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## Culture, Religion, and the New Geographies of Law Troubling Takedowns in ‘Ewa Glawischnig-Piesczek v. Facebook Ireland Ltd’

### Abstract

From the right to information to the right to privacy, from freedom of expression to protection from defamation, online conflicts are troubling private entities and jurists alike, particularly as the ever-increasing spread of global communications changes the meaning and impact of territories and jurisdiction. Beneath the hubbub runs a babbling brook of values, as pervasive and persistent as they are hidden. Religiously rooted conceptions permeate our legal decisions even as technological approaches are proposed as solutions. In this vein, a recent legal decision of the CJEU ordering Facebook to remove posts adjudicated as defamatory has mostly been analyzed in terms of content filtering technology. The essay argues, however, that true import of the case lies in the largely unattended cultural motors that are silently and perhaps inadvertently determining social paths. These religious and cultural values extend tendrils across global platforms through blunt decisions that lack the nuance to address potential impacts. At risk is a detachment between law and common sense in which fundamental human rights are not only unprotected, but not even acknowledged. Changing this state of affairs requires a more sophisticated cultural awareness that leverages the semiotic potential of legal instruments to deliver interculturally aware solutions.

**Keywords:** Defamation, Freedom of Expression, Content Filtering, Culture, Religion, Facebook.

**Summary:** 1. The case: *Ewa Glawischnig-Piesczek v. Facebook Ireland Limited* – 2. Religion in the rafters – 3. Defamation: where words and actions, opinions and facts, collide – 4. The hammer of equality – 5. Italy: a case study – 6. Magic filters and global takedowns – 7. Conclusion

### 1. The Case: *Ewa Glawischnig-Piesczek v. Facebook Ireland Limited*

On April 3, 2016, an anonymous user with the username “Michaela Jaskova” posted on his/her Facebook page a link to an article from an Austrian online news magazine together with comments calling Austrian Green Party leader Eva Glawischnig-Piesczek a “lousy traitor” (*miese Volksverräterin*), a “corrupt oaf” (*korrumpierter Trampel*), and a member of a “fascist party” (*Faschistenpartei*).<sup>1</sup> Ms. Glawischnig-Piesczek filed both a criminal and a civil suit with the Austrian courts but only the civil case was

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<sup>1</sup> An informal translation of the full post text is offered by legal scholar Daphne Keller: “Lousy traitor. This corrupt oaf has never earned a single honest cent with real work in her whole life, but with our tax money is kissing the asses of these smuggled-in invaders to build them up into the most valuable of all. Let us finally prohibit this Green Fascist party.” Keller (2019).

successful. The Austrian court ruled that the post constituted defamation, and in addition to the removal of the post, ordered Facebook to proactively monitor and block both “identical” and “equivalent” posts in the future. The monitoring requirement was upheld on appeal. The case was then brought before the Austrian Supreme Court. The appeal centered on both the monitoring/blocking (filtering) requirement as well as a more contentious issue: whether Facebook must remove the post globally. Both the filtering and global takedown issues were referred to the Court of Justice of the EU (CJEU). The Court was specifically asked to interpret the Directive on electronic commerce,<sup>2</sup> which states that a host provider such as Facebook is not liable for stored information if it has no knowledge of its illegal nature or if it acts expeditiously to remove or to disable access to that information as soon as it becomes aware. However, such a host provider can nevertheless be ordered to terminate or prevent an infringement, including by removing the illegal information or by blocking access to it. Even so, the directive does not require the host provider to monitor generally information which it stores, nor to actively seek facts or circumstances indicating illegal activity. On October 3, 2018, the CJEU ruled that member states can indeed order a host provider (e.g., Facebook) to remove/block access to 1: content that has been declared to be unlawful, 2: content which is identical to the original content (e.g. “re-posts”), and 3: content which is equivalent (e.g., a new post with only slightly different wording). It was also determined that in the execution of these blocking duties, the host provider should not be required to assign people to assess content, thus, automated search tools and technologies should be employed. While the judgement is in many ways unexpected, perhaps the most astonishing aspect is that it is to have *worldwide effects* within the framework of relevant international law. This means that nationally determined legal constraints on speech/expression can now potentially be imposed worldwide.

The judgment has stirred up a veritable hornets’ nest of issues and legal debate regarding the competing rights of freedom of expression and protection from defamation, as well as several contrasting views on the capabilities of filtering technology. I would like to argue, however, that lurking beneath what may appear to be a rather classic conflict of competing rights is a complex web of interconnected cultural contrasts that is not being addressed and that could have rather dire effects. While the technology aspects of the case seem to be serving as shiny baubles of distraction, far more troubling is the newly legalized ability to impose value categorizations in the form of terms such as defamation, offense, insult, etc., on a global scale. The takedown of information based on these kinds of categorizations is essentially a form of censorship empowered by unspoken cultural frameworks. These cultural motors are silently operating behind decisions about what kind of expression is permissible and by whom. While the ECJ was asked to give an interpretation that was ostensibly about an Ecommerce directive, the reach of the decision goes far beyond commerce to impinge upon what is to be published (expressed and shared) globally, and not only. It also potentially prescribes monitoring activity that impacts everyone making use of social media platforms. In the case of Facebook, this affects 2.45 billion people in more than 60 countries. This massive impact is particularly important in light of the tremendous diversity that such reach inevitably

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<sup>2</sup>Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1).

encompasses. The cultural fabric that gives form and meaning to terms such as “reputation,” “insult,” “offense,” etc., cannot be said to be in any way globally consistent. Cultural determinations about what is offensive and what is not, where to draw the line between, for instance, freedom of speech and freedom of religion, are constantly shifting variables. The pervasive inconsistencies and disagreements within these domains have always been and continue to be sites of social conflict on a large scale. To give just one pithy example: while just a few years ago thousands took to the streets in defense of the freedom of French cartoonists to mock Islam in print, now, quietly, Austria can globally silence a citizen for having called a politician a corrupt oaf<sup>3</sup>. Is this an appropriate balance of rights? Is it even within the remit of a European court to answer the question for the rest of the world? How are values best addressed when it comes to legal impositions with global effects?

## 2. Religion in the Rafters

It may seem that religion per se is not at issue in this case. However, I would like to try to elucidate how it is impossible to consider the concepts of insult and defamation without addressing the values that shape their contours in any given cultural context. Though Ms. Glawischnig-Piesczek was not successful in her criminal case, nevertheless the civil case upheld the concept of defamation set down in the Austrian Criminal Code: “Accusing someone of a disreputable characteristic or disposition, dishonourable behaviour or of a behaviour offensive to good morals that may denigrate that person or bring him/her into disrepute in the eyes of the public.”<sup>4</sup> Now, the concepts of disrepute, honor, denigration and offence to good morals have a provenance; they do not simply appear in the modern world as readily understood and agreed upon. In many European nations that provenance is deeply Christian, and Austria is certainly no exception. Austria, like the vast majority of European countries, is a secular state, meaning freedom of religion is recognized and citizens are not “born members” of any church. As has been articulated in a mounting collection of scholarship, however, secularity is much more complex than the simple notion of separation of church and state.<sup>5</sup> The historical circumstances even of this separation always have a lasting and formational impact on how secularity is carried out within any given state. Even the briefest review of the religious history of Austria reveals the overwhelming impact of the Hapsburg Empire during the Counter-Reformation, which restored Catholicism as the dominant religion and left a legacy that remains today, with nearly 60% of the population self-declaring Catholic<sup>6</sup>. Regardless of the particular weight given to this social fact, the prohibition of “dishonorable behavior” cannot be understood without considering this historical-religious context. To be clear: there is no simple causal effect in which Austria has made this decision because its population has a large Catholic majority. Rather, the prevalence of Catholicism is

<sup>3</sup> The term used in the original German was “korrupter Trampel.” For a translation of the offending comment, see above at Note 1.

<sup>4</sup> <http://legaldb.freemedia.at/legal-database/austria/>

<sup>5</sup> In a massive literature beginning at least in the mid 20<sup>th</sup> century and increasing daily, see indicatively Casanova (1994), Asad (2003), Taylor (2007), and Calhoun et al (2011).

<sup>6</sup> 2017 data from the Austrian Catholic Church available at:

<https://www.katholisch.at/aktuelles/2018/01/09/statistik-2017-wieder-leichter-rueckgang-bei-kirchenaustritten>

undeniably a part of a broader cultural fabric that informs what is considered offence to good morals in Austria. This is true for every social context, regardless of the particularities of its religious-cultural history.

Judgments about what is good and therefore allowed, and what is offensive and therefore not allowed, are the scaffolding of all legal systems. It is therefore not surprising that there have been many legal cases, even limiting the view to Europe, in which the interplay among modern moral judgment, freedom of expression, and religious context are at issue. One of the most often cited of these cases, in fact, took place in Austria. *Otto-Preminger-Institut v. Austria* is almost always cited when it comes to the contrast of freedom of speech and freedom of religion, perhaps because it is considered by many to be among the most controversial of the ECtHR cases regarding freedom of speech. A brief look at the case may help to illustrate some of the ways in which religiously rooted cultural manifestations operate as a determining part of legal decisions with potentially far-reaching implications.

The Otto-Preminger-Institut was a private cultural association that offered audio-visual entertainment. In 1985, the association announced the screening of the film *das Liebeskonzil* ("Council in Heaven"), restricting the viewing public to those over 17 and advising in the adverts that the film contained caricatures of Christian figures and beliefs.<sup>7</sup> Before the film was screened, criminal proceedings were brought against the association's manager (Mr. Dietmar Zingl) by the public prosecutor, at the behest of the Catholic Church. The film was seized, Mr. Zingl was subsequently convicted of "disparaging religious doctrines," and this conviction was upheld, in 1993, by the European Court of Human Rights (ECtHR). The Court's reasoning was that Austria should be allowed a margin of appreciation for its religious cultural context. Among the main arguments made by legal counsel in Austria was precisely the religious-cultural context in which the film was to be screened. The ECtHR case documentation is clear:

...they stressed the role of religion in the everyday life of the people of Tyrol. The proportion of Roman Catholic believers among the Austrian population as a whole was already considerable - 78% - but among Tyroleans it was as high as 87%. Consequently, at the material time at least, there was a pressing social need for the preservation of religious peace; it had been necessary to protect public order against the film and the Innsbruck courts had not overstepped their margin of appreciation in this regard.<sup>8</sup>

There was another very similar case shortly after with a similar result, *Wingrove v. UK*<sup>9</sup>, in which the banning of a film found to be offensive to Christians was upheld by the ECtHR. Though these cases are somewhat dated and have been criticized by legal scholars as an example of the misuses of

<sup>7</sup> A description of the contents of the film is offered in the court documentation as follows: "Oskar Panizza's satirical tragedy set in Heaven was filmed by Schroeter from a performance by the Teatro Belli in Rome and set in the context of a reconstruction of the writer's trial and conviction in 1895 for blasphemy. Panizza starts from the assumption that syphilis was God's punishment for man's fornication and sinfulness at the time of the Renaissance, especially at the court of the Borgia Pope Alexander VI. In Schroeter's film, God's representatives on Earth carrying the insignia of worldly power closely resemble the heavenly protagonists. Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated." See: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57897%22%7D>

<sup>8</sup> *Otto-Preminger-Institut v. Austria* no. 13470/87 § 52 ECHR 1994.

<sup>9</sup> *Wingrove v. UK* no. 17419/90 ECHR 1996.

proportionality,<sup>10</sup> I believe they are relevant here for several reasons. First, morality within cultures tends to move slowly. Even broad measurements of the role of religion in a given society such as church membership can only capture a tiny protruding tip of what are instead cultural depths filled with the multiple ways religiously rooted worldviews play out anthropologically. In other words, the relationship between a given culture's religious profile, not only today but also historically, and the moral views that prevail in that same social context are entwined; these threads and the specific ways they tangle can end up being somewhat covert. Declared membership in a church is one thing, cultural habits and behaviors a much more pervasive other, even if there is unavoidable overlap. Second, if we consider the stated goal of the judgment, that is, the "preservation of religious peace," we can interpret this as a desire for the aversion of conflict through the protection of people's beliefs and feelings, which again, is deeply cultural. Precisely which of people's feelings and beliefs, if any, are to be protected by the State varies considerably across the world's legal cultures.<sup>11</sup>

The Preminger case has been highlighted once more in the legal media of late thanks to a 2018 decision of a 2010 legal case<sup>12</sup>, also in Austria, in which a woman was convicted for disparaging religious doctrines in publicly held seminars entitled "Basic Information about Islam." During the seminars, which were advertised to young voters as "top seminars" in the framework of a "free education package" she stated, among other things, that Mohammed was a pedophile. The judgment was upheld by the European Court of Human rights which agreed with the Austrian courts that the defendant's statements went "beyond the permissible limits of an objective debate" and constituted instead, "an abusive attack on the Prophet of Islam," thus legitimating legal interference with rights to freedom of expression. Assessing these cases in parallel we see a kind of consensus in Austria, supported by the European Court which also references several of their related cases<sup>13</sup> that address the legitimacy of protecting religious feelings, the balancing of freedom of expression in light of the need to protect these feelings, and the importance of allowing for a wide margin of appreciation to States when it comes to maintaining social peace. This last is of special importance for the current Facebook case under analysis. The *E.S. v. Austria* judgment states:

The Court notes at the outset that the subject matter of the instant case is of a particularly sensitive nature, and that the (potential) effects of the impugned statements depend, to a certain degree, on the situation in the country where the statements were made at the time and the context in which they were made. Accordingly, and notwithstanding some of the domestic courts' considerations such as the duration of the marriage in question<sup>14</sup>, the Court therefore considers that the domestic authorities had a wide margin of appreciation in the instant case, as they were in a better position to evaluate which statements were likely to disturb the religious peace in their country.<sup>15</sup>

<sup>10</sup> See Klatt, M. and Meister, M. (2012).

<sup>11</sup> I will address this in more depth below, but to offer a pithy preview of the core of the Facebook case, calling a politician a corrupt oaf is a daily occurrence in many countries.

<sup>12</sup> *E.S. v. Austria* no. 38450/12 ECHR 2018.

<sup>13</sup> In the judgment, the ECtHR cites a number of cases, including *Otto-Preminger-Institut v. Austria*, *Wingrove v. the United Kingdom*, a very similar case regarding a film that was offensive to Christians in England and whose censorship was upheld by the ECtHR, *I.A. v. Turkey*, *Aydın Tatlav v. Turkey*, *Giniewski v. France*, *Handyside v. the United Kingdom*, *Fressoz v. France*, *Baka v. Hungary*, *atakunnan Markkinapössi Oy v. Finland*, *Sekmadienis Ltd. v. Lithuania*, *Gündüz v. Turkey*, *Von Hannover v. Germany*, and *Medzlis Islamske Zajednice Brčko v. Bosnia and Herzegovina*

<sup>14</sup> This refers to the Prophet Mohammed's marriage.

<sup>15</sup> *E.S. v. Austria* no. 38450/12 § 50 ECHR 2018.

The tendency to favor margin of appreciation for States in these cases comes from an underlying assumption that the State's relationship to and legislation regarding religion is the result of the historical tradition and the social, moral and cultural circumstance of each country.<sup>16</sup> This brings me to my third point. If there is European consensus that individual countries are in the best position to determine how to maintain religious (read: moral/social) peace in their countries, then how could the results of such efforts possibly be legitimately imposed globally? As more than one commentator has pointed out, the content which prompted this Austrian plaintiff to request a global take-down would not be qualified as offensive in many countries but instead be immediately dismissed by the Courts, especially because the comments made were about a politician, someone who has chosen to be in the public spotlight and therefore in many countries benefits from less "protection."<sup>17</sup> Defamation, in short, is neither simple nor a question of fact.

### 3. Defamation: Where Words and Actions, Opinions and Facts, Collide

The issue of defamation, whether associated with religion or not, has been troubling legal systems for quite some time. While there is much concern about whether such offences should be criminal (there appears to be quite a bit of consensus internationally that they should not) more complex still is the concern that excessive application of even civil penalties for defamation has what has been termed a "chilling effect" on free speech, provoking self-censorship among journalists or even citizens who wish to avoid potential legal consequences. Again, if it is worrisome to think about self-censorship in a given democratic state, what happens when the effect is global? Even looking only at Europe, in some States defamation is a criminal offence punishable by imprisonment, in others criminal but only punishable by a fine, and in still others not criminal at all.<sup>18</sup> Forcing multinationals to essentially carry out a sentence globally that does not have legal support globally is illogical at best. This observation does not even consider the far more complicated variations in what constitutes defamation in the first place. Indignation over hurt feelings? Insult? Damage to a "rightful reputation"? Whose definition should prevail?

There are at least two other major facets to the legal tangles around defamation: veracity and incitement. Some States have differing legal provisions based on whether or not the statements assessed as defaming are deemed to be factually accurate or not. In yet another Austrian case, dating back to 1975, the ECtHR assessed whether the applicant Lingens, an Austrian journalist, should have been sanctioned for publishing comments in a Viennese magazine, applying the terms "basest opportunism", "immorality" and an "undignified" behavior to the Austrian Chancellor. The Austrian Criminal Code maintained that the only acceptable defense for these statements was a proof of their veracity. Since they are, however, value judgments rather than facts, Lingens could not prove the

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<sup>16</sup> Martínez-Torrón (2019), 58.

<sup>17</sup> As a Portuguese Court of Appeal succinctly stated, "Freedom of expression constitutes one of the fundamental essences of modern democratic societies. In such societies, public debate and freedom of expression should enjoy increased protection when relating to political questions or politicians themselves." Cited in Ellis (2014), at Note 65.

<sup>18</sup> For a map showing the breakdown in Europe as of 2014, see Ellis (2014), 8.



truth of the statements. Mr. Lingens claimed that the impugned court decisions infringed his freedom of expression to a degree incompatible with the fundamental principles of a democratic society and the Court agreed. Unfortunately, the same careful reasoning of this case was not applied in *Ewa Glawischnig-Piesczek v. Facebook Ireland Limited* which failed to consider any of the nuances of the judgment upon which the CJEU's subsequent judgment rests. Though the inclusion of potentially offensive and unpleasant content within the category of expression worthy of legal protection appears over and over in legal judgments, particularly within the case law of the ECtHR<sup>19</sup>, in this case the issue seems to have been overlooked altogether. The statements made about Ms. Glawischnig-Piesczek appear to be comprehensively value statements rather than statements of fact. While they may be objectionable on various grounds, they cannot be disproven on a factual basis. For the sake of comparison, in the US statements cannot qualify as legal defamation unless the statement made can be proven to be false and the person making the statement also knew their statement to be false. Defamatory statements which are labeled as opinion are not protected by the first Amendment. Similar statutes exist in other European states and decisions have been made in several legal cases to support them. The ECtHR, for example, has repeatedly found a violation of Article 10 (Freedom of Expression) precisely in cases where a distinction between fact and value statement has not been made by national courts.<sup>20</sup> In this cultural moment where “fake news” is such a ubiquitous concern should there not be more attention paid, rather than less, to any discernable differences between value statements and factual statements?

I cannot let this dichotomy rest, however, without making a few observations about the way in which it, too, is problematic. A very brief historical reminder seems useful at this juncture. While it would appear to be the Enlightenment's great gift to the Western world to replace the religious monarch with the monarchy of reason, this was not a clean break<sup>21</sup>. Though the leaps in understanding made through the profound scientific discoveries of the 17<sup>th</sup> and 18<sup>th</sup> century cannot be overstated, reason did not—because it could not—replace all other human ways of understanding and making the world. Both in terms of the everyday lives of people and the larger systems and structures developed to organize them, traditions, emotional ties, faith, transcendence and the unknown have always brought more than reason into play. From a political point of view, for all of its achievements, the secular world did not exterminate all things religious, replacing them with atheist views, for example. The fundamental guiding ideas we have about right and wrong and the myriad ways these ideas structure our societies do not come from reason (or atheism for that matter), and yet we frequently treat them as if they were factual. Agreed upon fictions such as the calendars we use to mark time or the determinations we make about the dividing line between childhood and adulthood become facts. Of course, it would be impossible to organize or regulate our societies without such categorical distinctions, irrefutably cultural though they are. One result, however, is that the

<sup>19</sup> See *Dichand v. Others*, no. 29271/95 ECHR 2002, *Scharsach and News Ukrainian Media Group v. Ukraine*, no. 72713/01, ECHR 2005, *Verlagsgesellschaft v. Austria*, no. 39394/98 ECHR 2013, among many others.

<sup>20</sup> See, *Grinberg v. Russia* no. 23472/03, ECHR 2005, *Savitchi v. Moldova* no. 11039/02 ECHR 2005 and *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, no. 58547/00 (ECHR) 2005.

<sup>21</sup> Nor has there been agreement about its characterization as a gift, as argued in the by now iconic work of Adorno and Horkheimer (Adorno and Horkheimer 1972).

fact/value dichotomy is often not such a clear one<sup>22</sup>. While we can certainly establish laws and then determine, factually, whether the laws are being properly obeyed, the laws themselves frequently rest on unstable notions of comportment because comportment itself fails to remain strictly within the camp of reason or not-reason (whether this last is defined as emotion, faith, or anything else). It is precisely because religious viewpoints often straddle the traditional terrain of these domains that they are apt to throw wrenches into legal systems.

I insist on the connection between the religious and values understood more generally because it is impossible to meaningfully isolate them. Secular states define themselves in response to religion just as non-partisan is a term that exists only through its reference to parties. Though the case this paper analyzes is about “defamation,” this is defined as “offense to good morals” and any meaning that may be attributed to the term “good morals” belongs to a social fabric with religious threads. It is an understatement to say that the cultural nature of human behavior makes it difficult to regulate within single states, so what are we to make of globally imposed regulation? The facticity of offense or not-offense to good morals is problematic, but at least it does not typically result in criminal sanction. There is another criterion, however, that is being increasingly applied to online behavior that does result in criminal sanction, namely, incitement.

In 2016, the European Commission teamed up with some of the major online players (Facebook, Microsoft, Twitter, You Tube) to create a guide to Human Rights for internet users which includes a code of conduct intended to counter illegal hate speech online<sup>23</sup>. The guide states:

You are free to express yourself and access information online. The freedom to express and access information and opinions extends to those which may offend, shock, or disturb others as long as they do not incite discrimination, hatred, or violence. Public authorities must respect and protect this right, and any restrictions must pursue a legitimate aim in accordance with the European Convention on Human Rights.

Perhaps not surprisingly given the technology companies involved, this position mirrors the US legal framework more than the European one(s), placing a premium on expression over offense. Instead, the line is drawn at incitement. While distinguishing words that are used in order to express ideas from words that are intended to provoke potentially violent actions makes intuitive sense, there remains a giant question mark when it comes to who, exactly, determines whether something is inciting and why/how. Though the word “incitement” was not used, all the way back in the Otto Preminger case, the Austrian Court argued that the seizing of the offensive film was justified by a pressing social need for the preservation of religious peace, and that “it had been necessary to protect public order against the film.”<sup>24</sup> The implication is that showing the film would have incited people to acts of aggression or violence, and this despite the fact that it was a private for-fee screening limited to those over the age of 17, in other words, a cultural event that was easily avoidable by those who wished to avoid it. The more recent case addressing these issues, *E.S. v. Austria*, was decided using

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<sup>22</sup> Though I will address this in more depth below, this is admittedly an oversimplification of something that has been addressed by philosophers from the ancients to Gadamer in his signature opus (Gadamer 2013, 1975), Esser (1970), and beyond. Very little of Esser’s important contribution is available in English but see Prott (1978) and references therein for a contextual understanding and Mathis (2011) for a more recent legal analysis.

<sup>23</sup><https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804d5b31>

<sup>24</sup> *Otto Preminger Institut v. Austria*, no. 13470/87 § 52 ECHR 1994.



much the same reasoning, stating in the Merits section of the judgment that expressions that are likely to incite religious intolerance, or seek to spread, incite or justify hatred based on intolerance cannot enjoy the protection of Article 10.<sup>25</sup> Expressions that are potentially offensive to others (or at least their proliferation and rapid diffusion) would appear to have increased in the last twenty years, and still more relevant to the primary case under analysis in this paper, their dissemination is ever more rapid and vast. If, as the ECtHR has repeatedly reiterated, the sensitive issues of offence and incitement are best understood by State courts, how does Europe come to instead heedlessly propagate national rulings on a global basis and then delegate their execution to technology filters? Why does incitement to violence or hatred as a key determinant in the evaluation of freedom of expression play no role in this case? Why does the international consensus regarding the special treatment of political speech<sup>26</sup> similarly receive no attention here? The expression that has been globally banned in this case was political, seems to have been intended to spark debate, and did not specifically encourage its readers to do anything other than not vote for the political party the politician represented. The consequences for the plaintiff seem to be quite minimal and she has since left politics of her own volition. The consequences for expression, international jurisdiction and the use of filtering technology, on the other hand, appear to be significant to say the least.

Just one month before the decision, the Council of Europe published a study entitled, “Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states.”<sup>27</sup> This study identifies the problem of “forum shopping” in defamation cases, which consists of plaintiffs selecting the court in which to bring an action based on the prospect of the most favorable outcome, even when there is no or only a tenuous connection between the legal issues and the jurisdiction.<sup>28</sup> The study goes on to describe in detail what kinds of cases have illustrated this issue, what courts have done about it, Brexit and its impact on these cases, as well as what might be done to address all of the inherent problems, identifying 15 “Good Practice” points along the way for Courts to consider when dealing with forum shopping and problematic international cases generally. While the care and deliberation that clearly went in to this work is evident and to be appreciated, it seems that in one fell swoop, with *Ewa Glawischnig-Piesczek v. Facebook Ireland Limited* the ECJ has instead swept all these concerns off the table. All the considerations regarding how Courts should assess foreign judgments, when they should accept or refuse judgments, how to apply *res judicata*, how to enforce time constraints for cases to ensure justice is served, when and how to make use of *forum non conveniens doctrine* to make sure cases are heard in the best forum, all these Good Practices are essentially neutralized by the new ruling. The age-old questions regarding what levels of protection of rights and freedoms States should offer their citizens

<sup>25</sup> *E.S. v. Austria*, no. 38450/12 § 43 ECHR 2019.

<sup>26</sup> In *Lingens v. Austria* the Court elucidates: “[f]reedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.” *Lingens v. Austria* no. 9815/82 § 42 ECHR 1986.

<sup>27</sup> Available at: <https://rm.coe.int/study-on-forms-of-liability-and-jurisdictional-issues-in-the-applicati/168096bda9>

<sup>28</sup> *Ibid*, 6.

have little bearing if one State can simply impose its decisions on the rest of the world. Group rights vs. individual rights become similarly moot; in this case the billions of people whose content will be patrolled and potentially censored by filtering technology have no say at all in these practices since they have been essentially disappeared by the rights of the Austrian plaintiff. As long as one European Court can be convinced that a right has been infringed, the sentence can be executed globally. One result is that the problem of forum shopping would appear to be exponentially exacerbated. Another, even more troubling outcome is the lack of possibility to engage in meaningful international legal dialogue addressing the balancing of rights, the need for culturally-aware communication and exchange, which up until this judgment seemed to be taking place through various channels.

#### 4. The Hammer of Equality

As I have been trying to show, among the many troubling aspects of this case is the disregard for the inescapable cultural imposition that is empowered by the decision. In some respects, however, this disregard is almost to be expected. The act of imposing one solution onto other people without taking into consideration how social/legal/cultural contexts differ vastly from one place to another is an unfortunate defect of modern liberal democratic thinking.<sup>29</sup> What is closest to us is always most invisible. What is considered normal, good morals, just, is always the product of history, tradition, culture. It is only before an unavoidable counterclaim that we are compelled to question our own frameworks for understanding our assumptions, whether they relate to offense, incitement, just indignation, or anything else. The almost automatic quality of the decision comes from an inability to even imagine that in another context, claims that seem obvious may not be obvious at all. When one cultural position forces the other into submission, there can never be any meaningful understanding or exchange. There are many voices today declaiming the negative tone of much of the commentary online. There are many who are tired of the ubiquitous insults and loose relationship with truth in online political expression. The Austrian decision, therefore, could potentially have something to offer to a dialogue regarding online behavior and freedom of expression. Instead, the global imposition of the sentence has the effect of shutting down any possible interactions, not only about defamation online but, importantly, about international sanctions. Since the issues at hand are to do with freedom of expression vs. offense to values, it could be helpful to spend a moment on another case study of sorts that illustrates the dazzling-blinding effect of cultural mindsets.

The Jyllands-Posten Muhammad cartoons controversy occurred in 2005 when a Danish newspaper published 12 editorial cartoons mainly depicting the Prophet Muhammad. The newspaper claimed that the goal was to foster debate about the criticism of Islam and self-censorship. Muslim groups in Denmark voiced concern, and eventually protests were held around the world, including violent demonstrations and riots in some Muslim countries. When interviewed by the New York Times about his decision to publish the cartoons, editor Flemming Rose stated that the publication of the cartoons as well as others that were anti-Semitic, was a case of “documentation, not

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<sup>29</sup> This is essentially a way of thinking that has infused many academic fields including of course Post-Colonialism, Anthropology and Political Theory, and as such one footnote cannot hope to do it justice. However, for a pointed and astute sociological analysis, see Bhambra (2007).

endorsement.” I believe it is worth quoting him more extensively because he so succinctly captures the equality-as-a-hammer I would like to describe. He states:

Equal treatment is the democratic way to overcome traditional barriers of blood and soil for newcomers. To me, that means treating immigrants just as I would any other Danes .... Those images in no way exceeded the bounds of taste, satire and humor to which I would subject any other Dane, whether the queen, the head of the church or the prime minister. By treating a Muslim figure the same way that I would a Christian or Jewish icon, I was sending an important message: You are not strangers, you are here to stay, and we accept you as an integrated part of our life .... It was an act of inclusion, not exclusion; an act of respect and recognition.<sup>30</sup>

Probably at least a volume could be written on the points I would like to make next, so please forgive the necessary brevity as I try to keep the argument aligned with the Facebook case under analysis. Nonetheless, it seems crucial to note, despite the regrettably cursory quality of these observations, at least two characteristics of Islam that contrast with Rose’s comments. First, the vast majority of Muslims are born into the religion, which like Judaism, has long been understood as an integral part of a cultural context. Children raised in these contexts are born within the religion, they are automatically a part of the religion, which means they are raised with the worldview, customs and tradition of the religion. It is not easy to say which of the cultures’ behaviors and ideas are “religious” and which are “cultural.” From dietary choices to ideas about relationships and marriage, about property, about punishment, religion and culture are for the most part inseparable. Furthermore, people are grouped not only by the choices they make but also by the way they are seen and treated by others. The racialization of religious minorities especially by others has a long and material history. As can be seen in any context where a person’s physical presentation or habits appear to be in contrast with typical societal norms as occurs with migrants, but also adoptees<sup>31</sup>, we are who we are seen to be. Our ethnicity is in a sense determined by what is mirrored back by the society that surrounds us. So when Rose says that the controversy “has nothing to do with racial issues because the difference between ethnicity and religion is you are free to choose your religion whereas you can’t choose the color of your skin,” he is already missing the way in which the ethnicity/religion dichotomy does not effectively pertain in the same way to Islam or Judaism as it might (or might not) to Protestant Christianity. The very notion of “choosing your religion” and keeping it “separate” makes sense within the Danish context as it is very much a product of the form of secularism in place subsequent to the Protestant Reformation. It is however in no way universal, not even within Europe. Finally, the strong tradition of aniconism in Islam makes it highly blasphemous in most Islamic traditions to visually depict Muhammad, something that is in total opposition to the omnipresence of Christian religious figures in every major square of every major European city. So here too, a Muslim icon does not have the same meaning to members of the faith as a Christian (or Jewish, for that matter) icon by a matter of kind rather than degree.<sup>32</sup> With these two instances of dramatic disregard for what it is and means to be Muslim or Jewish, it is difficult to take seriously his insistence that his was an attempt at inclusion. If what he means by inclusion is assimilation, a cancelling out of one’s historical

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<sup>30</sup> Malek (2007).

<sup>31</sup> For an in-depth analysis of the cultural complications of international adoption, see (Ricca 2019).

<sup>32</sup> A brilliant and insightful analysis of the contrasts between Christianity and Islam that emerge with questions of freedom of expression in Europe can be found in Asad (et al) 2009.

identity in order to conform to the norms of the dominant society, that would be a different matter, but it would be utterly incongruous with his claim of offering “respect and recognition.”

At an ideological level, the protection of freedom of expression and freedom of religion (or conscience or belief or even “good morals”) are undertaken to safeguard the flourishing of human beings. But the only way for freedoms to be meaningfully protected is if they remain free, free to differ from one context to another, free to mean different things to different people. It is for this reason that the ECtHR has placed such an emphasis on balancing rights and freedoms.<sup>33</sup> One cannot treat a wide range of people “the same way” and expect the results to be egalitarian. The Facebook case sentence, as has been noted, does not minimally take any of these concerns into consideration since it is only focused on the applicability of the E-commerce directive to impose takedown requirements on hosting companies. Nevertheless, as I have been trying to show, European States have long been wrestling with how to manage defamation issues such that a just balancing of rights can be found. A review of one European country’s legislation on the matter may provide useful perspective.

## 5. Italy: A Case Study

Italy is interesting to consider in the matter of defamation because it has such a strong and clear religiously influenced history. Even limiting the observation to the 20th century and beyond, we note that the Lateran pact in 1929 established the State of Vatican City, seat of the Catholic church, and established Catholicism as the state religion. This relationship was not officially concluded until 1984. There is no question, therefore, that defamation laws in Italy, particularly regarding defamation of religion, have been strongly influenced by this relationship. Indeed, a recent comparative study showed Italy to be one of just four European countries with laws in all the categories related to offense against religion: blasphemy, insults to religious beliefs or doctrines, interfering with religious worship and/or freedom of religion, sacrilege against an object of worship, and inciting discrimination or religious hatred. These laws, solidified by the fascist regime, were substantially reformed in 2006 under the rubric of a modification to all “Crimes of Opinion.”<sup>34</sup> In general terms, the reform involved extending protection to religions other than the Catholic faith and reducing penalties from imprisonment to fines. The movement from an officially Catholic state to a secular one is fairly clear in the changes made in the law. It is interesting, however, to note the language that remains within the statutes. The laws refer to *condotta vilipendiosa*, which can be translated as insult or contempt, and which is considered a crime, defined in Criminal Code Articles 403, 404 and 405. These articles make a distinction between contempt and defamation of *religions* as opposed to defamation and offence to the sensibilities of *believers*. It is the religious sentiment of the organized community of believers that is protected rather than the specific creed of the denomination. As in

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<sup>33</sup> For an analysis of freedom of expression vs. freedom of religion that considers the legal cultural differences between the US and Europe, see Foster (2009), and for a spirited cultural comparison in the domain of hate speech, see Heinze, (2009).

<sup>34</sup> Law 24 February 2006, n. 85 *Modifiche al Codice penale in materia di reati d’opinione* (Changes to the penal code regarding crimes of opinion).

several other European legal systems, censorship is not permitted if the expression is deemed to be criticism that contributes to constructive social debate, distinguished from “mere derision, through rudeness and contempt.”<sup>35</sup>

The Italian courts have of course addressed the interaction between these laws and Article 21 of the Constitution which guarantees freedom of expression, defining defamation of religion thus: contemptuous or insulting conduct against religious people, views, or objects constitutes an injury to the believer and therefore to his legal personality, as well as offence to the ethical values which substantiate and nourish the religious phenomenon, viewed objectively.<sup>36</sup> This approach appears to be consistent with that underlying the Austrian case analyzed here, wherein the plaintiff’s claim of defamation, though not religious, is similarly conceived. And yet just as many American commentators struggled to understand Austria’s definition of defamation for this politician, it is far from easy to feel certain about what injury to a believer and therefore his/her legal subjectivity might entail, especially given a description of the religious phenomenon viewed “objectively.” How does a secular state understand the religious phenomenon objectively? At its very core, it is anything but objective since it pertains to transcendent interior experience and individual conscience, in addition to its public external praxis. Furthermore, conduct that may be experienced as religious either to a person enacting it or to a person observing it may exceed the typical categorization schemes assigned to religion. In other words, people who are religious do not contain their religiousness to places of worship; they live their religiousness within many aspects of their lives which certainly overlap with secular spaces. A secular state must attempt to protect the interests of all of its citizens, religious and non. It might seem that protecting religious phenomena would be more problematic than adjudicating non-religious defamation. Italian jurisprudence, however, does not quite support this hypothesis.

For a state that has the general reputation of being unduly influenced by its history of entanglement with the Catholic church, the roster of legal cases in the domain of religious defamation is not terribly robust. The most recent case, in 2015, involved a seventy-two-year-old man who was convicted by the Italian Supreme Court for violating Criminal Code Article 403, offence against a religious denomination through the insult of a religious leader. The accused exhibited a large format triptych canvas in the center of Milan featuring Pope Benedict XVI, male genitalia, and Monseigneur Gaenswein, the Pope’s personal secretary, with a caption that read, “Let the person who is not a faggot cast the first stone.” The defendant argued that he had manifested his freedom of expression, despite its vulgarity. The Court ruled the speech act to be defamation because it was insulting in and of itself, meaning it was derisory without contributing to social criticism in a constructive way. Further, the Court found that there had been “injury beyond acceptable limits, taking into account the minimal respect due for other people’s religious beliefs.” It is not difficult to

<sup>35</sup> Cited in Cianitto (2017) at Note 23.

<sup>36</sup> This is a translated paraphrase of a legal scholar Fabio Basile’s interpretation of the Constitutional Court’s ruling n. 188 from 1975. Basile (2018). Translation mine. Furthermore, there is a massive literature in Italian on the intersection of freedom of expression, freedom of religion and the related legal issues in Italy. For a comprehensive overview of the domain, see Fuccillo (2019). For a very recent analysis of the protection of religious feeling and “crimes of opinion,” see Licastro (2020) and Adamo (2018). Blasphemy and hate speech with specific regard to religion are investigated by Cianitto (2016), Colaianni (2008) specifically addresses satire and religion, Angeletti (2010) defamation of religion and human rights, Siracusano (2009) pluralism and the secularism of values, while and references therein.

imagine such a case resulting in the same outcome even in states who place greater emphasis on freedom of speech than protection of religious feeling. Perhaps more relevant to the issues under analysis here are Italy's laws regarding non-religious defamation, which have been severely criticized for dictating punishments that are among the harshest penalties in Europe.<sup>37</sup> As one freedom of the press watchdog observes:

According to data obtained by the Italian free expression group *Ossigeno per l'Informazione*, Italian courts annually sentence around 155 individuals, mostly journalists, to jail for defamation. Over the last five years, the sentences have added up to 515 years of imprisonment. Although those jail sentences have been carried out in only a few cases – in others, convicts were sentenced to house arrest or had their jail terms suspended – their very existence has the potential to cast a chilling effect on journalism.<sup>38</sup>

The question then is: why? Article 594 of the Criminal Code (*reato di ingiuria*), defines defamation as offending the honor of another person. Honor—for the purposes of defamation—refers to the moral qualities (honesty, loyalty, etc.), of the person offended.<sup>39</sup> Though this may sound rather vague, the Austrian case under consideration is entirely consistent with this approach, since the offended politician was referred to as being corrupt and dishonest. Indeed, Article 21 of the Italian constitution, protecting freedom of expression, also invokes morality, stipulating that “Printed publications, shows and other displays contrary to morality are forbidden.” But how is morality to be defined? Who decides what is contrary to morality? Defamation penalties are more severe when the “audience” of the offense is larger, so there appears to be an idea nested within this concept of morality that pertains to community and reputation. Also relevant, again, are the issues of veracity and intentionality in these cases. Article 596 of the Criminal Code, “Inadmissibility of exonerating evidence,” stipulates that in cases of defamation, proving the truth or notoriety of the allegation does not absolve the offending party.<sup>40</sup> So, the damage to reputation occurs regardless of the veracity of the allegation. Another interesting exception occurs in cases of retaliation, as defined in Article 599: “Persons having committed one of the acts described in Articles 594 and 595 in a state of anger which has been caused by an unjust act by a third party and is suffered after this act shall not be punishable.” Who is to decide what is an unjust act? Or whether a state of anger is justifiably caused by such?

It could be speculated that the harsh penalties, the inclusion of provisions against offense to heads of state or objects of state (e.g. flags), the fact that veracity does not excuse the offense, etc., have their origins in the fascist period of Italian history and before that, in the time when religious leadership was tightly connected with the State. Or that there are religious roots to be found, for example, in the provisions regarding retaliation. It would take a much more extensive legal-historical analysis of the jurisprudence of defamation than this paper permits to effectively explore how and why these specific provisions have ended up in their current state. Pertinent to this analysis, however, is the cultural effervescence, if you will, that can easily be perceived in all of the legal terminology and

<sup>37</sup> <http://legaldb.freemedia.at/2018/01/30/defamation-laws-still-concern-for-europe-media/>

<sup>38</sup> *Ibid.*

<sup>39</sup> Extracted and translated from <https://www.brocardi.it/dizionario/5244.html>

<sup>40</sup> Persons committing the offences set out in the previous two articles are not permitted to exonerate themselves by proving the truth or notoriety of the alleged act performed by the defamed person.



the resulting impossibility of constructing globally accepted definitions. Reading the legal statutes and the cases that have put them to use there is a clearly discernable cultural fabric full of unspoken assumptions regarding proper (moral) conduct, honor, reputation, truth, audience, offense, and more, whether religion is a factor or not. A closer look at intent, legally defined, may be helpful here.

Intent, in the legal context, must be finalized after the legal facts have taken place. Definitions regarding the action and the actor have already occurred when legal proceedings begin. The accused enters the courtroom as an accused person, someone who is being characterized as a wrong doer, if not a criminal, even if formally he is innocent until proven guilty. Thus, the person accused of defamation is already being seen in terms of the defaming act. Motive or intention are already woven into these qualifications. There is very little space, if any, for an inquiry into the massive web of variables from which the act emerged. Whereas outside the legal context, understanding a person's intent for a given action might be a highly complex and time-consuming process, conducting extended research on intent is not really within the purview of the court. This is not to say that legal qualification of intent is casual, quite the opposite. There are several different qualifications for intent, or *dolus*, in the Italian (criminal) legal system as in many other systems, and which one is applied has a crucial bearing on legal outcomes.

The history of the term is revealing. While *dolo* dates back to ancient Roman law, its original definition was deceit, or fraud. *Dolus malus* specifies that the aim of the deceit is reprehensible or immoral, while *dolus bonus* identifies the aim as meritorious. These definitions are still part of legal qualification today. What changed in the 18<sup>th</sup> century, however, is an extension of the qualification of *dolo* to include not just deceit but any conduct intentionally undertaken with the awareness of wrongdoing, in short, the modern idea of intent.<sup>41</sup> This leads then to the refinements *dolus directus*, in which the accused is believed to have objectively foreseen the consequences of the act, and *dolus eventualis*, in which the accused is believed to have had an awareness of the *likely* outcome of an action. One of the inescapable difficulties of all of these qualifications, however, is that they are made after the fact, or the object of analysis. Once again, the blurred lines across expression and religious factors help demonstrate why this process is difficult: if a person insults the Pope (as in the case above), was the intention necessarily to offend Catholics in their religious beliefs? To add some additional perspective, the events of 2016 showcased Europeans loudly proclaiming the unacceptability of Muslims taking offense at insults of the Prophet Mohammed.<sup>42</sup> Does an insult to a religious figure always constitute a deliberate offense to believers? If so, which kind of offense? If the qualification of intent is too general, there is a risk of constant litigation that overtaxes legal systems and results in a disproportionate use of legal resources. If, on the other hand, the qualification is too specific, the risk becomes that no one is ever held responsible. So, there are those who would say that qualifying a brief online insult of a politician as defamation (damaging of reputation with *dolus generalis*) is too broad and puts it in direct contrast with fundamental rights of freedom of expression.

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<sup>41</sup> It is unlikely that this timing is a coincidence. The entire ethos of the 18<sup>th</sup> century in Europe was saturated in a solidification of the triumph of human free will and reason over the previously shackling chains of religion. It seems more than fitting that intent, precisely at this historical moment, becomes solidified in the legal system as fundamental to the adjudication of right and wrong.

<sup>42</sup> Again, an excellent and multifaceted anthropological and sociological analysis of these events is offered by Asad et al (2009).

The more specific qualifications often required, however, have raised strong objections in the ever-expanding area of hate speech, instances of which have led to serious consequences beyond the speech itself.<sup>43</sup> A just assessment of intent would seek to find a middle ground. This already monumental task, however, is aggravated by the relentlessly increasing pluralism of modern societies. The notion of a “global culture” feels more like an oxymoron than a goal to strive for.

The “cultural factor,” moreover, is in some sense a further complication of an already deeply complex situation. The moment of adjudication showcases a debilitating hurdle: the impossibility of determining subsequent to its occurrence the “fact” on which the legal definitions will rest. What we call “the fact” which sets legal processes in motion is already a synthesis between objective and subjective aspects of human conduct. It is not only intent that slips easily out of our grasp within legal assessments, but the very acts themselves. A small example may be useful here. A man is driving a car. Suddenly the car swerves wildly across the road. In this action, a child who was crossing the road has been spared. The car, however, has run over a person walking on the sidewalk. It is then revealed that the man driving was in the midst of a carjacking, and had a gun pointed to his head as he drove. It is then discovered that the carjacker was a woman, running away from her husband who was trying to kill her. Then we discover that the driver was deaf and could not hear anything the woman was saying to him. Or that the driver was the brother of the abusive husband. Infinite layers can be added to the scenario, but what are the facts of the case? Is it murder? Self-defense? Is the driver a hero for saving the girl? A murderer for killing the pedestrian? Exclusively a victim of a violent crime? Is the man a driver or a hostage? Is the car a vehicle or a weapon? What if the gun used was a toy gun? This example may seem extreme, but these kinds of layers of complication are daily realities in legal cases. Is the person posting an insult conducting defamation or political protest? A journalist or a traitor? To arrive at legal qualifications, understanding must be reached of factual circumstances, *but the two are co-constitutive*. When an offense occurs, the facts that make it an offense are not solid or immutable but instead change depending on the perspective of who is viewing them. Legal categories, for their part, inevitably change over time as they adjust to evolving human conduct. What I am calling perspective is created and sustained by culture. Categories like “driver,” “hostage,” and “weapon” are not flat but instead operate like placeholders or icons beneath which lie universes of meaning, checklists of attributes that are at times included, at others excluded. A previous axiological assessment had to be made in the initial act of category creation and is subsequently made each time the category is invoked. Again, those assessments are made within cultures. Thus, to understand facts and qualify them is an inescapably cultural act, and culture is not objective. There is no perspective “from nowhere”; all perspective is from somewhere. It is always historically and sociologically imbued.

When the German philosopher Gadamer wrote his magnum opus *Truth and Method*, one of his key conclusions was of course that the “historical stream” in which we find ourselves permeates our understanding, it is always within us, and cannot be separated from the “methods” we use to make sense of the world and of each other.<sup>44</sup> Law, as a method for regulating societies, is certainly no exception. The imbrication and entanglement of means and ends is intrinsic to every task of law. Methods and solutions that rest at the extreme ends of a spectrum do not appear to be very effective when addressing the issues that straddle domains such as freedom of expression and freedom of

<sup>43</sup> Italy report of hate speech crimes.

<sup>44</sup> Gadamer (2013).

religion. If we recognize that it is impossible to pre-determine a divide between factual and legal qualification, then perhaps the task is to work on separating the two as a cultural operation, to subtract or subjectivize values and ends before evaluating behavior, to find the culture(s) within and without before the judgment is made. Most likely it is an operation that needs to take place long before the case is brought before the judge.<sup>45</sup>

## 6. Magic Filters and Global Takedowns

I have tried to argue that there are important overlooked assumptions and ramifications for the *Glawischnig-Piesczek v. Facebook Ireland* decision regarding the imposition of one culture's values over a vast array of others. There are, however, also straightforward logistical issues with the decision coming from a perhaps limited understanding of the current state of online content filtering tools. Probably in an attempt to not overtax entities like Facebook who are now being made responsible for the takedown of content deemed defamatory, the judgment specifies that content monitoring should be done exclusively using technology rather than assigned human personnel. This approach to content filtering has led to widespread criticism from human rights and free speech advocacy groups who point out that filters fail to cope with understanding context, often flagging legitimate expression for takedown<sup>46</sup> or bypassing impermissible content. Facebook itself has long understood the importance of human monitoring of content; it has been reported that they have hired 15,000 people for the task.<sup>47</sup> Yet even this highly controlled approach to monitoring has been unable to prevent lawsuits and controversy across over a dozen categories including intellectual property infringement, violent content, incitement of terrorism, fake news, trolling, anti-Semitism and white supremacist content. Facebook was recently in the spotlight when it was discovered that it took down hundreds of videos of people expressing political opinions that were actually facsimiles, that is, purely digital constructions known as "deep fakes." Video production technology has become so advanced that it is no longer possible to distinguish "real" from "fake" video with the naked eye.<sup>48</sup> There have even been studies showing that groups suffering discrimination "offline" are disproportionately affected by content takedown online.<sup>49</sup> It is almost unnecessary to point out that automated filters are not up to the extremely complex task of monitoring the relentless stream of content posted by a quarter of the world's population.

Understanding filtering technology and its limitations, however, may be the least of the problems in this domain. The bigger issue, it would seem, is the global interconnectedness of all

<sup>45</sup> For a recent rigorous analysis of the relationship between reasonableness and rationality in the law and the importance of intercultural analysis and translation before cases are adjudicated, see Ricca (forthcoming). For a classic and eloquent analysis of the challenges of the judge when facing factual vs. legal qualification, see Hutcheson (1929).

<sup>46</sup> See *SIN v. Facebook*, in which a Polish non-profit organization promoting evidence-based drug policy filed suit against Facebook for taking down content related to its educational campaigns on the harmful consequences of drug use.

<sup>47</sup> <https://www.npr.org/2019/03/02/699663284/the-working-lives-of-facebooks-content-moderators>

<sup>48</sup> [https://www.vice.com/en\\_us/article/ywyxex/deepfake-of-mark-zuckerberg-facebook-fake-video-policy](https://www.vice.com/en_us/article/ywyxex/deepfake-of-mark-zuckerberg-facebook-fake-video-policy). YouTube similarly came under attack for removing videos documenting the Syrian war.

<sup>49</sup> <https://www.eff.org/deeplinks/2018/03/offlineonline-project-highlights-how-oppression-marginalized-communities-face-real>

content online. As one journalist put it, “Facebook understands that there are cultural and historical nuances in different countries, but still fundamentally sees the internet—and itself—as a borderless platform.”<sup>50</sup> They are not wrong. One legal commentator downplaying the negative reactions to *Glawischnig-Piesczek v. Facebook Ireland* argued that the ruling does not actually impose worldwide effects, but instead does not prevent them, simply remaining silent on the desirability of such injunctions or their potential effect in worldwide digital trade.<sup>51</sup> This is said to be the right approach since the CJEU lacks jurisdiction on the worldwide effects of international law. While technically this is true, it is difficult to see how, from a user perspective, worldwide effects are not imposed, nevertheless. It remains the case that in Austria, a post about a politician was deemed to be defamatory and around the world that post was taken down. The real-world international impact of these kinds of decision cannot be overlooked. Whether the law stipulates it or not, through the sheer force of its membership numbers, Facebook has tremendous power over what is and is not allowed online. Concerns have been raised regarding the absence of a mechanism for contesting takedowns or even account bans.<sup>52</sup> Significant action has been taken against Facebook for lack of transparency; in July of 2019, German authorities fined Facebook 2 million euros for under-reporting complaints about illegal content on its social media platform in breach of the country’s law on internet transparency. These contrasts demonstrate how the very concept of nation in some sense dissolves when it comes to the Internet. The spatial continuum of the online world creates a daily contamination of language and culture that keeps cultural values in constant motion and makes clashing perspectives inevitable. Is it, then, feasible or desirable to try to block information flow based on culturally specific, technologically imposed, inadequate filters and culturally determined laws? As one commentator pointed out, Facebook’s content policy’s reflect the American cultural values of its founder and home base, but Americans and Canadians make up only 17% of the total user base.<sup>53</sup> Even when it comes to apparently simple issues such as data privacy as seen in “Safe harbor”<sup>54</sup> laws, these depend on people showing ‘good faith’ efforts. Who is going to decide what “good faith” is? What *should* it be in an unescapably globally interconnected world?

<sup>50</sup> [https://www.vice.com/en\\_us/article/xwk9zd/how-facebook-content-moderation-works](https://www.vice.com/en_us/article/xwk9zd/how-facebook-content-moderation-works)

<sup>51</sup> <https://euinternetpolicy.wordpress.com/2019/10/04/the-cjeu-facebook-judgment-on-filtering-with-global-effect-clarifying-some-misunderstandings/>

<sup>52</sup> <https://qz.com/651001/getting-banned-from-facebook-can-have-unexpected-and-professionally-devastating-consequences/>

<sup>53</sup> *Ibid.*

<sup>54</sup> Safe Harbor was the name of an agreement between the US Department of Justice and the EU regulating the way US companies could export and handle the personal data of European citizens. The goal was to provide a single set of data protection requirements. In 2015, the ECJ overturned the agreement, ruling that each of the 28 European countries should determine how their citizens’ online information can be collected and used. In 2016, the European Commission and US Department of Commerce established a new legal framework for transatlantic data flows, the EU-US Privacy Shield. See <https://searchcio.techtarget.com/definition/Safe-Harbor>

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## 7. Conclusion

The legal management of values-driven sanctions in the digital world calls for a more interculturally informed approach. Freedoms such as expression; choosing your religion; practicing your religion; determining what are facts and truth; being protected from harassment or misrepresentation; taking responsibility for silencing defamation or hate speech, are no longer living isolated within individual states. We cannot ignore that the impact of commercial providers is a *fait accompli*, nor can we depend on technology or even transnational technology-based agreements to solve online conflicts. Every instance of conflict online reveals how culturally determined values lurk within regulation. Even the issue of fake news (too large to take on meaningfully in this paper, but relevant nonetheless) brings up questions of education, and therefore of values. Where the responsibility for the education of citizens lies with regard to online information is unclear, but only education can truly defuel the motor of fake news. It would seem that if there is to be any possibility for an egalitarian interface to determine laws (if there are to be laws) to help govern, or at least manage the world online, international agreements on human rights will need to play some role. Continuing to mutely impose the cultural frameworks of one nation on all the others will not be sustainable as human interaction borders continue to dissolve.

There may be some hope to be found in taking a more spatially aware perspective. If law, communication, subjectivity and ultimately the meaning we find in life could be understood as actually global issues, it might help guide some small concrete steps forward. With the incredible access we have now to the deep thinking of philosophers and merchants alike, might we not begin to elaborate a sort of collection or list of strategies for facing the spatial-geographical spectacle of our society? Might we not grow and apply our cultural skillsets to the problems of legal regulation and sanction? Are there not ways of thinking about prevention that might help head off conflicts in multiple cultural contexts before they become crimes? If the real, everyday scope of our experience is not reflected by our laws, they will cease to have any effectiveness. And yet legal practitioners—at least, sometimes—are already finding solutions to their clients' conundrums before they become offenses.<sup>55</sup> Online giants are working together to try to understand how to balance freedom of expression and offensive speech<sup>56</sup>. International consortiums are identifying best practices online that similarly seek balance, between privacy and access, between expression and safety. The first step, in my humble opinion, is to acknowledge the presence of culture. Anthropological analysis is useful for all human communities, not only tribes in Micronesia.

In order to be effective, such an analytical approach will require moving beyond the fetishization and ghettoization of cultures in which only the most contrasting morphological differences are paid any attention, and then only to be quieted down with temporary accommodations that leave existing power structures intact. Taking cultural difference seriously means engaging it reciprocally and at the molecular level. The disparities between freedom of expression allowances in the US vs Europe, for example, are the products of long historical processes

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<sup>55</sup> Ricca (2015).

<sup>56</sup> The European Commission's "Code of Conduct for Countering Illegal Hate Speech Online" commits companies to removing reported hate speech within 24 hours from Facebook, Twitter, Microsoft and YouTube. Document available at: [https://ec.europa.eu/info/sites/info/files/code\\_of\\_conduct\\_on\\_countering\\_illegal\\_hate\\_speech\\_online\\_en.pdf](https://ec.europa.eu/info/sites/info/files/code_of_conduct_on_countering_illegal_hate_speech_online_en.pdf)

that should be untangled and better understood. The scars left upon the face of Europe by World War II have inevitably shaped what it means today to protect people from hate speech and have undoubtedly inspired laws that demand a balancing between freedom of expression and what legal instruments call human dignity. The US, in line with its capitalist history, has instead nurtured a fervent desire to protect a free marketplace of ideas, to which any kind of censorship is anathema. These kinds of conceptions need to be examined not only for how they came to be, but also in view of what their historical threads have tangibly wrought in the form of laws and regulations. A case in point is the “Right to be Forgotten” controversy<sup>57</sup>. Here, the rights to freedom of expression and of access to information are pitted against the right to privacy. But \ either floating above or lying beneath are overlapping ideas about the right to dignity and the free development of personality, the right to safety and security, and the right to earn a living without discrimination, among others. Before the Internet revolution, cultures could make their own determinations, relatively autonomously about what was to be ceded to history and what was to be held fast and firm before us, lest it be forgotten. Now, technology remembers everything indiscriminately. Some say this is a good thing, others a menace.<sup>58</sup> In Europe, the courts have found in favor of plaintiffs wishing to be “forgotten” online and supporting the removal of evidence of past conduct from indexing engines. In the US, instead, people have been fired or denied graduation for past conduct evidenced online.<sup>59</sup> The only certainty is that these determinations are inescapably cultural. We will need culturally aware practices of semiotic exploration that benefit from the knowledge gained in these first digital rights forays if we are to renovate the legal categories required for adjudication.

Even in the West, we have some magic formulas at our disposal, I think (hope), we just need to learn a more modest and aware use of them. If we look at Article 26 of the UDHR on the right to education and its reference to “the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms,” we find a vision for education that promotes “understanding, tolerance and friendship among all nations, racial or religious groups.” Parents are also to have the right to choose the kind of education given to their children. For many around the world the Internet is a tool that is paramount to daily education in all of these senses. Neither an unfettered unmonitored avalanche of expression nor a tightly regulated control would seem to support this vision of education. Instead, these broadly expressed rights can serve as umbrella terms, of sorts, that can be broken down into their constituent parts. The full development of human personality is an idea that finds general agreement in modern societies, and internet technologies provide ample fuel for such development. In a globally networked world, however, we need intercultural translation to help us make sense of the how and what of human development in

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<sup>57</sup> The landmark case that caught international attention on the issue was *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* in which the defendant successfully petitioned for Google to remove information about his past debts from their indexing engine, as the information was no longer current or relevant. Court of Justice press release available at:

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>. Similar movements and laws have taken root in France and Argentina.

<sup>58</sup> One reporter captured this malaise succinctly: “The fact that the Internet never seems to forget is threatening, at an almost existential level, our ability to control our identities; to preserve the option of reinventing ourselves and starting anew; to overcome our checkered pasts.” Rosen (2010).

<sup>59</sup> *Snyder v. Millersville University et al.*



societies with wildly diverse cultural contexts. Single solutions branded across vast territories are unlikely to be successful. The law has the wonderful potential to make and unmake solutions, to keep pace with cultural changes as they occur, to suss out what is needed to preserve both the wonderful opportunities that are part of online life as well as how to protect people from its dangers. It needs eyes open to culture. It needs the desire to translate.

The jurist, we might say, is not unlike the sorcerer's apprentice, performing spells whose consequences he has not been able to imagine. Marx and Engels used the same analogy to criticize modern bourgeois society as being like, "a sorcerer who is no longer able to control the powers of the nether world whom he has called up by his spells."<sup>60</sup> My slight adjustment would be that it is not a nether world from which these powers come, but our very own world, which we make, undo, and remake every day. Human imagination is outrageously abundant, if only we put it to good use.

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<sup>60</sup> Marx and Engels (2009, 1848).

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