THE RIGHT TO ANONYMITY. OVERVIEW OF THE INSTITUTE AND ANALYSIS OF ITS EVOLUTION IN THE AGE OF THE WEB REVOLUTION

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Abstract

The contribution examines the phenomenon of anonymity starting from the analysis of the legal basis and then examining its evolution in the context of the information revolution produced by the origin of the internet. In particular, the essay starts from the reconstruction of the national and supranational regulatory framework and then reflects, in a more detailed manner, on the problems (including jurisprudential) deriving from the use of anonymity by authors of denigrating and offensive messages, in violation of the protection of others dignity. Hence, the reflection on some of the critical issues that currently undermine the protection of personality rights in comparison with an improper use of anonymity and with the consequent risk of severing that link between freedom and responsibility which should rather support every human action.

Keywords

Right to Anonymity, Privacy, Freedom of Speech, Dignity, Net.

Summary

1. For an introduction to the concept of anonymity. - 2. In search of a legal basis for the right to anonymity. - 3. The consequences of the internet revolution on anonymity: regulatory and jurisprudential evolution. - 4. Conclusions.

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1. FOR AN INTRODUCTION TO THE CONCEPT OF ANONYMITY.

In the world of human relationships, writing about a lack is never too simple as it can force the Author to deal with the pain of a loss or, again, with the emptiness of a desire never realized.
But even in the scientific field, investigating an "absence" can raise many critical issues, especially if the concept we are examining is defined starting from a deprivation.
In this case, in fact, "anonymity" is a term that derives from the Greek, "α+ὄνομα", and can be literally translated as "nameless".
From a legal point of view, therefore, anonymity presupposes the lack of something which is, commonly and initially, used to identify a subject, namely the "name", which constitutes "an essential and indispensable part of the [...] personal sphere"[2] of each person.
In the legal system, the *right to a name* is configured as a *personality right* and therefore has the characteristics of *necessity*, *imprescriptibility*, *absoluteness*, *non-patrimoniality* and *unavailability*[3].
However, the attribution of a name[4] not only fulfills a "private" function, helping to define the most personal and intangible sphere of the individual, but also a "publicistic" function, since it is the main instrument of social identification of the individual all within the community[5] and therefore cannot be modified "except in the cases and with the formalities indicated

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[2] IUZZOLINO 2022, 107. In other words, the "name is the sign that identifies each person and that allows personal deeds and events to be referred to each person, even if absent", like this RICCI 2008, 78 ss.
[3] On the inclusion of the right to a name among personality rights GROSSI 1991, 260 ss.
[4]Which, as provided by art. 6, second paragraph, cod. civ., consists of a first name and a surname.
[5] Cf. RICCI cit., 77.

by law”[6]. On closer view, therefore, it is precisely the concept of “personal identity”, of which the name is perhaps the first and main attribute, which expresses this ambivalence – individual and social – of the individual's identification process, implying the latter as the projection of the *social self* and therefore the representation of the person in the context of social relations[7].

Therefore, it is evident how the coordinates of this reasoning are destined to change when the author of a certain thought or a given conduct makes use of anonymity, preventing (or impeding) the traceability of the action to his person[8]: “[i]n the most generic meaning of the term, any act or relationship of a person with a legally unknown name can be considered «anonymous»”[9].

However, beyond the more specific and sectoral declinations of the topic (explicable in the civil, criminal, administrative and, naturally, constitutional fields), it is first of all necessary to ask ourselves whether anonymity can constitute the object of an autonomous legal claim, through the recognition of a real *right to anonymity* (*ex se* claimable *erga omnes*) or if, on the contrary, its

[6] Art. 6, par. 3, civ. code. “The interest that the name satisfies, as a sign of identification of each individual, is therefore twofold. In fact, the public interest in identifying associates is accompanied by the private interest in enjoying and having one’s identity recognized through the use of one's name”, like this RICCI cit., 83.

[7] NIGER 2008a, 113 ss.

[8] For a distinction on the formal and substantial notion of anonymity see PELINO 2008, 34 ss., who observes: the formal notion of anonymity “defines ‘anonymous’ writing that lacks the formal indication of the author's name, or even an equivalent sign, such as a pseudonym or an acronym of known meaning. (...) The second notion, however, regardless of strictly formal elements, gives relevance to any possible connection between a writing and an author from whom it comes, so that only when faced with a truly unknown author can the statement be said to be truly ‘anonymous’: it is the substantial notion of anonymity. According to this latter approach, therefore, the unsigned writing may *not* even be anonymous”.

[9] CANDIAN 1958, 500.

protection appears merely instrumental towards the protection of other constitutionally relevant assets and interests.
A question which, in truth, has already been resolved by the prevailing doctrine in the sense of excluding the configurability of anonymity as an autonomous subjective right[10], highlighting rather its *instrumentality* to the enjoyment of other rights; the topic we are discussing therefore requires to be investigated with greater accuracy by verifying, on the one hand, the nature and extent of the rights, on the basis of which a need for the protection of anonymity can be deduced and, on the other, analyzing the evolution of the matter by virtue of the consequences resulting from the internet revolution[11], which, as is known, has opened up new and unprecedented scenarios in terms of anonymity, enormously strengthening the techniques and tools for the manifestation of anonymous thoughts.
It is equally well known, however, that the *online* dissemination of anonymous messages often leads to the violation of others' right to honour and individual reputation, so that the need to deal with any possible abuse of the use of anonymity is increasingly felt, in order to prevent it from turning into an instrument of legal irresponsibility for the perpetrator of an offence.
Hence, the choice to delve in depth in the pages that follow both the question relating to the search for a legal basis for anonymity and the evolution that this legal situation has undergone in comparison with the development of the new means of digital information and communication, analyzing the actions undertaken at a regulatory level to counter the proliferation of anonymous crimes.

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[10] On the "instrumental" function of anonymity see *ex multis* MORELATO 2008,136 ss.
[11] "This has generated a social habit of anonymous speech. While in the material world people tend to identify themselves when they enter into relations with other persons, on the Internet this is not widespread practice", like this ZENO-ZENCOVICH 2014, 103-116.

2. IN SEARCH OF A LEGAL BASIS FOR THE RIGHT TO ANONYMITY.

Given the necessary premises regarding the individualistic and social function covered by the "name" in the legal system, it seems reasonable to suppose that anonymity cannot enjoy any legal coverage[12] if conceived as a mere faculty of the individual to *not* exercise the right to the name[13]. The reason is simple: the failure to reveal the name, in fact, would hinder the fulfillment of that function of social identification that the legislator has attributed to as "name", ascribing the latter among the criteria for tracing a certain action back to its author.

If we carefully observe, therefore, the recognition of the right to a name, strictly connected to the definition of the personal identity of each individual, sets itself as an immediate and direct explanation of the broader and more general principle of responsibility[14], as well as of the principle of legal certainty (and of legal relations) and, *last but not least*, of the *personalist*

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[12] In a similar sense TASSINARI 2008, 182 ss.

[13] As well as qualified instead by BRECCIA 1988, 441: "There is talk of an autonomous «right to anonymity», but, upon closer inspection, the phenomenon can be included in the phase of the exercise of the «right to the name», even if it is the negative or omission aspect of this exercise. Anonymity, in itself, is a legitimate choice of the subject (sometimes strictly connected to the defense of other values of the person, such as intimacy or confidentiality)". As observed instead by GROSSI cit., 260 ss., the right to a name "cannot be depicted as a situation of freedom, given its necessary and not merely possible function as an instrument for the identification of the person (see articles 494 to 496 of the penal code): it derives, in fact, from, on the one hand, the extension of the identical claim also in favor of those who, although not carrying it, have "an interest based on family reasons worthy of protection" (art. 8 of the civil code); on the other, the owner's lack of enjoyment in a negative form, consisting in the possibility of not using it".

[14] "«Responsibility» means that a subject must account on a human, moral or legal level for facts, activities, events of which he is the author or party involved, and suffers the consequences", FLAMINI 2013, 1.

principle[15] which, as is known, has abstracted itself from the liberal individualistic tradition to materialize the person in the context of social relations, with a view to reciprocity with other individuals[16].
However, if the reconstruction of an autonomous right to anonymity appears to be of dubious admissibility, especially if configured as a right to have one's name forgotten, the same cannot be said for those cases in which the protection of anonymity is instrumental to the guarantee of others constitutionally protected rights and interests, first of all the *right to privacy*[17],

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[15] Likewise, TASSINARI cit., 184, observes: "If, as suggested above, the attribution and use of the name constitutes a fundamental aspect of the certainty (and even of the genesis) of inter-individual legal relations and State-citizen relations, anonymity in its capacity as an autonomous right places itself, not in line, but in contradiction with constitutional values; the knowledge of one's name by other members, in fact, is configured as a prodromal fact to the fulfillment of the social duties to which art. 2 of the Constitution refers".
[16] BOBBIO 2022, 42: "I call a person the individual in a reciprocal relationship with other individuals. Person is the individual no longer withdrawn into himself, but turned towards others and therefore towards society. As a socially oriented individual, or social individual, the person is a living synthesis of individuality and sociality. The needs of the individual and those of society find their point of unification in the individual, who, rather than closing in on himself, reaches out towards others and is recognized and reciprocated by others with an equal reaching out of others towards him, in the individual who in the reciprocal relationship with other individuals, equal to him, ceases to be an individual and becomes a person. In the person, individuality and sociality meet, the historical tension between individual and society calms down".
[17] In truth, the right to the protection of private life is not expressly mentioned in the Italian Constitutional Charter; however, the inviolability of this right has been recognized hermeneutically both in the jurisprudence of the Court of Cassation (see in particular sentence no. 2129 of 1975) and in that of the Constitutional Court. More precisely, in sentence no. 38 of 1973, the constitutional judges, through a systematic and extensive interpretation of articles. 2 and 3 of the Constitution, include the right to respect for privacy and intimacy among the inviolable human rights (point 2 of the *Consideration in law*).
On the enucleation of "new rights" in constitutional jurisprudence, see more fully MANGIAMELI 2020, 169 ss., which includes among the cc.dd. "new rights" those relating to one's decorum, honour, respectability, intimacy, reputation and confidentiality. For further and more accurate information on the "constitutional coverage" of the right to

understood in its original meaning of "*right to be let alone*"[18] or, more generally, respect for the private life of the subject, as expressly established in art. 7 of the Charter of Fundamental Rights of the European Union[19] and art. 8 of the European Convention on Human Rights[20].
It is in this direction that, for example, the constitutional jurisprudence regarding the right to anonymity of the biological mother militates[21]. In particular, already in sentence no. 425 of 2005, the judge of laws endorses the choice of the legislator, made in art. 28, paragraph 7, of law no. 184 of

privacy, see again MANGIAMELI 1982, 1034 ss., e 1980, 545 ss., where, thinking more specifically about the compatibility of the oath formula with the protection of confidentiality, it is highlighted how the "right not to reveal one's beliefs" constitutes "the foundation for the recognition of the rank of «constitutionally guaranteed freedom» to the right to confidentiality, at least under the more limited aspect of the negative freedom of expression of thought" (559). With respect to the connection between confidentiality and anonymity, writes COSTANZO 2003, 77: "Anonymity also represents the most effective means of protecting personal privacy, to the protection of which our legal system has dedicated (...) a complex protection discipline".

[18] According to the famous definition of WARREN, BRANDEIS 1890, 193.

[19] Art. 7 Charter of Fundamental Rights of the European Union, Respect for private and family life: "Everyone has the right to respect for his or her private and family life, home and communications".

[20] Art. 8 European Convention on Human Rights, the Right to respect for private and family life: "1. Everyone has the right to respect for his private and family life, his home, and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[21] Otherwise, the recognition of a right to anonymity for a woman who has resorted to the application of medically assisted procreation techniques does not seem admissible, as provided, among other things, by art. 9, paragraph 2, of law no. 40 of 2004 (Regulations regarding medically assisted procreation): "The mother of the child born following the application of medically assisted procreation techniques cannot declare her wish of not to being nominated, pursuant to article 30, paragraph 1, of the regulation referred to in the decree of the President of the Republic of 3 November 2000, n. 396".

1983, to protect the anonymity of the natural mother, without any type of limitation (even temporal), also regarding the adopted minor who wishes to obtain some information on his or her origin. In fact, according to the opinion of the Court, "the choice of the pregnant woman in difficulty that the law wants to favor – to protect both her and the unborn child – would be made extremely difficult if the decision to give birth in an adequate medical facility, remaining anonymous, could lead to for the woman, on the basis of the same rule, the risk of being, in an unspecified future and at the request of a never-known and already adult child, consulted by the judicial authority to decide whether to confirm or revoke that distant declaration of will" (point 4 of *Considered in law*).

In truth, the mentioned provision was declared constitutionally illegitimate with sentence no. 278 of 2013[22], in the part in which this did not provide – through a procedure, established by law, which ensures maximum confidentiality – the possibility for the judge, upon request of the child, to consult the mother who had declared that she did not wish to be named, actually making the secret irreversible[23]. However, in the reasoning carried out by the Court, the principle already enunciated in the previous decision regarding the natural mother's right to anonymity is confirmed: "The founding nucleus of the choice then adopted is thus easily grasped in the

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[22] The mass of notes commenting on the decision is considerable: *ex plurimis*, AGOSTA 2021; BALDINI 2014; BARBISAN 2016; RUGGERI 2014; STEFANELLI 2013, 4031 ss.; MASCIOTTA 2016; FRONTONI 2013.

[23] It is also worth pointing out that the Constitutional Court's decision came after the European Court of Human Rights, in its ruling of 25 September 2012 (*Affaire Godelli c. Italie*), had found a violation of the art. 8 of the ECHR in the part in which the Italian legislation did not give any possibility to the adopted child who was not recognized at birth, to request access to non-identifying information on his origins. In these conditions, the Court considered that Italy had not attempted to establish a balance and proportionality between the interests of the parties involved and had therefore exceeded the margin of discretion that the conventional legislation recognizes to States in this matter.

considered biunivocal correspondence between the right to anonymity, considered in and of itself, and the continuing and mandatory protection of the aspects of confidentiality or, if you prefer, secrecy, which the exercise of that right inevitably involves. A founding nucleus which – is worth pointing out – can only be reaffirmed, precisely in light of the primary values that it intends to preserve" (point 4 of the *Considered in law*). In fact, the constitutional foundation of the biological mother's right to anonymity rests "on the need to safeguard the mother and the newborn from any disturbance, connected to the most heterogeneous range of situations, personal, environmental, cultural, social, such as to generate the emergency of dangers for the psycho-physical health or the very safety of both, and to create, at the same time, the conditions so that the birth can take place in the best possible conditions" (point 4 of the *Considered in law*). In other and more immediate words, the guarantee of the right to anonymity is rooted in the need to safeguard the life and health of the biological mother and the child also through the protection of privacy profiles connected to natural parenting.
Equally clear is the link that emerges between the protection of the right to anonymity and the right to confidentiality in the legislation on narcotics and psychotropic substances referred to in the D.P.R. n. 390 of 1990 where, in art. 120, paragraph 3, it is established that "The interested parties, upon their request, can benefit from anonymity in relations with the services, facilities and structures of the local health unit companies, and with the private structures authorized pursuant to article 116, as well as with doctors, social workers and all assigned staff or employees". Paragraph 6 also provides that "Those who have requested anonymity have the right that their health card does not contain their personal details or other data that can be used to identify them"; to this end, paragraph 8 provides that "The health card model must include a coding system capable of protecting the patient's right to anonymity and avoiding duplication of correspondence".
Likewise, Legislative Decree no. 297 of 1994 ("*Approval of the consolidated text of the legislative provisions in force on education, relating to schools of all levels*"), art. 326, entitled "Interventions in favor of students at risk and prevention of

drug addiction", recognizes absolute respect for anonymity for students who turn to the information and consultancy centers possibly established by the education authorities, in agreement with the councils institution and with public services for social and healthcare assistance to drug addicts (paragraph 18)[24].
Not even negligible in terms of the instrumentality of anonymity to the protection of certain confidentiality needs (but also, if we carefully observe, for the protection of the public function and related public policies, as well as the lawfulness of economic relationships) are the indications coming from the discipline relating to the phenomenon of the so-called *whistleblowing*, i.,e. the practice of anonymously reporting crimes or irregularities within companies or public bodies. This institute, also following the recent changes contained in Directive (EU) 2019/1937[25], should allow the so-called dd. "whistleblowers" to report violations of public interest (such as, for example, that inherent to the good performance of public administration pursuant to art. 97 of the Constitution) making use of a protection system that guarantees the confidentiality of their identity, so as to prevent the risk of undue retaliation.
However, it is important to clarify how, in addition to protecting the right to privacy, anonymity can play a paradigmatic role[26] for the exercise of the

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[24] For a better and more in-depth comment on the legislative interventions briefly referred to here, please refer to MORELATO cit., 137 ss.
[25] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. Art. 1 clarifies that the aim of the directive is to "enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law".
[26] RODOTÀ 2012, 392: "Anonymity thus presents itself as a precondition of the freedom of expression of thought, so that it cannot be considered only as a component of the refugee status, but as a constitutive element of the digital version of citizenship, with the temperaments made necessary when, for example, we are faced with the need to protect people from defamation online".

broadest and freest expression of thought[27], allowing anyone to spread their beliefs without the fear of persecution or discrimination[28]: "Anonymity therefore expands the effective and equal enjoyment of freedom of thought by everyone, allowing anyone to expose their beliefs in the *marketplace of ideas* without fear of retaliation or exclusion"[29].
In particular, the instrumentality of anonymity to the freedom of expression of thought emerges, already in the past and especially starting from the eighteenth century[30], with reference to the diffusion of literary and political works, when the authors preferred the concealment of their name or the use of "pseudonym-masks"[31] to escape the ax of censorship, to protect themselves from the interference of public power or for other reasons of a personal nature (for example the fear of being delegitimized by the

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[27] The Supreme Court of the United States of America, on the basis of a now granitic interpretation of freedom of expression, stated that "*an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment*" (*McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 342 (1995)). Likewise, albeit from a different point of view, the European Court of Human Rights, in the case *Standard Verlagsgesellschaft Mbh c. Austria* of 7 December 2021, reiterated the importance of anonymity for Internet users in order to encourage the widest and freest expression of opinions, information and ideas.
[28] RICCIO 2002, 27 s.: "It was thus believed that, by protecting anonymity, complete democratic development could be facilitated, allowing members to freely express their opinions, without fear of any repercussions. The guarantee that one's identity is not revealed would favour, in particular, individuals who, due to economic or social conditions, find themselves in a disadvantaged and weak position and who, for these reasons, would risk being discriminated against for their opinions".
[29] Cfr. MANETTI 2014, 3.
[30] On the topic see the extensive reconstruction of BRAIDA 2019.
[31] Unlike the civil name, the pseudonym "is a particular means of identification limited to a sector of personal activity" (RICCI cit., 97) and can consist either in the use of an art or fictional name, deemed better suited by the author to identify his person, or in the use of a mask name, fulfilling in the latter case a concealment function equal to that of anonymity.

presentation of a certain editorial proposal[32]); certainly paradigmatic is the publication, between 1787 and 1788, of the *Federalist* by Madison, Hamilton and Jay through the use of the pseudonym *Publius*[33], as well as the original publication in anonymous form, in 1670, of the Spinoza's *Tractatus theologico-politicus*.

In our legal system, the author's right to remain anonymous has found formal and expressed recognition in the r.d.l. n. 1950 of 1925 ("*Provisions on copyright*") which, in art. 14, provided[34]: "The author has the right to publish the work under his name, either anonymously, or with a pseudonym. In these last two cases he also has the right to reveal himself when he likes, and

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[32] Just as happened with the literary genre of the novel. Indeed, as he recalls BRAIDA cit., 163: "despite being a very successful genre at all social levels, the novel, as is known, struggled to find recognition from the cultured tradition and, consequently, to allow the authors who challenged themselves with this new genre to live with pride their choice. (...) The judgment of Niccolò Tommaseo will be of the same tone when, in reviewing the first edition of *Promessi sposi* (1827), he reproached Alessandro Manzoni for having «stooped to give us a novel». Writing a novel, even in the first decades of the nineteenth century, was considered, for a cultured man of letters, an infamous literary activity, «a degradation» towards a vulgar genre and too oriented towards capturing the tastes of the lower classes.".

[33] As specified by FANTONI 1995, 652 s.: "The choice of this pseudonym, a peculiarity of political essayists in the Anglo-Saxon world of the time, was made by Alexander Hamilton; by opting for that of *Publius*, which he had already used about ten years before the *Federalist*, he demonstrated that he knew Roman history well, a fact that is certainly not surprising after what Bernard Bailyn wrote, as the reference is to the figure of Publius Valerius, known as Publicóla, lived in the era of profound turbulence that characterized the transition from the monarchic to the republican regime in Rome. The pseudonym chosen by Hamilton therefore represents an explicit reference to the historical figure of the founding father of a State, that is, it embodies the positive aspect of someone who defends a new and changing choice, but at the same time guarantees that it is also the best way to obtain political stability. All this inserted into the American historical context of the years 1787-1788 meant that the choices of the Constitution that emerged from Philadelphia, and therefore of the political-institutional structure outlined in it, represented the only possibility of giving birth to a new political community in the former British colonies".

[34] The provision was subsequently repealed by Legislative Decree no. 200 of 2008, converted with amendments by law no. 9 of 2009.

to have his quality of author recognized in court against anyone who claims it".

Explicit references to anonymous and pseudonymous works are also contained in law no. 633 of 1941 ("*Protection of copyright and other rights related to its exercise*") as established in art. 9: "Whoever has represented, performed or in any case published an anonymous or pseudonymous work is entitled to assert the rights of the author, until he has revealed himself"; furthermore, art. 21 preserves the right of the author of an anonymous or pseudonymous work to "disclose himself and have his quality as author recognized in court".

However, on the level of general theory, the question of the full traceability of anonymity within the scope of the constitutional guarantee referred to in art. 21 of the Constitution, which protects everyone's right to "freely express their thoughts", appears problematic to say the least. And in fact, although "even anonymous manifestations [are] personal manifestations, even if they are not marked by those brands of people which are name and surname, and it is also possible to check whether they truly manifest the thoughts of a person"[35], the observation that the use of anonymity appears

[35] ESPOSITO 1958, 9. On the same topic, MANETTI cit., 9, observes: "it seems unreasonable to believe that since art. 21 of the Constitution protects only authentically one's own thought, the speaker is also obliged to explicitly identify himself in order to benefit from constitutional protection. In other words, if it is true that subjectively false thoughts can be prohibited by legislators, in my opinion this does not apply to thoughts expressed anonymously, because they do not in themselves constitute fraud.". *Contra* BETZU 2011, 3: "The attribute "*own*" excludes from the scope of constitutional protection the manifestations of the thoughts of others, which the subject has not decided to appropriate. The specification contained in the text of the article implies, in fact, that the constitutional guarantee concerns the expressions that he has made his own, corresponding to his internal persuasions. It follows that the freedom of expression of thought does not cover communications that the author does not allow to be recognized as his own, and therefore not only those that are «subjectively false», but also those that are anonymous. Only the identification of the subject allows us to trace the manifestation of the thought back to its author, in order to ascertain the correspondence between the manifestation and

to be difficult to understand, especially if practiced in the context of freedom of the press, for the exercise of which the Constituents have introduced specific transparency obligations regarding the identification of the subjects responsible for a publication even if different by its author (leaving the law to establish the relevant and precise regulations)[36].

And it is always within the framework of the relationship between the sense of responsibility and the freedom of citizens that the provision referred to in the fifth paragraph of art. 21, pursuant to which: "The law may establish, with general provisions, that the means of financing the periodical press be disclosed"[37].

This is based on the belief, expressed among others by *Lelio Basso*, that "Freedom always entails responsibility. Whoever wants to have freedom must assume responsibility for the acts he can perform; therefore, publications that do not respect this provision (i.e., when the name of the manager is omitted, or when a book is published without the printer's indication) lead to the denial of responsibility and therefore freedom cannot

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the thought. This operation is not possible when the thought is expressed anonymously, in which case any criterion useful for filling the "*own*" attribute with content is lacking. In the manifestation of the thought in anonymous form, it is the agent himself, in fact, who wants to sever the connection between the thought objectified in the declaration and his person. The logical corollary of this solution is twofold: there is no right to anonymity *tout court* at a constitutional level; anonymity is not a constitutionally protected mode of freedom of expression of thought".

[36] And in fact, as stated in art. 21, third paragraph, Const.: "Seizure can only be carried out by reasoned act of the judicial authority in the case of crimes for which the press law expressly authorizes it, or in the case of violation of the rules that the law itself prescribes for the identification of those responsible".

[37] BASSO 1970, 756: "I believe that this rule should be linked to the aforementioned framework of a relationship between the sense of responsibility and the freedom of citizens. It is right that freedom of the press is recognized; it is right, however, that this freedom is accompanied by responsibilities which are not only the responsibilities of the one who signs, but are also the responsibilities of the one who finances and of the one who gives the news that is published. I believe this is a new conquest of press freedom".

be recognized for them, given that the principle that freedom is connected to responsibility"[38].

Furthermore, from a careful reading of the work of the Constituent Assembly, the principle clearly emerges that the link between freedom of the press and responsibility does not only concern the periodical press, for which the figure of the responsible manager emerges, but also the press in general, identifying the printer as the person responsible for the publication[39].

This is also confirmed by the examination of law no. 47 of 1948 ("Provisions on the press") which, in art. 2, establishes: "Every printed matter must indicate the place and year of publication, as well as the name and domicile of the printer, and, if there is one, of the publisher. Newspapers, publications of information agencies and periodicals of any other kind must bear the indication of: the place and date of publication, the name and domicile of the printer; the name of the owner and the responsible director or deputy director". This provision must be interpreted in conjunction with, among others, art. 16 which, in sanctioning clandestine press, in the second paragraph punishes "anyone who publishes a non-periodical publication in which the name of the publisher or the printer does not appear or in which these are indicated in an untrue manner".

However, while the existence of this link between freedom and responsibility is affirmed, there can be no doubt that anonymous thought, as long as it does not cross over into criminal hypotheses (such as, for example, defamation (art. 595 penal code), insult[40], slander (art. 368 p.c.) or incitement to commit a crime (art. 414 p.c.)) fully falls within the freedom of expression of thought for which, in the community, anonymous thought

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[38] BASSO cit., 436.

[39] In this regard, see the discussion held in the session of 26 September 1946 at the first Subcommittee of the Constitution Commission.

[40] The crime of insult, originally regulated in art. 594 of the criminal code, was decriminalized by Legislative Decree no. 7 of 2016.

has the same value as identified thought: the reasons for such protection can be found in the circumstance that, although the constitutional system is regulated according to the principle of the widest freedom of expression of thought, some expressions could be uncomfortable or otherwise considered dangerous for the social stability of ways of thinking and for the exclusionary or retaliatory attitudes that those in power could adopt towards individuals; furthermore – and this is no small matter – the bearers of certain thoughts could be opposed simply because their manifestations are contrary to the dominant thought of a given group (think of the lines of opinion that identify with *political correctness*), so marked forms of social and/or political discrimination could result.

It follows that the protection of the free circulation of anonymous thoughts, even and above all if socially or politically "inconvenient", constitutes a tool to guarantee both the author from any negative repercussions of his own thoughts and the freedom and authority of the thought itself.

In light of what has been observed so far, the teaching that can be deduced regarding the relationship between anonymity and art. 21 of the Constitution, at least does not seem to move in the direction of a total inadmissibility of the institution (proposing an absolute prohibition for the individual to express himself anonymously) but, rather, in the need for his *temperament*[41], to prevent the manifestation of an anonymous thought,

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[41] As also believed by CARETTI, CARDONE 2019, 256 ss.: "It seems difficult to state that, since art. 21 of the Constitution protects only authentically one's own thought, the speaker is also obliged to explicitly identify himself, in order to benefit from constitutional protection. if it is, in fact, true that subjectively false thoughts can be prohibited by the legislator, this does not apply to thoughts expressed anonymously, because they do not constitute falsehoods in themselves. However, the opposite solution also seems problematic, according to which the choice to spread the thought anonymously would pertain to the freedom to formulate the content of the message - as a choice to say anything or remain silent - and would therefore enjoy the maximum level of constitutional protection. The most correct solution seems to be the intermediate one, entirely within the limits of the constitutional guarantee of art. 21 of the Constitution and the balance between

harmful to the dignity of others, can translate into an instrument of legal irresponsibility for its author[42]; a need which, at the time of the Constituent Fathers, was felt with greater urgency in the case of printed publications, and not only, as is easy to imagine, because the press then constituted the main instrument for the manifestation of thought (in addition to the word) but also because the Constituents showed a more acute sensitivity to the theme of the function performed by the press: "The press performs a very important function: it educates the people, gives ideas to the people, creates moods, feelings, opinions and therefore must be governed by honest and uncorrupted people, who have a high sense of responsibility, a high sense of duty and do not dare to slander with the utmost thoughtlessness, to destroy with slander the personality of honest citizens. The dignity of the human person requires this great protection, and a great sense of responsibility in the men responsible for carrying out this noble activity of the press. Therefore, ordinary legislation must ensure that the press, the daily bread of the people's spirit, nourishes the spirit, but does not poison it"[43].

Now, in the age of the Net revolution, it is evident that a similar need for *reconciliation* is being prepared especially for the diffusion of anonymous messages via the *Internet*; in fact, it is certainly known that the internet, in

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freedom of expression and (counter) constitutional rights of the person as qualifications on which to base in concrete cases the obligation to identify the authors".

[42] Similar is the reasoning of MANETTI cit., 9 ss., which, while believing that even the manifestation of an anonymous thought can fall within the scope of the constitutional guarantee referred to in art. 21 of the Constitution, considers the thesis to be inaccurate "according to which the choice to spread thoughts anonymously would pertain to the freedom to formulate the content of the message - as a choice to say anything or remain silent - and would therefore enjoy the maximum level of constitutional protection . On the contrary, it must be observed that the content of the message is one thing (protected, unless it is subjectively false), the anonymity of the author is another, which must be guaranteed but also balanced with the need to identify those responsible for any illicit acts".

[43] DAMIANI 1970, 280.

addition to being the most important tool of communication today, gives the information and contents published on it "a very particular capacity for permanence and volatility"[44], giving them a *viral* character which is, instead, alien to the traditional means of diffusion of thought.
Hence, the need to protect the person against the diffusion of anonymous messages with defamatory or, in any case, offensive content of the dignity of others, likely to sever that link between freedom and responsibility which the Constituent Fathers have otherwise placed as the foundation of the exercise of the broadest and freest manifestation of thought.
This is on the assumption, widely reiterated in the jurisprudence of the Constitutional Court, that "even the so-called privileged freedoms"[45] – such as the freedom of expression of thought – "cannot escape the general principles of the legal system, which impose natural limits on the expansion of any right"[46]; therefore, "the constitutional protection of rights always has an insurmountable limit in the requirement that, through exercising them, goods equally guaranteed by the Constitution are not sacrificed"[47], just like the reputation of the person which constitutes an inviolable right pursuant to art. 2 of the Constitution, closely connected with human dignity itself.
On the other hand, as *Carlo Esposito* also stated, "among the traditional limitations of the freedom of expression of thought, those relating to the honor of the person are admitted by the Constitution, when it proclaims the equal social dignity of citizens. This proclamation in fact demands, precisely, that society and each member of it never brings himself, in good or bad faith, to judge the unworthiness of others and that he does not express with actions or words, directly or through the reference of certain facts deemed despicable, negative evaluations of people"[48].

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[44] CAMPAGNOLI 2020, 307.
[45] Constitutional Court, sentence n. 25 of 1965, point 3 of the *Consideration in law.*
[46] Constitutional Court, sentence n. 25 of 1965, point 3 of the *Consideration in law.*
[47] Constitutional Court, sentence n. 19 of 1962.
[48] ESPOSITO cit., 44 s.

3. THE CONSEQUENCES OF THE INTERNET REVOLUTION ON ANONYMITY: REGULATORY AND JURISPRUDENTIAL EVOLUTION.

As widely mentioned, the expansion of the digital world has contributed to giving new impetus to the exercise of anonymity, offering users new and unprecedented tools through which to hide – albeit rarely absolutely – their identity.

In particular, in the reconstruction of some American authors, an almost inextricable link seems to emerge between the guarantee of anonymity on the Internet and the protection of the broadest and freest expression of thought[49]: "Anonymous and pseudonymous speech on the Internet forms a part of the rich tradition of such speech in prior media, including print, and is entitled to the same First Amendment protections. Legislation against anonymity threatens to end that rich tradition and should be opposed"[50].

The idea of the "net" as an uncontaminated space of freedom[51], metaphorically defined as the *free marketplace of ideas*, would therefore have encouraged a rather massive use of anonymity by the user, in the belief "of

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[49] As also highlighted by RESTA 2015, 196: "Anonymity is seen as an effective, often indispensable tool for the explication of thought, and this is even more so in cybernetic space, where the utopia of the perfect *marketplace of ideas* seems to be realized. Therefore, its compression is perceived as a *vulnus* to the guarantee engraved in the First Amendment of the Constitution".

[50] WALLACE 1999.

[51] The words written by John Perry Barlow in his *Declaration of the Independence of Cyberspace* still resonate today: "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather" (v. but critically MANGIAMELI *Digital Sovereignty*, in this issue).

acting without being tracked, free to manage their online identity and adapt it to the desired context"[52].

Furthermore, in an environment characterized by the spread of increasingly penetrating and invasive surveillance technologies, in which data constitutes the greatest source of profit in the *new digital economy*, anonymity is also perceived as a tool for protecting the right to privacy and the right to informational self-determination of users against the tendencies of "surveillance capitalism"[53].

And it is exactly in this perspective that a first enucleation of anonymity can be found in the Legislative Decree of 30 June 2003, n. 196 (Personal data protection code) and art. 4, paragraph 1, letter. *n*)[54], defined "anonymous data" as that "data which originally, or following processing, cannot be associated with an identified or identifiable interested party".

Likewise, the *Declaration of Internet Rights*, approved on 28 July 2015 by the *Commission for Internet Rights and Duties* established at the Italian Chamber of Deputies, in art. 10, paragraph 1, expressly recognized the protection of anonymity[55], stating that "every person can access the network and communicate electronically using tools, including those of a technical nature, that protect anonymity and avoid the collection of personal data, in particular to exercise civil and political liberties without suffering discrimination or censorship".

Similarly, the centrality of anonymity for the protection of personal data also emerges clearly from the analysis of European legislation which, through Regulation (EU) 2016/679 (GDPR), has codified a subtle but fundamental distinction between the phenomenon of *anonymization,* and that of

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[52] BRIGHI, DI TANO 2019, 193.

[53] According to the well-known expression of ZUBOFF 2019. On the same topic see more extensively LYON 1997; MICHETTI 2023; NIGER 2008b; HELZEL 2023; BAUMAN, LYON 2013; TRAVERS 2022; CURCIO 2022; PERRI 2020; CALENDA, FONIO 2009.

[54] Subsequently repealed by Legislative Decree no. 101 of 2018.

[55] Although it is necessary to specify that the Declaration is devoid of any legally binding effect.

pseudonymization. In this regard, the Regulation specifies, in para. 26, that the principles regarding the protection of personal data do not apply to "anonymous" information, i.e., "information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is no longer identifiable". Anonymization is therefore a procedure as a result of which the data should not allow (and here the conditional is a must) any form of personal identification, severing any connection between a natural person and the data concerning him or her. Rather, the principles contained in the Regulation apply to all the information subjected to pseudonymization, i.e., to all data which, with the aid of various techniques, could be traced back to a natural person[56], considering the costs, of the time necessary for identification but also of the technologies available (reasonableness criterion)[57].

Having said this, it is however necessary to ask ourselves whether the national and supranational regulations, briefly referred to here, can be considered adequate enough for the protection of anonymity or whether, on the contrary, doubts and uncertainties remain regarding its scope of application and effectiveness.

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[56] As explained by PROSIA 2023, p. 152, "since this technique is based on the simple replacement of an identifying data with a 'masked data', therefore not immediately intelligible, the identification is only made more complex, while still remaining possible to trace the person back to the given pseudonym".

[57] On this point, it is necessary to point out a recent ruling by the Court of Justice which, with the ruling of 26 April 2023 in case T 557/20, stated that personal data can be classified as anonymous and not simply pseudonymized even when the third party to whom personal data is transmitted, regardless of the characteristics possessed by the latter, do not have the necessary means to have access to information aimed at re-identifying persons; therefore, the principle of law enunciated by the CJEU moves in the direction of considering that if the recipient of the data transmission does not have information or tools that allow him to identify the interested parties, the data transmitted is considered as anonymous data and therefore does not represent personal data , therefore remaining excluded from the scope of application of the principles regarding *data protection*.

And in fact, there are many critical issues that arise from even a preliminary reading of the question, especially if, nowadays, we consider how, from a technical point of view, it is increasingly difficult to talk about the existence of absolute anonymity on the internet. There are so many tools for monitoring electronic signals – used both by public and private authorities – that the idea that data could be perfectly anonymous is unrealistic[58].
In truth, this problem can be treated differently if we look at the purpose to which today's techniques for "unveiling" anonymity can be intended: in particular, if the ultimate objective of tracking consists in carrying out an indiscriminate and unreasonable control activity, it is necessary to attribute a decidedly negative value to the lack of a more concrete protection of anonymity; otherwise, the perspective will change if the identification mechanisms of the author of an anonymous thought are functional to identifying the person responsible for defamatory content or content that is in any case harmful to the dignity of others[59].
It is clear, in fact, that anonymity can act both as a tool for the protection of certain fundamental rights and freedoms and as a ploy to evade the attribution of legal responsibility arising from the dissemination of illicit content, for which it is necessary to elaborate a system of rules designed to repress or sanction any form of abuse of anonymity[60].
In this regard, it is worth underlining how different the *disclosure* techniques used by the judicial authorities are: among these, it is certainly worth

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[58] On the problem only briefly mentioned here, see BUCCAFURRI 2021.
[59] Thus, avoiding the danger that the perpetrator of an offense could become the "invisible man"; the expression is taken from PACE 1998, 341.
[60] Likewise, COSTANZO 2003, 77 s.: "However, it should be noted that our Constitution shows that it links the diffusion phenomenon to a principle of responsibility that seems to be in stark contrast with the use of anonymity. In this sense, if it can be considered plausible that the personal identity of the speakers is not always and immediately detectable by anyone (so-called protected anonymity), a regulation intended to provide both preventive and subsequent methods suitable for identifying the author of the diffusion".

remembering the *John Doe subpoena* remedy used by the US courts[61] or, as for what is a matter of concern, the internal legal system, the tools for identifying subjects involved in the production and distribution of products and services that constitute a violation of intellectual property rights (see articles 156 *bis*[62] and 156 *ter*[63] of law no. 633 of 1941).

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[61] On the subject see more widely GLEICHER 2008.

[62] "1. If a party has provided serious evidence from which the validity of its claims can be reasonably deduced and has identified documents, elements or information held by the other party which confirm such evidence, it may obtain that the judge orders its production, or requests information from the other party. He may also obtain that the judge orders the other party to provide the elements for the identification of the subjects involved in the production and distribution of the products or services that constitute a violation of the rights referred to in this law. 2. In the event of a violation committed on a commercial scale, the judge may also order, upon request of a party, the production of the banking, financial and commercial documentation found in the possession of the other party. 3. The judge, in taking the measures referred to in paragraphs 1 and 2, adopts appropriate measures to guarantee the protection of confidential information, having consulted the opposing party. 4. The judge deduces evidentiary arguments from the answers that the parties give and from the unjustified refusal to comply with the orders".

[63] "1. The judicial authority, both in precautionary and substantive proceedings, may order, upon justified and proportionate request from the applicant, that information be provided on the origin and distribution networks of goods or provision of services that violate a right referred to in this law by the author of the infringement and by any other person who: a) has been found in possession of goods subject to infringement of a right, on a commercial scale; has been caught using infringing services on a commercial scale; b) has been caught providing on a commercial scale, services used in infringement activities; c) has been indicated by the subjects referred to in letters a) or b) as a person involved in the production, manufacture or distribution of such products or in the provision of such services. 2. The information referred to in paragraph 1 may include, among other things, the name and address of the producers, manufacturers, distributors, suppliers and other previous holders of the products or services, as well as wholesalers and retailers, as well as information on the quantities produced, manufactured, delivered, received, or ordered, as well as on the price of the products or services in question. 3. The information is acquired through the questioning of the subjects referred to in paragraph 1. 4. The applicant must provide a specific indication of the persons to be questioned and the facts about which each of them must be questioned. 5. The judge, having admitted the interrogation, requests

However, apart from any observation on the cumbersomeness of similar procedures, we cannot remain silent about the condition of substantial *anomie* in which the protection of personality rights finds itself, which, in comparison with anonymization techniques, is often forced to assume a recessive position (as this often happens in the case of *online* defamation); and in fact, unlike those inherent to copyright, personality rights do not benefit from the provision of specific procedural tools that allow the victim of an offense perpetrated anonymously to easily obtain the identification of the author[64].

The absence of a more specific regulatory discipline has been only partially filled by the intervention of some jurisdictional rulings which seem to have oriented towards the recognition and attribution of a form of objective responsibility on the part of the manager of a *blog* for the hypothesis in which offensive comments are published by unidentified users.

In this regard, it should be noted that, already in 2006, the Court of Aosta issued a conviction against the administrator of a *blog* for a case of anonymous defamation; in particular the judge, in addition to finding the existence of a series of circumstantial evidence regarding the attribution of the administration of the site to the accused, stated that the latter, as manager of the *blog*, held a position identical to that of the director responsible for a printed publication and therefore the responsibility referred to in art. 596 *bis* c.p.[65].

The decision, however, stands in clear antithesis to the jurisprudential orientation developed by the Court of Cassation on the issue of the

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the information indicated by the party from the subjects referred to in paragraph 1; he may also ask them, ex officio or at the request of a party, all the questions he deems useful to clarify the circumstances on which the interrogation is taking place. 6. Articles 249, 250, 252, 255 and 257, first paragraph, of the civil procedure code applied".

[64] On this issue see more thoroughly RESTA cit., 213 ss.

[65] "If the crime of defamation is committed through the press, the provisions of the previous article also apply to the responsible director or deputy director, the publisher and the printer, for the crimes provided for in articles 57, 57 bis and 58".

responsibility of the managers of digital platforms (*forum, blog, newsletters, newsgroups, mailing lists, social networks*), excluding that their position can be assimilated to that of the directors responsible for a newspaper or other periodical[66] with a consequent application of the regulations on editorial

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[66] In this regard, however, it is necessary to consider an evolution that has affected the jurisprudence of the Court of Cassation which, with sentence no. 31022 of 2015, ruled at United Sections on the question of the admissibility of preventive seizure of a duly registered online newspaper or of a specific web page of said newspaper. In particular, with the decision in question, the judges decided to attribute an evolutionary meaning to the term "press", automatically extending the guarantee contained in art. 21, third paragraph, of the Constitution to journalistic information disseminated electronically: "It is necessary [...] to move away from the literal exegesis of the regulatory dictate and favor an extensive interpretation of the same, so as to attribute to the term "print" an evolutionary meaning, which is consistent with technological progress and, at the same time, is not in any case extraneous to the positive order, considered as a whole and in the structure progressively achieved over time". In any case, the Court clarifies, such an evolutionary interpretation cannot encapsulate all the new IT and telematic means of expressing thought (*forum, blog, newsletter, newsgroup, mailing list* etc…) as the "area of professional information, conveyed through a newspaper" must be kept very distinct *online*, from the vast and heterogeneous scope of the spontaneous dissemination of news and information by individual subjects", to which the list of constitutional guarantees regarding freedom of the press does not appear to be extendable. On the contrary, with specific reference to the phenomenon of online newspapers, the judges state that the concept of the press set out in art. 1 of law no. 47 of 1948 also has a "figurative" meaning such as to include every editorial product having the ontological (structure) and teleological (dissemination of information) requirements typical of a newspaper; it follows that even an online newspaper, if equipped with the required requisites, cannot be exempted from the guarantees and responsibilities provided by the legislation on the press, thus overcoming the "Gutenbergian" notion of the press: "In conclusion, the electronic newspaper, whether it is a reproduction of the paper one or whether it is the sole and autonomous source of professional information, is subject to the legislation on the press, because it is ontologically and functionally similar to the paper publication. […] Obviously - it is worth underlining - the guarantees and responsibilities provided for the press by both constitutional and ordinary provisions must refer only to editorial content and not to any comments entered by users (external subjects). to the editorial staff), which activate a forum, i.e., a discussion on one or more published articles"; consequently, "the 'electronic press', like the traditional one, as it is emancipated from any

responsibility contained in the press law or in articles 57[67], 57 *bis*[68], 58[69] and 58 *bis*[70] of the criminal code for the publication of any denigrating or offensive comments made by users.

However, from a different point of view, the responsibility of the manager of a *blog* for the publication of anonymous denigrating comments has been (re)affirmed more recently by the V section criminal case of the Court of Cassation which, in sentence no. 45680 of 2022, endorsed the reconstruction carried out by the judge of merit regarding the attribution, to the administrator of the *blog*, of the crime of defamation by way of

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form of censorship, cannot be subjected to preventive seizure, except in the exceptional cases expressly provided for by law, and is subject to the rules governing the responsibility for the offenses committed".

[67] Art. 57 p.c., "Crimes committed through the periodical press": "Without prejudice to the responsibility of the author of the publication and except in cases of complicity, the responsible director or deputy director, who fails to exercise the control necessary to ensure that the content of the periodical directed by him is not exercised, prevent crimes from being committed through publication, is punished, by way of guilt, if a crime is committed, with the penalty established for said crime, reduced by an amount not exceeding one third".

[68] Art. 57-*bis* p.c., "Crimes committed by means of non-periodic printing": "In the case of non-periodic printing, the provisions referred to in the previous article apply to the publisher, if the author of the publication is unknown or not attributable, or to the printer, if the publisher is not indicated or cannot be attributed".

[69] Art. 58 p.c., "Clandestine press": "The provisions of the previous article apply even if the legal requirements on the publication and dissemination of periodical and non-periodical press have not been observed".

[70] Art. 58-*bis* p.c., "Prosecution for crimes committed by means of the press": "If the crime committed by means of the press is punishable by complaint, queries or request, a complaint, queries or request is also necessary for the punishability of the crimes provided for by the three previous articles. The complaint, queries or request presented against the responsible director or deputy director, the publisher or the printer, also has effect against the author of the publication for the crime committed by him. It is not possible to proceed for the crimes provided for in the three previous articles if a proceeding authorization is necessary for the crime committed by the author of the publication, until the authorization is granted. This provision does not apply if the authorization is established due to the personal qualities or conditions of the author of the publication".

competition, maintaining that "the blogger is responsible for the writings of a denigrating nature published on the their own site by third parties when, having become aware of them, they do not promptly remove them, given that such conduct is equivalent to the conscious sharing of content harmful to the reputation of others and allows the further dissemination of defamatory comments" (point 2.4. of the *Consideration in law*)[71]. In the opinion of the Supreme Court, in fact, the administrator of a website cannot be held responsible pursuant to art. 57 p.c. as this provision would apply only to newspapers and not to the various IT means of expressing thought, excluding the existence of a general position of guarantee on the part of the

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[71] Although the liability regime established by the Court for the manager of a *blog* seems similar to that provided for other *internet providers*, in sentence no. 12546 of 2019, the V section. pen. of the Court of Cassation has expressly stated "the intrinsic difference between internet providers and blog administrators, since the latter do not provide any service in the specified sense, but rather limit themselves to making a platform available to users on which they can interact through the publication of content and comments on topics in most cases proposed by the blogger himself, as they are characterized by the line, which could be defined (even if incorrectly) as "editorial", impressed by the manager on said platform. In short, the blog (a term that derives from the contraction of *web-log*, or "network diary"), managed as a personal site, is conceived mainly as a container of text (i.e., as a diary or as an independent information body), which can be updated in real time thanks to specific software" (point 2.4). In terms of responsibility, the judges reiterate that the blogger cannot be held responsible for everything written on his site even by other users and his responsibility must be excluded when he "becomes aware of the offensiveness of the publication, decides to intervene promptly to remove the offensive post"; said otherwise, "the blogger can be held accountable for the denigrating contents published on his diary when, having become aware of the harmfulness of such contents, he knowingly maintains them" (point 2.5). A responsibility that may be attributed to the blog manager not pursuant to art. 57 of the criminal code, given that a blog cannot be compared to a periodical (not even an online one), but rather as a competitor with the material author; however, "the appellant's failure to promptly remove the offensive comments published by third parties on his blog is equivalent not to the failure to prevent the defamatory event (...) but to the conscious sharing of content harmful to the reputation of others, with further response to the offensiveness of the contents published on a diary that is managed by the blogger" (point 3.3.b.).

manager of a *blog* with consequent obligations (and powers) of preventive control.

Furthermore, the orientation developed by the Court of Cassation seems to be well placed in the wake of the jurisprudence of the European Court of Human Rights in the matter of anonymous *online* defamation where, since the decision *Delfi v. Estonia* of 10 October 2013[72], it stated that the guarantee obligations of the publisher of a printed newspaper cannot be extended by analogy to the operator of an IT portal; however, regarding the matter in question, it deemed the Estonian judge's decision to condemn "Delfi", a well-known information site, for the publication (and failure to remove) anonymous comments with defamatory and even intimidating content which is not disproportionate, recognizing that the information portal bears a form of editorial civil liability[73]; probably, at the basis of this reconstruction, was the desire of the judges to combat the germ of irresponsibility for the publication of anonymous offensive comments, and this on the principle, of broader general scope, that "anonymity on the

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[72] Commenting on which see, *ex multis*, VIGEVANI 2014a; SPAGNOLO 2014; VECCHIO 2014.

[73] However, as he points out VIGEVANI cit.: "Some characteristics of the case undoubtedly influenced the decision. First of all, the article, although balanced, was on a topic capable of eliciting "strong" reactions and in fact the comments were seriously offensive. Furthermore, despite a disclaimer stating that the site was not responsible for the comments and that threats and insults would not be tolerated, the automatic technical solutions adopted to remove defamatory content had not been able to block the most common and explicit vulgar words. It was not even possible to identify the authors, as it was possible to leave posts without registering. Furthermore, the civil trial against the company that managed the portal ended with a little more than symbolic sentence, in the face of a request that was a hundred times greater. Finally, of no small importance is the fact that the Estonian legislator had made an explicit choice in favor of the civil venue for defamation, which on the one hand is less intimidating than the criminal one and on the other makes it more difficult for the private citizen, without the powers of the judicial authority, identify the authors of anonymous texts".

Internet, despite being an important factor, must be balanced with other rights and interests" (p. 149).

4. CONCLUSIONS

The tiring (and not always linear) path undertaken by national and European jurisdictions seems to move in the direction of seeking a more reasonable "balance between the protection of personality rights and the free expression of thought online, as well as in identifying the boundaries of responsibility of the subjects who act therewithin"[74], with the aim of ensuring the offended person some form of protection even in the event that he or she encounters the impossibility or in any case the difficulty of identifying the author of an illicit comment.

However, although appreciable in its purpose, the orientation that has emerged in the jurisprudential field remains the expression of a remedial policy "*of the concrete case*" which denotes the absence, in the field of IT security, of a more organic regulatory strategy aimed at the preparation of adequate tools for revealing the identity of the authors of offensive comments (often hidden behind fake profiles and false registrations), overcoming the technical and organizational problem of "ensuring that a subject really is who he says he is"[75].

And in fact, although the choice to prohibit any form of anonymity does not appear to be fully acceptable (in line with the findings noted so far), it would still be desirable to have a regulation that requires platforms to adopt an accredited digital identity authentication system, in order to allow – at the request of the judicial authority[76], once the offensiveness of the conduct

[74] MELZI D'ERIL, VIGEVANI 2017.
[75] BRIGHI, DI TANO cit., 188.
[76] Thus strengthening cooperation between service providers and judicial authorities; in this sense art. 17 of Legislative Decree no. 70 of 2003, establishes that service providers,

has been ascertained – the disclosure of the real identity of the user who has acted in violation of the rights of third parties[77].

In essence, it is about the need to develop a regulatory solution (and not merely jurisprudential) that bridges the gap between the freedom of expression of thought online and the principle of personal responsibility,

although not subject to a general surveillance obligation, are required "to provide without delay, at the request of the competent authorities, in giving the information in their possession which allows the identification of the recipient of their services with which it has data storage agreements, in order to identify and prevent illicit activities" (letter *b*). A similar provision is found in art. 9 of the *Digital Services Act* where, while confirming the regime of absence of general obligations of surveillance or active verification of facts, providers of intermediary services are required to follow up on the order issued by the competent national judicial or administrative authorities to counteract one or more specific illegal content; similarly, art. 10 establishes that providers of intermediary services must inform, without undue delay, the authority that issued the order to provide specific information on one or more individual recipients of the service.

[77] A similar proposal was suggested by RICCIO cit., 39 ss.: "it is necessary to separate absolute anonymity from partial anonymity and grant adequate protection only to the latter. In other words, to clarify the point better, we can say that there is partial anonymity in the case in which the identity of a person who transmits a certain information is known not to the recipients, but to the people who allow the communication. In this way, there is the possibility of tracing the real identity of the agent, who will be called to respond directly for any damages resulting from his actions". In truth, the obligation on platform operators to provide data relating to users is not a clear issue in the jurisprudence of the ECtHR which, for example, in the case *Standard Verlagsgesellschaft Mbh v. Austria* of 7 December 2021, stated that the obligation to disclose the data of the authors of anonymous online comments could dissuade users from contributing to the debate (*chilling effect*); therefore, the Strasbourg judges believe that any obligation to disclose the identity of users can be considered legitimate only if it complies with the assumptions that art. 10, par. 2 of the Convention rules on the limitations that can be imposed on freedom of expression, for which it is necessary that the measure is provided for by law, pursues a legitimate interest and, above all, is necessary in a democratic society; an assessment that will have to be carried out on a case-by-case basis, verifying the proportionality of the interference to the aim pursued (a condition which, in the case in question, the Court deemed not to have been satisfied). For a comment on the decision see DUNN 2022.

moving towards a more effective protection of those rights and of those freedoms that may be compromised by an improper exercise of anonymity[78].

Therefore, however arduous it may be, it is a path that the institutional authorities are called upon to undertake with the aim of placing the person at the center of the new network *governance* model, for this purpose taking the opportunity to establish specific control obligations for ISPs. on the identities of users, not even neglecting the possibility of developing an adequate accredited authentication system that involves the authorities responsible for the protection of personal data; this with the aim of ensuring that the collection of the most sensitive user data is regulated by specific rules aimed at preventing the development of inappropriate contractual practices (think of *real name policies*) from delivering a real reserve into the hands of digital platforms of "white gold"[79].

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[78] VIGEVANI 2014b, 11 s.: "The main path traced in the Constitution instead enhances the relationship between freedom, individual self-determination, and personal responsibility, rooted in natural law, in the provisions that guarantee fundamental rights, such as freedom of speech first and foremost, and in the criteria for attributing responsibility sanctioned by Paper. In this logic, the hypotheses that envisage the introduction of "partial" anonymity, i.e. an obligation on the providers and managers of a site to verify the identity of a user who enters content on the network, preserve the data and communicate them to a private entity if it has carried out clearly illegal activities, with consequent liability in the event of failure to adopt such measures. The main task of the legislator would therefore be to identify mechanisms for identifying the person responsible which do not excessively sacrifice individual guarantees and which provide for control by an impartial third party regarding the existence of the disputed offence".

[79] TREMONTI 2019, 95.

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