from situations of social hardship: it is agreed that the perpetrator of hate crimes is often also a socially integrated subject<sup>28</sup>.

According to a criminological acquisition, it is frequently about perpetrators unknown to the victims, as we have already had the opportunity to highlight, but this is not a constant fact, since very often it can also be a neighbor, an acquaintance, when it does not happen, as in gender-based violence, it is a person linked by an emotional relationship with the victim. Often these are subjects who live in the same city or work in the same organization, however they are subjects with whom you are familiar<sup>29</sup>. This figure is then accentuated in the case of minor crimes, such as intimidation. On the contrary, the attacks on the physical integrity of the victim seem to be more perpetrated against unknown victims. On this point, the thesis, supported in the doctrine, according to which, in the case of hate crimes, there is familiarity between victim and author, but there is an “emotional distance” on the part of the author with respect to this last<sup>30</sup> seems to be well founded.

The offender tends to attack the individual victim (in 83% of cases). The perpetrator, single, more often, or group, attacks above all victims whom he considers vulnerable and unable to react. Weapons are rarely used and above all these are events that arise spontaneously and without premeditation, by

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Office for Democratic Institutions and Human Rights, 2009, in the Preface, p. 7.

26 Against incrimination of hate speech, A. Pugiotto, *Le parole sono pietre? I discorsi d’odio e la libertà d’espressione nel diritto costituzionale*, in *Diritto penale contemporaneo*, 2013, p. 1 ss, in part. p. 6 ss. On restorative justice, see C. Mazzucato, *Offese alla libertà religiosa e scelte di criminalizzazione. Riflessioni de iure condendo sulla percorribilità di una politica mite e democratica*, in G. De Francesco, C. Piemontese, E. Venafro, *Religione e religioni: prospettive di tutela, tutela della libertà*, Torino, Giappichelli, 2007, p. 134 ss.

27 J. Waldron, *The Harm in Hate Speech*, cit., p. 105 e p. 9 ss.

28 C. Turpin-Petrosino, *Understanding Hate Crimes. Acts, Motives, Offenders, Victims, and Justice*, New York-London, Routledge, 2015, p. 106 ss.; N. Chakraborti, J. Garland, *Hate Crime. Impact, Causes, and Responses*, London-New York, Sage, 2015, p. 105 s.; P. B. Gerstenfeld, cit., p. 99.

29 Id., cit., p. 100, See also N. Chakraborti, J. Garland, *Hate Crime*, cit., p. 107 ss.

30 Id., cit., p. 108.



subjects without a criminal record for hate violence, which makes some scholars say that criminal provisions against hate crimes could prevent new crimes of this nature<sup>31</sup>.

In particular, a typological classification of hate crime offenders by Levin and McDevitt was developed in the nineties in the context of American criminological doctrine. According to this classification, there would be perpetrators who act on the basis of emotion, authors who act convinced that they are operating in defense of their territory, authors who believe they are acting with the mission of driving out evil from the world, and finally, according to a fourth type, there would be authors acting in retaliation<sup>32</sup>.

The general-preventive mechanism, which can operate for the first two types of authors mentioned and for the fourth, would seem unable to operate in the case of the offender who acts in the name of a salvific mission, a subject that cannot be justified by reason of the radicality of the conviction that moves him and that often acts by carrying out conducts characterized by extreme brutality<sup>33</sup>.

The first type, that of the offender who is driven to the crime out of boredom and in search of emotions, as well as out of prejudice, moving away from his neighborhood in search of an unknown victim, would seem, according to subsequent studies, the most widespread<sup>34</sup>.

However, this complex classification has been openly criticized over time. This led Levin and McDevitt to revisit it: the two criminologists therefore highlighted how the different categories can overlap each other and also identified different roles and degrees of guilt among the participants in these crimes (when committed by a group): the leader, the travel companion (the one who incites the leader), the involuntary participant (the one who does not approve the act, but does not have the courage to rebel for fear of losing the approval of the group), the hero (the one who disapproves of the act and opposes it)<sup>35</sup>.

Similar to the typification of Levin and McDevitt is the categorization of the perpetrators made by Willems, according to the degree of adherence to the ideology of hate: thus the sympathizers, the young criminals, the xenophobic or ethnocentric and finally the right-wing extremists are identified,

31 J. McDevitt, J. Levin, J. Nolan, S. Bennet, *Hate Crime Offenders*, in N. Chakraborti, *Hate Crime. Concepts, Policy, Future Directions*, London-New York, Routledge, 2015, p. 124 ss., 127 ss.; D. Joliffe, D. P. Farrington, *The Criminal Careers of Those Imprisoned for Hate Crime in the UK*, in *European J. of Criminology*, 2019, I-20, p. 2 ss.

32 The first type seems to belong above all to young aggressors who act out of boredom and in search of emotions (rather than out of hatred, although prejudice is the engine of their actions and acts as a motive like the search for entertainment). The second type includes those who act to protect their neighborhood, their school or place of work: it is often a young adult, exemplified in the figure of the young person who acts against a family belonging to an ethnic minority recently moved to the neighborhood to which it belongs. Then there is the offender who acts convinced that he is pursuing the mission of saving the world: here the motivation of hatred or prejudice is central and often the violent act is committed by a group. Finally, there is the typology of the offender who acts in the belief that he is reacting to a wrong suffered by the victim or the group to which the victim of hate crimes belongs. This is the classification of Levin and McDevitt, formulated in a first study, already mentioned: J. Levin, J. McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, New York, NY Plenum, 1993. See J. McDevitt, J. Levin, J. Nolan, S. Bennet, *Hate*, cit., pp. 132 ss. See also D. Gadd, T. Jefferson, *Introduzione alla criminologia psicosociale. Verso una nuova teorizzazione del soggetto criminale*, a cura di A. Verde, Milano, Franco Angeli, 2016, p. 173 ss.

33 P. B. Gerstenfeld, cit., p. 103.

34 See B. D. Byers, B. W. Crider, *Hate Crimes Against the Amish. A Qualitative Analysis of Bias Motivation Using Routine Activities Theory*, in *Deviant Behaviour*, 2002, 23, 115 ss.; K. Franklin, *Antigay Behaviours Among Young Adults. Prevalence, Patterns, and Motivators in a Noncriminal Population*, in *J. of Interpersonal Violence*, 2000, 15, 339 ss.; P. B. Gerstenfeld, cit., p. 100.

35 *Ibid.*, p. 135 ss. See J. McDevitt, J. Levin, S. Bennet, *Hate Crime Offenders. An Expanded Typology*, in *J. of Social Issues*, 2002, 58, p. 303 ss., and J. McDevitt, J. Levin, J. Nolan, S. Bennet, *Hate Crime Offenders*, cit., p. 143.

the latter with a leadership role in the commission of hate crimes<sup>36</sup>.

*Hate crimes are sometimes group crimes, therefore. This consideration leads to thematizing the so-called hate groups, a particular profile of the author of hate crimes.*

It is not easy to define a hate group. According to a definition found in Anglo-Saxon literature, “a hate group (which is composed of at least two or more individuals) presents aggressive and defamatory beliefs or practices of an entire class of people, typically due to their immutable characteristics”<sup>37</sup>.

The common feature of hate groups is therefore the hostile animus towards a group (ethnic minorities, LGBT people, other protected groups), based on race, ethnicity, religion, gender or sexual orientation. However, there are important differences in the structure, organization, leadership, ideology, and strategies adopted by different hate groups<sup>38</sup>.

It is therefore not possible to outline a unique profile of the so-called hate group. What appears to be established is the relative infrequency of hate crimes perpetrated by these groups: according to the data of Levin and McDevitt, only in 15% of cases are hate crimes committed by extremist groups. However, the incidence of hate crimes is equally linked to the influence that these groups exert in spreading a culture of hate. Many scholars have highlighted the culture of hostility, hatred and irrational violence that these groups help to create, a culture that is the background and legitimacy for hate crimes<sup>39</sup>.

As for the characteristics of the members of the hate groups, more often they are “marginalized subjects, with a failed school career, with problematic, insecure, alienated, helpless and angry family relationships”<sup>40</sup>. However, criminological research also highlights the involvement of integrated subjects, with stable family relationships, who nourish a sense of insecurity and apprehension due to the increasingly plural and heterogeneous nature of society.

The value system that inspires the work of the hate group, as we said, varies considerably from group to group. However, according to a recent criminological classification, we can identify some typical and recurrent reasons that animate these groups: the affirmation of an alleged racial superiority (there are many “white supremacist” groups), sometimes legitimized on the basis of a religious tradition, homophobic sentiments (more often directed towards men rather than women), contempt for ethnic minorities, immigrants and Jews, finally anti-statist ideologies<sup>41</sup>. The watchword that unites these groups, from an ideological point of view, is “power”. In particular, they talk about “White

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36 H. Willems, *Right-Wing Extremism, Racism or Youth Violence? Explaining Violence Against Foreigners in Germany*, in *New Community*, 1995, 21, p. 501 ss.

37 See C. Turpin-Petrosino, *op. cit.*, p. 109.

38 The common trait is the organizational one, but the level of organization is very varied: sometimes they are smaller and sometimes larger groups, often identified by common or uniform symbols; there are specific criteria for belonging to the group and sometimes an identification card is required; they have their own literature and sometimes raise funds to support the group. Very often the religious trait characterizes the group.

39 See C. Turpin-Petrosino, *cit.*, p. 110.

40 *Id.*, *cit.*, p. 111. In-depth studies were conducted on how to recruit members of the hate group. Some of these point out that often the personal bond with a person already belonging to the group is fundamental: at the origin of the choice to become part of the group there would be the need to establish or increase emotional and friendly relationships. However, more often the purpose with which one joins the group is to achieve the preservation of one's culture and values. Group members leverage the subject's sense of frustration and dissatisfaction to induce him to join the group, promising to preserve its culture and values. Above all, recent studies indicate that it is above all the attraction of committing violent acts that leads to joining the group, once joined to which racist feelings and attitudes are also strengthened, which remain even when you decide to leave the group. On such studies see P. B. Gerstenfeld, *cit.*, p. 174 ss.

41 See C. Turpin-Petrosino, *cit.*, p. 120 ss.

Power". These are in fact groups – the white supremacists – which are animated by the concern of the loss of power in the hands of whites and which embrace eugenic and racist theories in order to legitimize the domination of the superior race over others. This is accompanied by the idea of racial separation. An ideology that often finds its legitimacy in religious thought (Christian and otherwise)<sup>42</sup>.

A further taxonomy, within white supremacist groups, is often proposed: one distinguishes between extreme right-wing racist movements (think, in the US, the *Ku Klux Klan* and the *Christian Identity Groups*) and white resistance movements (think to Neo-Nazi groups and *Skin-heads*). Alongside these groups, there have also recently been nativist groups that aim to oppose the phenomenon of migration<sup>43</sup>.

When hate groups become protagonists in the first person of hate crimes, they are, according to the criminological findings, of hate crimes characterized by extreme violence<sup>44</sup>. So much so that, according to some scholars, hate groups are not distinct from terrorist groups<sup>45</sup>.

But the most significant acquisition is the following: the strategy of hatred is pursued mostly through the dissemination of publications, pamphlets, as well as messages that incite hatred towards the protected group conveyed, among other things, through the network and the web. The diffusivity of these tools means that even subjects not affiliated with the hate group become recipients of these messages and come to share the culture of violence promoted by the group and to implement it<sup>46</sup>. So it is necessary to deepen *the relationship between hate crimes, as well as hate speeches and social media, given that the diffusion of hate online is an acquired fact in criminological research* that affects both single authors of hate speech and also hate groups. In particular, as Ziccardi recalls, the Internet has provided before and even more since the 2000s a "forum in which racists could create their messages and transmit them all over the world, with very little effort, managing to bring offenses on a large scale"<sup>47</sup>.

It may therefore be useful to test the spread and incidence of hatred on the net and we have chosen to do so with reference to the Italian context. Some recent testimonies of the spread of hate on the net in Italy come from the Italian Observatory on Rights (Vox) which has mapped intolerance based on the study of hate messages on the net. Let's retrace the historical evolution of the data collected.

First of all, the third mapping of hate online shows that in the years 2017-2018 homophobic hatred decreased (negative tweets drop from 13,195 in 2017 to 8,727 in 2018), perhaps due to the law on civil unions, while it is growing exponential xenophobic hatred, which manifests itself in a high intolerance towards the migratory phenomenon, fueled especially by the landings of refugees (25,197 negative

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42 P. B. Gerstenfeld, *cit.*, p. 165 ss. Often, through the hate group attempts are also made to exert a weight in political and social life. Many members of these groups are in fact candidates in political elections in the ranks of far-right forces.

43 *Id.*, *cit.*, p. 147.

44 N. Chakraborti, J. Garland, *Hate Crime*, *cit.*, p. 111.

45 See P. B. Gerstenfeld, *cit.*, p. 143.

46 See C. Turpin-Petrosino, *cit.*, p. 112 ss. Often common acronyms and mottos characterize the work of hate groups: think for example of the acronym SWP, Supreme White Power, the acronym WPWW, White Pride Worldwide, the acronym RAHOWA, Racial Holy War, the acronym ZOG, Zionist Occupational Government; think of the number 88, which stands for Heil Hitler, since the H represents the eighth letter of the alphabet. Other tools for conveying the supremacist ideology are real rallies or marches where the symbols of this ideology are flaunted. The use of the telematic tool – the so-called hate online – is aimed not only at communicating with the affiliates of the group, but above all at spreading the hate message also to potential followers and to communicate with other hate groups spread all over the world. See on the topic P. B. Gerstenfeld, *cit.*, p. 180 s. On online hate see G. Ziccardi, *L'odio online. Violenza verbale e ossessioni in rete*, Milano, Cortina, 2016, *ivi*, on racial and religious hate, p. 105 ss., on homophobic hate, p. 135 ss.

47 G. Ziccardi, *op. cit.*, p. 70.

tweets in 2018 against 23,540 positive), anti-Semitism (6,566 negative tweets in 2018 against 2,847 positive), and Islamophobia (26,783 negative tweets in 2018, depicting Muslims as terrorists and jihadists or “vu cumprà”, against 16,042 positive), all figures on the rise compared to the 2017 surveys. It is very high hate against women, which is unleashed even when the news records cases of femicide (100,899 negative tweets in 2018 against 42,537 positive). Hatred of disabled people is also widespread online: 11,257 negative tweets in 2018 against 5,414 positive ones.

The third mapping has been adjusted by the fourth mapping of hate online, updated to 2019, from which similar data emerge: homophobic hatred is decreasing, which is rekindled when debating rainbow families (7,808 negative tweets against 3,933 positive); Islamophobia is confirmed in the first position in the online hate ranking. The most affected cities are Bologna, Turin, Milan, Venice. Stimulated by international events, such as the attacks, and instigated by a certain political narrative, intolerance against people of Islamic faith fades in the communities where their presence is more integrated. The negative tweets are 22,532 against 6,823 positive tweets. Migrants are in first place among the categories of people most affected by hate speech, in clear growth compared to the previous year. And, among the most intolerant cities, Milan stands out. There are, also following the utterances of politicians, 49,695 negative tweets against 24,756 positive tweets.

As for anti-Semitism, it is reported that hatred against Jews is rampant and is getting worse. It is concentrated in Rome and its surroundings. Almost non-existent in previous years, anti-Semitism explodes on Twitter. It mainly affects central Italy and targets Jews using stereotypes and fake news. Compared to Islamophobia, anti-Semitism does not need the inspiration offered by international events to unleash it. Negative tweets are 15,196 against 4,756 positive tweets. As for the disabled, Vox says that today they are in the crosshairs of hate. Compared to 2018, intolerance against people with disabilities has grown sharply: it rises with the media hype around issues related to the world of disability. Its spread throughout the peninsula is striking. The negative tweets are 16,676 against 6,823 positive tweets. Misogyny is stable.

Lastly, the online hate mapping was updated in 2020, with the fifth mapping, from which it emerges that in the year of the pandemic online hate focuses on women, especially if they work. And against Jews and Muslims. However, one main fact is striking. Hate speech has decreased significantly compared to 2019. In summary, it is hated in a different, more rooted and radical way, even if quantitatively the phenomenon has decreased: this incisiveness of intolerance in the online world is worrying, but also the specular diffusivity of this phenomenon at a geographical level. The social categories most exposed to the changes and adaptations necessary to overcome the current pandemic crisis are hated: women and migrants. Jews still are victims of hate in a stable way, because historically, in every period of crisis, object of intolerance.

Vox writes, “*a panorama that worries, because hating in a more rooted way is the activation factor of different and more organized forms of extremism*”<sup>48</sup>.

Going into more detail, the Vox mapping highlights a redistribution of total negative tweets; in fact, in 2019 the most affected clusters were migrants (32.74%), followed by women (26.27%), Muslims (14.84%), disabled (10.99%), Jews (10.01%) and homosexuals (5.14%). In 2020, women (49.91%) and Jews (18.45%) occupy the first two places, followed by migrants (14.40%), Muslims (12.01%), homosexuals (3.28%) and disabled (1.95%). There is also a higher percentage of negative tweets than positive ones in the following categories: disabled, women and Muslims.

Five, the main considerations that emerge from the research that I faithfully report.

“Compared to past years, the languages of hate are more *widespread throughout the country*, surpassing the concentration, typical of past editions, in large cities. Despite the confirmation of the

48 See the last mapping on the site: [www.voxdiritti.it](http://www.voxdiritti.it).

most affected categories (women, Muslims, Jews, migrants), however, *a certain stabilization emerges as regards above all homosexuals and people with disabilities*. Probably a sign of the spread of a more inclusive culture, the result of communication campaigns for social inclusion and the regulatory framework for protection, which is gradually being established (especially with regard to homosexuals). A particular focus deserves *misogyny*, which is still predominant. Strong, continued, concentrated attacks on women. But with a particularity. In addition to the ubiquitous body shaming attitudes, many attacks have contained the competence and professionalism of women themselves. It is the work of women, therefore, that emerges this year as a co-factor triggering misogynistic hate speech: an element, which has never appeared with this evidence in previous surveys, which seems to lead back to the broader reflection on the job opportunities of women linked to new way of working during the pandemic, with a focus on smart working. Another important focus concerns *anti-Semitism*, growing in absolute value compared to 2019 (today we are at 18.45% of the total negative tweets detected, in 2019 we were at 10.01%). In this case, the upward trend recorded over the years is worrying, passing from 2.2% in 2016, in a constant progression, to current data. And if the heavy outbreaks of anti-Semitism in the course of historical eras crossed by crises and fears is unfortunately all too well known, it should be added that, by disaggregating the data, a more positive curve is instead captured. Of all those who tweeted about Jews, in fact, the positive tweets this year outweighed the negatives for the first time: 74.6% positive tweets, *vs* 25.4% negative. To return to the comparison with the period November - December 2019, the percentage was clearly reversed (69.75% negative *vs* 30.25% positive). Other targets of the haters are the *Muslims*. The tweets of hatred and discrimination referring to Muslims come close to the more general category of *xenophobia* (12.01% of negative tweets out of the total of negative tweets detected in the first case, 14.40% of negative tweets out of the total of negative tweets detected in the second). The hatred of Muslims via Twitter is corroborated and activated both by national events (such as the case of the liberation and return to Italy of Silvia Romano) and by international events (such as the terrorist attack in Reading on June 20). Finally, it should be emphasized that the geographical distribution of hateful or discriminatory tweets against Muslims is more widespread throughout the country, although there are concentrations in some cities in Northern Italy<sup>49</sup>.

Conclusively, these data confirm the profile of the victims of hate crimes and hate speeches that emerges from criminology. As come from the study of the harmfulness of hate crimes, it is proven that such crimes have a worse impact on the victim than ordinary crimes: this is why it is important to study the *victimological profile* of such crimes<sup>50</sup>. *Criminological research has shown that the fact of being chosen as victims on the basis of personal and immutable characteristics generates a sense of vulnerability and victimization with a unique character*: the victims know that they cannot avoid fur-

49 *Ibidem*.

50 It is necessary to point out the difficulties in investigating the victimological profile, due to the high obscure number on the subject: various possible causes. Mostly, the victims of hate crimes, especially ethnic minorities, but also LGBT people, tend not to report the crimes they have suffered, sometimes due to a lack of trust in the police force, sometimes due to linguistic and cultural limitations. So much so that, in the U.S.A., alongside the official surveys carried out by the police, an annual survey on victimization is carried out, the so-called NCVS, or National Crime Victimization Survey, with which they try to measure the incidence of crimes regardless of the *notitiae criminis* collected by the formal social control agencies. Although only in recent times this tool has been used to investigate the motivations of the offender, in the view of the victims, this survey would reveal a number of hate crimes far more consistent than what emerges from the FBI data. Difficulties are also encountered in the interpretation of data and in the recording of hate crimes, once reported: often the same fact can represent a racial and ethnic as well as religious hate crime. See extensively on this topic P. B. Gerstenfeld, *cit.*, p. 192 s. On victim in the criminal system, today more protagonist, see M. Venturoli, *La vittima nel sistema penale. Dall'oblio al protagonismo?*, Napoli, Jovene, 2015, p. 1 ss., 86 ss.

ther attacks due to the personal characteristics of which they are carriers and this creates in them a strong sense of insecurity, much higher than the insecurity perceived by the victims of ordinary crimes. As noted in the literature, hate crimes are distinguished from this point of view for two reasons: first of all, there is a historical tradition of victimization motivated by racial, anti-Semitic and homophobic hatred; secondly, there is an ongoing complicity of social institutions and the dominant culture in the labeling of protected groups. These two components, together, account for the greater damage that accompanies the victimization of protected groups compared to that caused to the victims of ordinary crimes<sup>51</sup>.

So, which are the most frequently victimized groups online and offline? The most recent statistical data suggests that the first victims of hate crimes, in all legal systems, are *ethnic minorities*. It is no coincidence that racial prejudice is the primary motivation for hate crimes: if we consider the US context, it is an example of the primacy of racial hate crimes, committed to a greater extent, in that system, towards African-American victims, also due to a long historical tradition of discrimination dating back to the Civil War. The “black” victims are very easily identifiable and therefore more often the target of the haters. Furthermore, their lower legal protection by formal social control agencies makes them reluctant to report the hate crimes they have suffered<sup>52</sup>.

Ethnic/racial hate crimes are interpreted through various explanatory theories. In particular, there are two theories: the so-called power threat hypothesis and the so-called power differential hypothesis. The first theory postulates that hate crimes against ethnic minorities are perpetrated when “whites” believe that emerging minority groups pose a threat to their economic, social and political security. The second theory hypothesizes that, when “whites” dominate a particular neighborhood and control its political institutions (the victimization of ethnic minorities occurs more often in the areas of residence of the victims), they are less reluctant to commit hate crimes because of the power they enjoy. For both theories, these are crimes that represent the product of conflictual dynamics in the name of which the offenders act in order to safeguard the “white hegemony”<sup>53</sup>.

Increasingly, in many jurisdictions, based on the most recent data, victimization affects LGBT people secondarily: homophobic hate crimes compete for the field, so to speak, with racial hate crimes.

In this sense, the English, French and Spanish data are explaining. The US example is also emblematic: historically discriminated against in this legal system, homosexuals have taken on a strong social visibility following a revolt aimed at affirming the rights of LGBT people, the so-called Stonewall Rebellion, in 1969: since then, data from the Federal Bureau of Investigation testify to a constant increase in homophobic hate crimes, an increase also confirmed by the most recent surveys (16% in 2017)<sup>54</sup>.

What are the contours and impact of this victimization?

Most of these are crimes against the person and against property perpetrated towards LGBT vic-

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51 The serious attacks on physical integrity suffered by members of protected groups generate a sense of strong helplessness and frustration. The data of the American Department of Justice, which since the 1970's has compiled annual statistics on victimization, are unequivocal in this sense: over time, victimization resulting from hatred has increasingly become violent victimization that translates into assaults on life and the physical integrity of the protected groups. See C. Turpin-Petrosino, *cit.*, p. 136 e s. To similar conclusions the recent Report, dated 2017 on 2004-2015 years. See M. Masucci, L. Langton, *Hate Crime Victimization, 2004-2015*, BJS, U.S. Department of Justice, 2017, p. 1 ss.

52 See P. B. Gerstenfeld, *cit.*, p. 202, and L. Goisis, *Giustizia penale e discriminazione razziale*, in *Diritto penale contemporaneo*, 2012, p. 22 ss.

53 See C. Turpin-Petrosino, *cit.*, p. 140 ss.

54 P. B. Gerstenfeld, *op. cit.*, p. 194.

tims (more often by white males), at school, in the workplace, or even at home. In fact, it is not uncommon for the attacks to come from the victim's own family, which translates into a profound trauma for the victim. Criminological research highlights the brutality of attacks against this type of victim, who suffers a very marked psychological impact that is destined to last over time, a much more disruptive impact than that caused by ordinary crimes.

The obscure number is very high with reference to homophobic hate crimes due to the tendency of victims not to report in order not to declare their sexual orientation and this for fear of further victimization. The broad set of empirical research leads the criminological doctrine to affirm that homophobic violence is "common and widespread"<sup>55</sup>.

Not only. It also emerges from the criminological literature that such attacks are more serious than those that characterize racial and religious hate crimes<sup>56</sup>. However, as we said, criminal legislators do not always include sexual orientation among the protected characteristics. In particular, it emerges that victimization mostly affects male homosexuals (rather than female subjects), especially those of color; that they are more often crimes against the person, perpetrated in groups. Hate crimes against homosexuals occur more often in public places, those against lesbians in private places<sup>57</sup>.

The reasons behind this violence are many: certainly, the frequency and full social acceptance of homophobic prejudice, as well as arguments of a religious or moral nature, which, despite the affirmation of the movement for the recognition of the rights of homosexuals, condemn homosexuality. A further reason: the manifestation of homophobic hatred is often seen as a way to demonstrate one's masculinity. Where homophobic violence is expressed by hate groups, it is frequent to resort to arguments related to the moral and biblical prohibition of this practice, to the inadmissibility of special rights for LGBT people, as well as to their responsibility for the spread of AIDS, and finally to their violation (especially in the case of transgender subjects) of gender roles<sup>58</sup>. As Perry points out, offenders believe homosexuals should be punished for refusing to "interpret gender appropriately"<sup>59</sup>.

Finally, the most frequent victimization is that motivated by *religious hatred*. Religious hate crimes are in fact very widespread in various countries. What is important to observe is that religious hatred strikes the most diverse victims: taking the US legal system as an example again, for its representativeness in relation to the issue of hate crimes, it can be observed how, according to data from the Federal Bureau of Investigation, religious hatred is today and still above all anti-Semitic hatred – as has been observed "no form of hatred has been as universal, profound and permanent as anti-Semitism"<sup>60</sup> – and to follow anti-Islamic hatred, a hatred that grew exponentially following the notorious attack on the Twin Towers<sup>61</sup>. This is followed by hate crimes committed against Catholics,

55 P. B. Gerstenfeld, *cit.*, p. 214 ss.; G. M. Herek, J. Gillis, J. C. Cogan, *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, in *J. of Consulting and Clinical Psychology*, 1999, 67, p. 945 ss.

56 C. Turpin-Petrosino, *cit.*, p. 152 s. The results of the criminological investigations also seem to highlight a double discrimination against LGBT people of color. In particular, the study of E. Dunbar, A. Molina, *Opposition to the Legitimacy of Hate Crime Laws. The Role of Argument Acceptance, Knowledge, Individual Differences, and Peer Influence*, in *Analysis of Social Issues and Public Policy*, 2004, 4 (1), p. 91 ss., a study that testifies to the different brutality of hate crimes where the bias motivation is different, in addition to the presence of multiple forms of discrimination against people with multiple protected characteristics (race, sexual orientation, gender).

57 See P. B. Gerstenfeld, *cit.*, p. 216.

58 See *Id.*, *cit.*, p. 219 ss.

59 B. Perry, *In the Name of Hate: Understanding Hate Crimes*, New York-London, Routledge, 2001, p. 116.

60 D. Prager - J. Telushkin, *Why the Jews? The Reason for Anti-Semitism*, New York, Simon & Schuster, 1983, p. 17.

61 According to the statistics of the FBI, *Uniform Crime Report, Hate Crime Statistics 2017*, of the total religious hate crimes, 58.1% are anti-Semitic hate crimes (mostly crimes against property) and 18.7% are anti-Islamic hate crimes. See also C.

against various religious groups, against Protestants, against other Christians, against the Sikh minority, against the Orthodox. Although Jews make up only 3% of the American population, well over 15% of Americans (especially African Americans) harbor anti-Semitic sentiments and denier attitudes<sup>62</sup>.

In this case, also, the victimization is very strong due to the fact that the victim is chosen not in the name of what he has done, but in the name of what he is, that is in the name of a fundamental trait of his personality: being affected in the depths of one's identity it has a greater and more lasting emotional impact<sup>63</sup>.

Alongside racial, homophobic and religious hate crimes, disability and gender (as well as gender identity and, sometimes, homelessness) appear among the protected characteristics, for a high level of victimization.

As for the victims of hate crimes on grounds of *disability*, these are often subjects known and familiar to the offender who may be a relative or a person who takes care of the victim. A victim who very often does not report – the obscure number is very high compared to such crimes – as they are not even aware of having suffered a crime, especially in the case of individuals with mental deficits.

A critical profile with respect to this category of hate crimes is underlined by those who doubt that they are crimes in which more than the animus hostile towards a group, that of subjects with physical or mental disabilities, is in the presence of mere acts of bullying, an objection often raised also with reference to the crimes committed against the so-called homeless<sup>64</sup>.

On the other hand, the debate on crimes based on *gender* hatred is broader and more articulated, unanimously traced back in doctrine to the desire to affirm masculinity and the power of men over women<sup>65</sup>.

### 3. The Italian legislative panorama

When compared with the legislative landscape that emerges from the comparative perspective, and even if the criminological frame of the traditional and online hate in Italy is distressing, the Italian experience in the field of racial, religious, homotransphobic, sexist and by disability discrimination is scarce. The Italian legislator, on one hand, has ruled on racial and religious hate crimes and hate speeches with a scant special legislation (the so called "Legge Reale-Mancino"), recently transposed into the Criminal Code. On the other hand, Italy does not have any anti-homophobia law, nor does it provide for criminal rules, of ordinary rank, which incriminate or aggravate the sanctioning treatment for discrimination based on the victim's sexual orientation, gender identity or gender. Very scarce also the ad hoc norms aimed to protect disabled persons.

On homotransphobic discrimination, in particular, in the Italian context, however, there has been

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Turpin-Petrosino, *cit.*, p. 154 ss., in part. pp. 156-157. The study of the data relating to the individual jurisdictions allows us to highlight the increase in attacks against Muslims: for example, in Colorado there are no such attacks in the first part of 2001, while they amount to 19 in the second half of the year following the terrorist attacks on the Twin Towers. In Texas, anti-Islamic attacks went from 4 to 63. The data provided by associations in defense of discrimination against Muslims (in particular The American-Arab Anti-Discrimination Committee) testify to even higher numbers of Islamic victimization after 11<sup>th</sup> of September: in the order of 600 victims in the following six months. On the point P. B. Gerstenfeld, *cit.*, p. 194 ss.

<sup>62</sup> See *Id.*, *cit.*, p. 205 s.

<sup>63</sup> *Id.*, *cit.*, p. 159 s.

<sup>64</sup> *Ibidem.*

<sup>65</sup> See P. B. Gerstenfeld, *cit.*, p. 227 s.



debate for some time about the appropriateness and legitimacy of punishing acts of discrimination committed against homosexuals and transsexuals, as well as to punish with an aggravated sentence, thus providing for an aggravating circumstance, those crimes committed due to the homosexuality/transsexuality of the victim<sup>66</sup>.

In the first direction – that is, the provision as an autonomous type of crime of acts of discrimination due to homophobia – was the bill (AC 2807, in the name of Di Pietro) presented in October 2009 in Parliament and aimed at modifying the ratification law of the 1966 Convention on racism (law n. 654 of 13<sup>th</sup> of October 1975, the so-called Reale law) and the Mancino law, that is the law of 25<sup>th</sup> of June 1993, n. 205, in order to extend to behaviors based on homophobia and transphobia criminal offences provided for acts committed for racial, ethnic, national, religious reasons (the project also provided for the extension of the aggravating circumstance of racial hatred pursuant to Art. 3 of the so-called Mancino law).

In the second direction – the provision of a common or special aggravating circumstance – went the unified draft law AC 2802 and AC 2807, presented by Hon. Paola Concia in November 2010: the bill provided for the introduction in the special part of the Criminal Code of two aggravating circumstances at Articles 599-*bis* and 615-*quinquies* of the Criminal Code. There was no lack of proposals for the introduction of the homophobic aggravating circumstance in the body of Art. 61 of the Italian Criminal Code, with the provision of a paragraph 11-*quater*, exclusively applicable to non-culpable crimes against individual life and safety, or individual personality, personal freedom, moral freedom<sup>67</sup>.

The Italian Parliament rejected the various bills presented, most recently in November 2012, accepting on several occasions two preliminary questions, based on the principle of equality pursuant to Art. 3 of the Constitution, as well as on the principle of legality (in particular on the principle of precision) pursuant to Art. 25, paragraph 2 of the Constitution<sup>68</sup>. Issues that in reality both appear unfounded: above all the so-called argument of “reverse discrimination” is disavowed only if one thinks of the most recent statistical data on hate crimes (we will mention the data later) which testify of the diffusion and pervasiveness of homophobic violence, establishing in the sense of a condition of weakness and vulnerability of a group, that of LGBT people, also proven by the criminological findings on the gravity of homophobic hate crimes, a condition that the imperative of equality not only suggests, but requires to protect, according to a principle of differentiated protection of objectively different situations, in compliance with the principle of reasonableness. An argument which is also linked to the greater criminal value of crime inspired by homophobic hatred<sup>69</sup>.

Seemed to welcome the warning of the doctrine the relatively recent intervention of the legislator on homophobia, transfused into the bill AS 1052, the so-called “d.d.l. Scalfarotto”, approved in the House on 19<sup>th</sup> of September 2013. The bill, in line with the European idea of an assimilation between racial hatred and homophobic hatred<sup>70</sup>, extended the incriminating norms of the Reale-Mancino law to conducts based on “homophobia or transphobia”. However, in our opinion, not inappropriately, the bill excluded the extension for the crime of propaganda of racist ideas pursuant to Art. 3, paragraph 1, lett. a), part I, l. n. 654/1975. The legislator, in making this omission, seems in fact to have acknowledged the need to avoid the creation of new crimes of opinion.

66 E. Dolcini, *Omofobia*, cit., p. 25 ss.

67 Id., cit., p. 30.

68 See Id., *Di nuovo affossata una proposta di legge sull'omofobia*, in *Diritto penale e processo*, 2011, 11, p. 1393 ss.

69 Id., *Omofobia*, cit., p. 25 ss.

70 See L. Goisis, *Libertà d'espressione e odio omofobico. La Corte europea dei diritti dell'uomo equipara la discriminazione in base all'orientamento sessuale alla discriminazione razziale*, in *Rivista italiana di diritto e procedura penale*, 2013, p. 425.

“There is only one serious objection that can be advanced today against the proposal to extend – by the legislator – the provisions of the Reale law and the Mancino law to homophobic behavior (...). The problem concerns the reconciliation of the contrast to homophobia with the freedom of expression of thought (Article 21 of the Constitution)”<sup>71</sup>, as observed in the doctrine. Although, in our opinion, the balance between the juridical goods at stake, freedom and equality/dignity of the person, as well as the interpretation in light of the concrete danger and the contextualization of the propaganda and instigation offences, conducted by the judiciary, allows partially to overcome the doctrinal criticisms against the Italian anti-discrimination system based on hate speeches<sup>72</sup>.

The so called Scalfarotto’s bill, however, had been stranded in the Senate for years now.

Pending a reform of the discipline – inaugurated today by the combined drafts of bills from Hon. Zan, Hon. Boldrini, Hon. Bartolozzi, Hon. Scalfarotto and Hon. Perantoni, finally approved today in the Assembly – it is impossible not to suggest to the Italian legislator that his task is currently facilitated when one thinks of the presence in Italian legal system of a code system for the repression of racial hate crimes (ethnic, national and religious) which, making use of the two legislative techniques, both the aggravating circumstance and the autonomous type of crime – now contemplated in Articles 604-*bis* and 604-*ter* of the Criminal Code, significantly among *Crimes Against Equality*, following the so-called reserve code, implemented in 2018, which (partially) transfused the combined provisions of the so-called Reale-Mancino law in the Code – establishes a highly effective criminal law against hate crimes.

On the one hand, in fact, various offenses are envisaged: in Art. 604-*bis* c.p. the propaganda of ideas based on superiority or racial or ethnic hatred, the crime of inciting or committing acts of discrimination for racial, ethnic, national, religious reasons, the crime of inciting to commit acts of violence or the commission of violence or acts of provocation to violence for racial, ethnic, national or religious reasons. Any organization, association, movement or group having among its purposes the incitement to discrimination or violence for racial, ethnic, national or religious reasons is also prohibited. Alongside these typical behaviors, the so-called aggravating of denial. On the other hand, Art. 604-*ter* c.p. contemplates the aggravating circumstance of racial hatred: “for crimes punishable by a penalty other than life imprisonment committed for the purpose of discrimination or ethnic, national, racial or religious hatred, or in order to facilitate the activities of organizations, associations, movements or groups that have among their finalities the same purposes, the penalty is increased by up to half”.

While there remains room for discussion on the best formulation of the criminal rules to combat homotransphobia and misogyny – model the rules that provide for homophobic discrimination acts as a crime in a manner that respects the principle of precision on the example of foreign legislations, especially the French one, the use of expression “homophobia/transphobia”, rather than “homosexuality or transsexuality of the victim”, rather than “sexual orientation and gender identity of the victim”, the use of the term “reason”, “purpose” rather than “motives” – is to the new Section I-*bis*, within the scope of Title XII, Chapter III of the Criminal Code, entitled to *Crimes Against Equality* and the proven anti-discrimination system of the Reale-Mancino law, transfused in this Section of the Penal Code, which must be observed to counter the phenomenon of homotransphobia and misogyny.

In our opinion a proposal *de iure condendo* must be suggested: *it is necessary to insert in Articles 604-bis and ter of the Criminal Code the reference to sexual orientation and gender identity, as well as gender and also disability.*

The Italian legislator has attempted to remedy this obvious legislative gap with reference to the

71 E. Dolcini, *Omofobi: nuovi martiri della libertà di manifestazione del pensiero?*, in *Rivista italiana di diritto e procedura penale*, 2014, p. 22.

72 See L. Goisis, *Crimini*, cit., p. 202 ss.

categories of gender, sexual orientation and gender identity<sup>73</sup> and, finally, disability – only by filling which the principle of equality can be truly respected – through the recent draft of law, named *d.d.l. Zan et Alii*, on the 4<sup>th</sup> of November 2020 approved by the Assembly of the Italian Chamber of Deputies.

A more deeply study of the contents of this text of law, now to be examined by the other branch of the Italian Parliament, the Senate, is mandatory.

#### 4. The recent bill approved in the Italian Chamber of Deputies: a needed reform

It is known that the so called *d.d.l. Zan et Alii*, named by the rapporteur, has been approved as a unified text (AAC 107, 569, 868, 2171 and 2255) – the result of the various proposals from Hon. Boldrini and others, Hon. Zan, Hon. Scalfarotto and others, Hon. Perantoni and others, Hon. Bartolozzi – on 30<sup>th</sup> of July 2020 within the Justice Commission of the Italian Parliament. This draft of law, titled “*Amendments to Articles 604-bis and ter of the Criminal Code, on violence or discrimination on grounds of sex, gender, sexual orientation or gender identity*”, consists of 10 Articles, which focus on both repressive and preventive strategies (also protective), in order to counter forms of homotransphobic discrimination and misogynist violence, which, as stated in the accompanying report to the unified bill, are continuously growing according to statistical surveys. *Today*, after the approval in the Chamber, *the discipline has been correctly extended also to disability*.

Articles 2 and 3 of the *d.d.l.* modify the *Crimes Against Equality* provided for by Articles 604-*bis* and *ter* of the Criminal Code to add discriminatory acts based on “sex, gender, sexual orientation, gender identity or disability” to discrimination on racial, ethnic, national and religious grounds. The extension concerns offence of instigation to carry out or carry out discriminatory and violent acts re-

<sup>73</sup> There are numerous general and specific arguments raised in the debate on homophobia against the criminalization of homophobic and transphobic hate crimes. We would like to draw our attention to the objection relating to the violation of the principle of equality and the so-called “reverse discrimination”, to the detriment of heterosexuals, as well as the elderly and disabled. On this point, it seems necessary to highlight the reasonableness of a discrimination based on the principle of “differentiated treatment of the distinguished”: the vulnerability of the victims of hate crimes, and in particular of the victims of homotransphobic hate crimes, of which criminological and psychiatric science show evidence, undoubtedly makes, in our opinion, necessary the choice of providing for a penal discipline to contrast homotransphobia. As has been authoritatively underlined, “on the other hand, it is a well-known phenomenon in our legal system that a *particular vulnerability of the victim*, connected to a specific personal condition and/or to a specific space-time context, establishes a *disparity in criminal protection*: it suffices think of the common aggravating circumstance of Art. 61, n. 5, *c.p.* (so-called aggravating circumstance of the minority defense)” (E. Dolcini, *Omofobi*, *cit.*, p. 17). However, in our opinion, even if the greater vulnerability of sexual minorities is denied, there is undoubtedly the greater criminal value of the conducts inspired by transphobic and homophobic motivation: the reason for the greater gravity (as well as the greater degree of guilt) of the conducts inspired by racial hatred. A further criticism refers to the presence in Italian Penal Code of the so-called aggravating of abject and futile reasons, referred to in Art. 61, n. 1 *c.p.* (F. Pesce, *Omofobia e diritto penale: al confine tra libertà d’espressione e tutela di soggetti vulnerabili*, in *Diritto penale contemporaneo*, 2015, p. 21 e 31). However, the argument is without foundation because it ignores the fact that at the jurisprudential level there are no applications of the aggravating circumstance in question to the reasons of homotransphobia. In fact, jurisprudence emphasizes that this aggravating circumstance must be recognized on the basis of the average assessments of the community at a given historical moment: it is now evident that the acceptance of homosexuality is by no means the object of unanimous agreement in Italian society. See L. Goisis, *Crimini*, *cit.*, p. 519 *ss.*

ferred to in letters a) and b) of paragraph 1 of Art. 604-*bis* of the Criminal Code, as well as the associative hypothesis referred to in the second paragraph of the same article, excepting the extension of the propaganda, thus avoiding entering into potential collision with the freedom of expression (as well as the hypothesis of denial). Art. 3 similarly extends the aggravating circumstance so called of racial hatred to conducts based on sex, gender, sexual orientation, gender identity or disability. Art. 4 contains a clause of safeguard for freedom of expression and pluralism of ideas. Art. 5 amends Art. 1 of the law 25<sup>th</sup> of June 1993, n. 205, on the one hand, introducing the possibility of carrying out unpaid activities in favor of the community provided for therein also in the case of conditional suspension of the sentence and suspension of proceedings with probation. It is also envisaged that the community service can be carried out in associations and organizations that are interested in protecting the victims of the crimes referred to in Art. 604-*bis* of the Criminal Code, considering the reasons that led to the conduct<sup>74</sup>.

Furthermore, Art. 6 of the *d.d.l.* amends Art. 90-*quater* of the Code of Criminal Procedure, including among the vulnerability conditions of the offended person relevant for the purposes of the criminal trial also those arising from the fact that the crime is committed for reasons related to sex, gender, sexual orientation, gender identity or disability. Finally, Articles 7, 8, 9 provide for policies to promote the equal dignity of LGBT people and support actions in favor of victims of crime. Art. 10 requests Istat (Italian Institute of Statistics) to carry out surveys, at least every three years, on discrimination, violence and the characteristics of the subjects most exposed to risk, in order to verify the application of the reform and implement policies to combat racial and ethnic discrimination, religious, or based on sexual orientation or gender identity.

Some brief *comments* on the bill, which appropriately welcomes the warnings of a part of the criminal law doctrine.

On the one hand, it can be observed that the terminology used is *respectful* of the *principle of precision*: as we said, in fact, the terms sexual orientation, gender identity and gender, the same term sex, probably added in the unified text at the request of the feminist movements and in our opinion not necessarily introduced, are able to guarantee the precision and clearness of the type of offence, as also demonstrated by the experiences of foreign legislations that invariably make use of it, also avoiding discriminatory outcomes: in fact, these are terms widely used in Italian legal system (in labor law, in the penitentiary law, in the language of the Constitutional Court, as well as of the supranational courts, and in international documents). Art. 1, lastly introduced in the text of law, defines all these terms according to the most accepted interpretation, so that the precision is guaranteed<sup>75</sup>. Even if would have been more *appreciable*, for the reasons explained above, the choice *not to include definitions for criminal purposes* in the bill (despite the warning to this effect from the Constitutional Affairs Commission and the Legislation Committee): definitions risk not only excluding certain categories of subjects, but above all to create an unreasonable disparity with respect to the categories origi-

74 It is necessary to underline some critical aspects of the reform. With the amendment of paragraph 1-*quater* (letter a), n. 3 and 4, relating to community service, the maximum duration of 12 weeks is eliminated: this involves the application of Art. 37 of the Criminal Code, which establishes the principle of equivalence with respect to the main penalty, which could produce unreasonable outcomes. See Camera dei Deputati, Servizio Studi, Dossier n. 219/1.

75 Art. 1. – “For the purposes of this law: a) by sex we mean biological or personal sex; b) gender means any outward manifestation of a person that is in conformity or in contrast with the social expectations connected with sex; c) sexual orientation means sexual or emotional attraction towards people of the opposite sex, the same sex, or both sexes; d) by gender identity we mean the perceived and manifested identification of oneself in relation to gender, even if not corresponding to sex, regardless of having completed a transition path”. The same notion of discrimination can be found in the national and international anti-discriminatory legislation (as usually made by ordinary jurisprudence), even if a definition, similar to the French Criminal Code, could have been very useful.

nally protected by the discipline in question: race, ethnicity, nationality, religion.

On the other hand, we recalled in other place the attention of the legislator to the appropriateness of including *disability* as a factor of discrimination: although the aggravating circumstance referred to in Art. 36 of the law n. 104/1992, there is no discipline for the hypothesis of crimes of discrimination and violence due to disability. To corroborate the opportunity to introduce this additional factor of discrimination, in addition to its presence in the anti-discrimination legislation of various foreign countries, there is in our opinion the same provision of the bill which continues to include among the contents of the community service also the work in favor of social assistance and voluntary organizations, such as those operating towards the disabled. So that is *provident the last choice to introduce in the discipline the additional factor of discrimination of disability*, even if a clearer coordination between this reform and the law n. 104/1992 should have been operated (abolishing Art. 36 of this law).

Finally, the provision of the bill which contemplates a statistical survey program, in Italy today in deficit, appointed to verify the application of the law, as well as the implementation of policies to combat discrimination and violence of a racial and homophobic matrix, is worthy of note: this would make it possible to assess the effectiveness of criminal legislation to combat hate crimes and therefore the very symbolic nature of such legislation.

As for the *objection* most frequently raised to this bill – *its alleged liberticidal nature*, invoked, as is known, in the public debate, by members of the conservative parties, as well as by the Italian Episcopal Conference (CEI) itself in some recent occasions – it should be noted that it is a matter of *specious objection*.

First of all, the bill does not extend the protection to the propaganda, but only to the incitement to discrimination and violence, as well as to acts of discrimination and violence. This argument alone would be enough to rule out any concern about future restrictions on freedom of expression. However, the objection is also instrumental because it does not consider the consolidated jurisprudential approaches in the Italian legal system: it is undisputed that constitutional as well as ordinary jurisprudence<sup>76</sup> has constantly interpreted the instigating offences in the light of the concrete danger, balancing the interests at stake – freedom of expression and human dignity – in favor of the second, equal dignity precisely, the juridical good protected by *Crimes Against Equality*. The ECtHR operated according to the same logical process. In other words, freedom of expression is not endangered by this reform: nor is it clear why the objection should apply only to homotransphobic and gender discriminations (today also to ableism) and not to racial and religious ones, which have always been the subject of criminal protection.

However, it could be appropriate to provide, in order to dispel any doubts on this point, as well as in foreign legal systems, a clause to safeguard freedom of expression: in this direction, we can greet with favor, albeit in perfectibility of the formulation, the so called Costa amendment, which, accepting the suggestion of the Constitutional Affairs Commission, has recently inserted a new Art. 3 (today Art. 4) in the text of the unified draft of law, containing precisely such a clause, which has been correctly rewritten by the Assembly and now reads as follows: “pursuant to this law, free expression of beliefs or opinions is permitted as well as legitimate conduct attributable to the pluralism of ideas or the freedom of choices, as long as not able to determine the concrete danger regarding the fulfillment of acts of discrimination or violence”<sup>77</sup>. This formulation of the clause – which seems to be a clause excluding the possibility of punishment – is respectful of the judicial interpretation just mentioned,

<sup>76</sup> See, on this jurisprudence, L. Goisis, *Crimini*, cit., p. 202 ss.

<sup>77</sup> L. Milella, *Omofobia: la maggioranza con Forza Italia su emendamento salva-opinioni*, in *la Repubblica*, 23 luglio 2020. See the site of the Italian Chamber for the reports to Assembly of Hon. Zan, held starting from 3<sup>rd</sup> of August 2020 until 4<sup>th</sup> of November 2020.

claiming the concrete danger of the conduct: however, the tenor of the clause should be, in our opinion, more precise<sup>78</sup>.

A further objection raised against the proposed law currently being examined by the Italian Parliament refers to the unnecessary nature of the legislative intervention on the matter. In our opinion, there are three direct reasons, in addition to the specific criminal law arguments already mentioned, which disavow this objection and place in the sense of the inalienability of the reform in gestation: the presence of an international obligation (at least implicit for the homotransphobic hate crime and expressed for gender hate crime) to criminalization, an obligation corroborated by the now constant jurisprudence of the ECtHR, as well as the victimological data, which cannot be ignored, plus a constitutional reason.

International documents on homophobia make it possible to deduce the existence of an obligation – at least implicit – to criminalize homophobic hate crimes.

The set of international provisions on the subject first of all contemplates those agreements which provide for a prohibition of discrimination. At the European level, Art. 14 of the ECHR which provides for a general prohibition of discrimination; the same Treaty on European Union, in Art. 2, defines respect for human dignity, equality and fundamental human rights; moreover, more specifically, Art. 21 of the Charter of Fundamental Rights of the European Union prohibits all forms of discrimination based, among other things, on sexual orientation. Similarly, the Treaty on the functioning of the European Union, in Art. 10, clarifies that, in the definition and implementation of its policies, the Union aims to combat discrimination based on sex as well as sexual orientation, a prohibition of discrimination reinforced by Art. 19 of the same Treaty<sup>79</sup>.

There are also important soft law instruments, albeit not legally binding: stand out the Resolutions on homophobia of the European Parliament of 2006 and 2012, which suggest, indeed require, the intervention of criminal law in the fight against homophobia<sup>80</sup>. These soft law instruments, if they do not clearly imply, due to their intrinsic nature, as evidenced in the doctrine, an express obligation to incriminate homophobic hate crime<sup>81</sup>, nevertheless represent a non-negligible warning for the national legislator. What is certain is that, on an international level, it is excluded that there may be prohibitions on the indictment of homophobic hate crime and above all of homophobic hate speech<sup>82</sup>. It is stated, at European level, also in the light of the legislations that have taken a similar path, in the sense that “defining the incitement to hatred, violence or discrimination against LGBT people as a crime can coexist with respect for freedom of expression”<sup>83</sup>. This framing of the homophobic hate speech shows how there is unanimity of views at the international level on the advisability of resorting to criminal law in the fight against homophobic hate speech, reinforced in our opinion also by the presence of a more general international obligation, imposed on the national legislation from Art. 117, paragraph 1 of the Constitution, to the criminal repression of other forms of hate speeches, racial, religious and national, where they prove to be concretely dangerous. This is due to, among other things, the New York Convention of 1965, the ECHR, the same Statute of the International Criminal Court<sup>84</sup>. So much so

78 It should be construed, for example, as the Australian one. See *supra*, in the notes.

79 F. Pesce, *cit.*, p. 7 ss.

80 See, on similar soft law international documents, M. Pelissero, *Omofobia, cit.*, p. 16.

81 See *Id.*, *cit.*, p. 18.

82 *Hate speech* whose definition can be found in Recommendation (97) 20 of the Council of Europe. See A. Weber, *Manual on Hate Speech*, Council of Europe, 2009, p. 3.

83 Fra, *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity*, European Union Agency for Fundamental Rights, 2010, p. 36 ss.

84 G. Pavich-A. Bonomi, *Reati in tema di discriminazione: il punto sull'evoluzione normativa recente, sui principi e valori in gioco, sul-*

that it could be assumed that an obligation of criminalization, on the basis of the rules mentioned above, also exists for homophobic hate crimes.

With regard to *gender-based violence*, we have already mentioned the obligations of criminalization arising from the Istanbul Convention.

Not only. The analysis of the jurisprudence of the European Court of Human Rights in the field of homophobia allows us to grasp the orientation towards enhanced protection of sexual minorities. Suffice it to mention the well-known *Vejdeland* case<sup>85</sup>. The sentence is noted because it chooses to give a positive response to the debated problem of the use of criminal sanctions in the fight against hate crimes: like racial hate crimes, homophobic hate crimes can also be countered through recourse to criminal law. In a similar direction, but even more eloquent, that of an obligation to criminalize, the subsequent sentence *M. C. and A.C. v. Romania* of 12th of April 2016<sup>86</sup>. As had been done by the Court in the previous *Identoba et alii v. Georgia*, of 12th of May 2015<sup>87</sup>. The European Court reaches similar conclusions in the recent *Lielliendahl v. Iceland*, of 11th of June 2020, ruling in which the violation of Art. 10 of the ECHR, which protects freedom of expression, is excluded in the case of the Icelandic law against homophobic hate crimes, by reason of the recognition of a need to protect “the rights of others” and the equalization of discrimination on the basis of sexual orientation to racial ones. Similar *dictum* in *Beizaras and Levickas v. Lithuania* of 14th of January 2020, where the Court condemned the State involved for not having prepared suitable measures to repress homotransphobic phenomena<sup>88</sup>.

Therefore, it cannot be ruled out that the Italian government is exposed to the risk of being condemned by the European Court, should a similar case of homotransphobic violence emerge, in consideration of the fact that there has not yet been any legislation on the matter. If the jurisprudence of the European Court, as pointed out in the doctrine, has weight in the interpretation of the Italian legislative framework, given that it also constitutes a parameter of constitutionality for the Italian Constitutional Court, based on the interpretation of Art. 117, first paragraph, of the Constitution, the legitimacy of criminal law in the fight against homophobia – sanctioned by the Strasbourg Court in its most recent decisions – cannot be ignored even by the Italian legislator. Ultimately, the jurisprudence of the European Court of Human Rights leads, in our opinion, to corroborate the thesis about the existence of an international obligation to penalize hate crimes, among others, of a homotransphobic nature.

Pacific is also the Court’s orientation in the fight against gender-based violence, considered a violation of Art. 3 of the ECHR, that is an inhuman and degrading treatment, an open manifestation of the violation of the human rights of female victims<sup>89</sup>.

Lastly, *the victimological data – as we just demonstrated – point to the inalienability of the law on homotransphobia, misogyny and ableism.*

*le prospettive legislative e sulla possibilità di interpretare in senso conforme alla Costituzione la normativa vigente*, in *Diritto penale contemporaneo*, 2014, p. 15 ss.

85 ECtHR, 9th of February 2012, *Vejdeland et alii v. Svezia*, N. 1813/07. See L. Goisis, *Libertà*, cit., p. 418 ss.

86 ECtHR, *M. C. e A.C. v. Romania*, 12th of April 2016, N. 12060/12. See C. Danisi, *Omofobia e discriminazione: la continua evoluzione nell’interpretazione della Cedu*, in *Articolo29*, 2016, p. 1 ss., [www.articolo29.it](http://www.articolo29.it), and also C. Fatta, *Hate Crimes all’esame della Corte di Strasburgo: l’obbligo degli Stati di proteggere i membri della comunità LGBTI*, in *Nuova giurisprudenza civile commentata*, 2016, 10, p. 1330 ss.

87 ECtHR, *Identoba et alii v. Georgia*, 12th of May 2015, N. 73235/12. See P. Dunne, *Enhancing Sexual Orientation and Gender-Identity Protections in Strasbourg*, in *Cambridge Law Journal*, 2016, 75, p. 4 ss.

88 See on these cases, respectively N. 29297/18 and N. 41288/15, the site of the ECtHR: [hudoc.echr.coe.int](http://hudoc.echr.coe.int).

89 See L. Goisis, *Crimini*, cit., p. 435, p. 440 ss.; F. Tumminello, *Violenza contro le donne nella giurisprudenza della Corte EDU: da Opuz c. Turchia al caso Talpis*, in *Iusinitinere*, 2018, [www.iusinitinere.it](http://www.iusinitinere.it).

The evidence related to the spread of the phenomenon of homophobia, in all the forms described above, is given by the statistical surveys collected in numerous foreign countries and also in the Italian legal system on hate crimes. Despite the absence of sufficiently detailed official statistical data referring to Italy, both as regards racial hate crimes and homophobic hate crimes, the surveys provided by Oscad and Unar are currently available. The Observatory for Safety against Discriminatory Acts, Oscad, in collaboration with Unar, the National Office against Racial Discrimination, collects data on subjects who have suffered a crime in relation to race/ethnicity, religious belief, sexual orientation/gender identity and disability. According to the data provided by Oscad, 2,532 reports were recorded in Italy between 10<sup>th</sup> of September 2010 and 31<sup>th</sup> of December 2018 (a clearly not insignificant number), of which only a part constituting a crime, for which there were arrests and complaints. In particular, 59.3% (897) are ethnic/racial hate crimes, 18.9% (286) are religious hate crimes, 13% (197) are crimes of homophobic hatred, for 7.8% (118) of crimes against the disabled, for 1.0% (15) of hate crimes based on gender identity. The latest survey 2020 points out as the hate crimes has been 1,119 in 2019: 805 racial/religious hate crimes, 207 disability hate crimes and 107 homotransphobic hate crimes<sup>90</sup>. Lastly, the data collected by Vox, the Observatory for Rights, that we already mentioned, took part to corroborate the statistical data.

The qualitative, as well as quantitative, resurgence of acts of homotransphobic violence is therefore a phenomenon also present in Italy: which clearly demonstrates the *vulnerability of LGBT subjects*, as systematic victims of aggression motivated only by aversion to their sexual orientation<sup>91</sup>.

Consistent, reading these data, also the discrimination against disabled persons, by reason of their psychological or physical “difference”.

With reference to gender-based violence, most recently, according to the latest Istat surveys, updated to 2019, it is enough to recall one figure above all: it affects 6 million and 788 thousand women who have suffered physical or sexual violence during their lifetime<sup>92</sup>. Istat observes how, in reality, despite an encouraging number relating to a slight decline in violence, negative and by no means negligible signs emerge. “*The hard core of violence*”, writes the research institution, “*is not affected: rapes and attempted rapes are stable as well as the most heinous forms of physical violence. The severity of sexual and physical violence has increased*”<sup>93</sup>. In fact, in the last five years, compared with the five years prior to 2006 (the date of the first important Istat research on the subject), violence by partners and former partners has increased: the women who have suffered injuries increased (from 26.3% to 40.2%), very serious or medium-severe violence increased from 64% to 76.7%, women who feared for their lives following the violence they suffered increased from 18.8% to 34.5%. Gender-based violence,

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<sup>90</sup> See [www.interno.gov.it](http://www.interno.gov.it); [hatecrime.osce.org/italy](http://hatecrime.osce.org/italy). In addition to these recently emerging data, the evidence of the presence of strong homophobic violence also in the Italian society are numerous and reliable: the reports drawn up by Arcigay on the basis of news relating to episodes of a clear homophobic nature recorded annually by the mass-media. The portrait that emerges from the 2019 report of homotransphobia cases, noted since May 2018, is worrying: 187 cases of homotransphobia recorded by the press are up, compared to 119 cases in the previous year. Obviously, this number does not exhaust the dimension of the phenomenon (not all discrimination or homotransphobic violence ends up in the newspapers), but the comparison of this indicator with those of past years traces a trend that cannot fail to alarm. See Arcigay, *Omotransfobia, 187 casi nel report 2019 di Arcigay*, at [www.arcigay.it](http://www.arcigay.it). In fact, according to the report for the years 2013-2014, there were 75 reports of attacks in those years (about half compared to today). See V. Branà, Ed., *Report Omotransfobia 2013-2014*, 2014, p. 1.

<sup>91</sup> On this vulnerability, see E. Dolcini, *Omofobia*, cit., p. 24.

<sup>92</sup> A. Battisti, *La violenza contro le donne. Dai nuovi dati statistici ai nuovi strumenti di contrasto e di prevenzione*, Istat, 6 March 2019, [www.istat.it](http://www.istat.it).

<sup>93</sup> A. Battisti, *La violenza*, cit., slide 15.



therefore, remains an alarming phenomenon, both quantitatively and qualitatively. Data that are also reflected in the Vox survey on hatred of women on the net that we remembered before. *Data which prove undoubtedly the necessity of the legislative intervention.*

*This makes, in our opinion and partially of the criminal law doctrine, urgent and fully justified<sup>94</sup> the intervention of the legislator and above all the criminal legislator, who, precisely because of the “differentiated treatment of objectively different situations”, imposed by Art. 3 of the Italian Constitution, as declined in the light of the principle of reasonableness, will have to prepare a reinforced protection of subjects that the criminological reality proves to be in conditions of weakness and vulnerability<sup>95</sup>, which explains why in Europe the EU Directive 29/2012 included gender expression, gender identity, sexual orientation, in addition to gender and disability, among the protected victimological characteristics, due to the particular vulnerability of these victims.*

Ultimately, the victimological data, together with the international obligations and the warnings of the European Court of Human Rights, as well as the greater criminal value of conduct inspired by homotransphobic, gender and by disability hatred, and also the *constitutional question* in relation to the *Crimes Against Equality* which should provide protection to *all factors* contemplated in Art. 3 of the Constitution, fully legitimize the current Italian reform of law, which – albeit with the limits and the compromises that any legislative intervention pays for – aims, on one side, to combat two phenomena – *homophobia and misogyny* (or rather sexism) – which are the result of the same *patriarchal vision* of the world, a vision that is *no longer acceptable* nor for modern societies, nor for the legal sciences and especially for contemporary criminal law, on the other side, to *complete the frame of protection of disabled persons.*

## 5. Conclusion. A useful discipline also for online hate crimes?

As Ziccardi points out, “if hate speech online, as regards the “themes”, is not inherently different from similar expressions found offline, there are unique challenges that are related to online content and its regulation”<sup>96</sup>.

Four, in particular, are the differences between online hate speech and traditional hate speech. First of all, the permanence of hatred, that is, the possibility of hatred online to remain in circulation for a long time and to spread like wildfire: think of the trending topics on Twitter that facilitate the dissemination of hateful messages; the possibility of hatred to reappear even if the hate message has been deleted; the importance of anonymity, which induces people to hate freely; finally, the transnationality of hatred that increases the effect of hate speech<sup>97</sup>.

Faced with these peculiarities of online hatred, it can be seen that it is an evolving phenomenon that puts the law to a severe test.

Here we need to ask ourselves whether the repressive measures, and in particular the use of criminal law, in its sanctioning component, are sufficient to counteract such a complex and peculiar phenomenon as online hatred. In particular, it is necessary to ask whether the Italian discipline of crimes against equality, reformed in the direction of punishing also homotransphobic, gender and disability-based hate speech, as I said, can really be an effective discipline also on the ground hate online.

94 See M. Pelissero, *Omofobia, cit.*, p. 18.

95 E. Dolcini, *Omofobia, cit.*, p. 25 ss.

96 G. Ziccardi, *cit.*, p. 80.

97 *Id., cit.*, p. 78.

In our opinion, recourse to criminal law, in this historical phase – steeped in discrimination and overflowing with hate – is also essential in the field of online hatred as well as in the field of traditional hatred, with the foresight however that, *in the fight against online hatred, more targeted tools are needed*, which call into question the responsibility of various social actors – for example the providers which cannot be considered free from obligations and duties<sup>98</sup> – and not only of the criminal judge.

The Italian discipline of crimes against equality, if reformed according to the draft law in gestation, can only constitute a first step in the fight against online hatred, be it of a racial, religious, gender, sexual orientation or identity gender and disability nature. Much must be done by primary prevention, civil society and other fields of law (as private and administrative law).

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<sup>98</sup> See V. Nardi, *I discorsi d'odio nell'era digitale: quale ruolo per l'Internet Service Provider?*, in *Diritto penale contemporaneo*, 2019, p. 11 ss. It is questioned, in particular, if can be drawn an omissive responsibility for not having prevented the crime for the internet provider.