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The Legal Dynamics of Disrespect[1]: LGBTQI+ People, Hate speech, and Criminal Justice

Reflections around 'M. Pelissero, A. Vercellone (eds.), Diritto e persone LGBTQI+'

Le dinamiche giuridiche del disprezzo: Persone LGBTQI+, discorso d'odio e giustizia penale

Riflessioni attorno a "M. Pelissero, A. Vercellone (a cura di), Diritto e persone LGBTQI+"

La dinámica jurídica del desprecio: Personas LGBTQI+, discurso de odio y justicia penal

Reflexiones en torno a "M. Pelissero, A. Vercellone (eds.), Diritto e persone LGBTQI+"

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Abstract. This paper is inspired by a series of reflections developed while reviewing the volume 'Diritto e persone LGBTQI+' edited by Marco Pelissero and Antonio Vercellone. The contribution begins by locating the Italian case study within the context of 'queer criminology'. It then addresses head-on the question of whether homophobic and transphobic discrimination (including hate speech) deserves to be criminalized. It is submitted that the question could be answered in the affirmative, though with some caveats. The main ground for the legitimacy of criminal law intervention can be found in the notion of 'identity' as an expression of human dignity. In order to take the notion of 'identity' seriously, one has to recognize that identity is a relational concept rooted on social dynamics of mutual recognition. Criminal law may be used, as a part of a broader policy toolbox (and only as a last resort) to prevent a denial of recognition and a refusal of one's identity. Further arguments rely on substantive equality and the prohibition to treat similar circumstances in a different way. The article then tackles additional issues raised by the volume, regarding the prohibition of conversion therapies and the status of LGBTQI+ people within the correctional system.

[1] The title of this contribution takes inspiration from the essay on 'recognition' by A. Honneth, 'The social dynamics of disrespect' in (1994) 1 *Constellations*, 255-269.

Abstract. Il presente lavoro raccoglie alcune considerazioni svolte a partire dalla recensione del volume "Diritto e persone LGBTQI+" curato da Marco Pelissero e Antonio Vercellone. Il contributo prende le mosse dall'analisi del caso italiano nel contesto della c.d. "criminologia *queer*". Ci si sofferma in seguito sul tema della possibile rilevanza penale del discorso d'odio di matrice omofobica e transfobica. Il lavoro aderisce a una tesi cautamente favorevole all'ampliamento dell'ambito applicativo degli artt. 604-bis e 604-ter c.p. (proposto nel corso della XVIII Legislatura dal c.d. d.d.l. Zan) rispetto ai fattori di discriminazione fondati su sesso, genere, orientamento sessuale, identità di genere e disabilità. A partire dagli spunti offerti dal volume in commento, si ravvisa nella nozione di "identità", quale espressione della dignità umana, il principale fondamento dell'intervento penale in un'ottica costituzionalmente orientata. Al fine di valorizzare la nozione di "identità", nel solco di quanto previsto dagli artt. 2 e 3 Cost., l'articolo sottolinea come l'identità si configuri quale concetto relazionale radicato nelle dinamiche sociali di "riconoscimento reciproco". In quest'ottica, il diritto penale può essere utilizzato, soltanto quale *extrema ratio* e nel quadro di una più ampia gamma di interventi a carattere extrapenale, al fine di prevenire la negazione di siffatto riconoscimento e, per l'effetto, la negazione dell'identità sessuale e di genere dell'individuo. Ulteriori argomenti a sostegno del proposto intervento di riforma si fondano sull'uguaglianza sostanziale e sul divieto di trattare in modo diverso circostanze simili. L'articolo affronta poi ulteriori questioni sollevate dal volume in commento riguardanti, rispettivamente, il divieto (penalmente sanzionato) di terapie di conversione e lo status delle persone LGBTQI+ nell'ambito del sistema penitenziario.

Resumen. Este artículo recoge algunas reflexiones desarrolladas durante la elaboración de la reseña del volumen "Diritto e persone LGBTQI+" editado por Marco Pelissero y Antonio Vercellone. El trabajo comienza con un análisis del caso italiano en el contexto de la denominada "criminología *queer*". A continuación, aborda la cuestión de la posible relevancia penal de la incitación al odio por motivos homofóbicos y transfóbicos. La obra adhiere a una tesis cautelosamente favorable a la ampliación del ámbito de aplicación de los artículos 604-bis y 604-ter del Código Penal (propuesta durante la XVIII Legislatura por el denominado proyecto de Ley Zan) con respecto a la discriminación basada en el sexo, el género, la orientación sexual, la identidad de género y la discapacidad. A partir de las consideraciones de la obra en análisis, se observa en la noción de "identidad", concebida como expresión de la dignidad humana, el principal fundamento de la intervención penal en una perspectiva constitucionalmente orientada. Con el objetivo de valorar la noción de "identidad", en línea con los artículos 2 y 3 de la Constitución, el artículo subraya que la identidad es un concepto relacional arraigado en la dinámica social del "reconocimiento mutuo". Desde esta perspectiva, el derecho penal puede utilizarse sólo como *extrema ratio* y en el marco de un abanico más amplio de intervenciones extrapenales, para impedir la negación de dicho reconocimiento y, por tanto, la negación de la identidad sexual y de género de un individuo. Otros argumentos a favor de la reforma propuesta se basan en la igualdad sustantiva y en la prohibición de tratar de forma diferente circunstancias similares. A continuación, el artículo aborda otras cuestiones planteadas por el volumen examinado relacionadas, respectivamente, con la prohibición (sancionada penalmente) de la terapia de conversión y el estatus de las personas LGBTQI+ dentro del sistema penitenciario.

SUMMARY: 1. Introduction. – 2. Queer criminology in Italy: a case study. – 3. From sodomy laws to the protection of 'equality' through criminal law. – 4. Criminalizing homophobia and transphobia: a response to critics. – 5. Criminal law and conversion therapies. – 6. Corrections, prison, and the status of LGBTQI+ individuals behind bars.

1. Introduction.

The following observations are inspired by the recent volume edited by Marco Pelissero and Antonio Vercellone. The edited book is by far the most extensive companion on law and LGBTQI+[2] persons in Italy to date as it offers a comprehensive oversight on the debate in this field. It does so by drawing on contributions from legal scholars, practitioners and LGBTQI+ activists alike.[3] The contributions in the volume touch upon different branches and segments of the legal system which intersect the recognition of LGBTQI+ persons as rights-holders. The chapters devoted to private and family law issues, raised by the growing recognition of LGBTQI+ rights, warrant a special attention and are investigated in separate book reviews already published elsewhere.[4]

The present contribution delves into the most pressing issues regarding criminal justice, discussed in the volume. Such issues feature prominently in the second part of the book. With a different extent of completeness, contributors address topics as diverse as the gradual decriminalization of same sex relationships, the criteria underpinning the (proposed) adoption of provisions establishing new criminal offences to address hate speech and homo/transphobic discrimination, the practice of conversion therapies and their prohibition, and (last but not least) the delicate issues surrounding the incarceration of transgender and LGBTQI+ persons in general as vulnerable groups within prison population.

More generally, the issue of criminal law enforcement of LGBTQI+ rights cuts across several chapters in the book lingering on the background of many contributors. The problem of how to enforce LGBTQI+ rights underlies the reflections of several authors, even when their chapters do not deal directly with criminal justice. This is greatly due to the powerful symbolic nature of criminal law as well as to the communicative and value-enhancing function of punishment.[5] It is submitted, however, that the centrality of criminal justice in this debate may

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[2] The present article adopts the acronym chosen by the editors, 'LGBTQI+'.

[3] See G. Malaroda, 'Un po' di storia, tante storie', in M. Pelissero and A. Vercellone (eds), *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 15.

[4] N. Palazzo, 'Book review. Diritto e persone LGBTQI+ Torino, Giappichelli, 2022', in (2023) 2 *Italian Law Journal*, to be published. See also P. Gori 'Diritto e persone LGBTQI+, una lettura proposta' in *Giustizia insieme*, 1 April 2023.

[5] R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) 79 ff.

partially be explained by the role and recognition of fundamental rights to homosexual, transgender and queer individuals, as these are increasingly regarded not just as rights-holders but also as members of vulnerable groups in need of 'protection'.

In fact, fundamental rights are premised on the idea of 'autonomy'. Yet, in a complex society, autonomy – and thus human rights – cannot be exercised without a minimum degree of self-respect, self-esteem, and self-trust. These are pre-conditions for autonomy and rely on the intersubjective/mutual recognition of each person's worth.[6] Such recognition is fragile and may be subject to injuries or threats, thus showing that a solid legal infrastructure of recognition (or 'recognitional infrastructure') is needed to protect autonomy. This claim illustrates the very specific way in which groups (like LGBTQI+ people), lacking such recognition, may be vulnerable. Vulnerability is a social product and derives from 'harms to and neglects of these relations of recognition', which 'jeopardise individuals' autonomy'. [7]

At the same time, fundamental rights lay bare the constitutive duplicity of criminal law. Individual human rights are, at the same time, *sword* and *shield* vis-à-vis state interference into the sphere of personal freedoms.[8] Fundamental rights, and among them, LGBTQI+ rights are believed to foster a response that may take different shapes, depending on how such rights are relied on to build up state reaction through the criminal justice system.

At the same time, as criminal justice theorists have convincingly argued, a robust trend in post-modern criminal policy relies on the status of victimhood of vulnerable individuals as a ground to invoke and legitimize criminalization.[9] This has obvious implications for the question of whether bias-motivated discrimination or violence against homosexual, transgender and queer individuals should be punishable on the basis of autonomous (and penalty-enhancing) criminal provisions. Once heavily criminalised and dealt with by criminologists and criminal justice officials merely as sex offenders,[10] queer and homosexual individuals are now increasingly regarded as vulnerable victims. Yet one may run the risk of oversimplification, as the law's 'flat understanding' of LGBTI+ persons as perpetrators is increasingly replaced by an equally flat narrative of such individuals as victims.[11]

[6] P. Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012) 84.

[7] J. Anderson, A. Honneth, 'Autonomy, Vulnerability, Recognition and Justice' in J. Chrisman and J. Anderson (eds) *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: Cambridge University Press, 2005) 145.

[8] F. Tulkens 'The Paradoxical Relationship between Criminal Law and Human Rights' in (2011) 9 *Journal of International Criminal Justice*, 577–595 and K. Kamber, *Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights Law* (Leiden: Brill, 2017).

[9] M. Venturoli, *La vittima nel sistema penale: dall'oblio al protagonismo* (Napoli: Jovene, 2016) 168

[10] J. Blair Woods, 'LGBT Identity and Crime' in (2017) 75 *California Law Review*, 688-733.

[11] Ibid., 716.

2. Queer criminology in Italy: a case study.

To cope with this risk, criminologists have successfully sought to emphasise the insights offered by the lived experience of 'queer folks' within the criminal justice system, as well as the 'unique pathways to offending that in many ways relate specifically to their sexual orientation and/or gender identity'.[12] In recent years, queer criminology – often described as an attempt to cast light on the multiple facets of LGBTQI+ people's experience with criminal justice – has grown to become a central and promising field of criminological studies.[13] The authors belonging to this subfield challenge a simplistic understanding of the place LGBTI+ persons occupy within the legal system. In order to capture nuances and depict a comprehensive portrait of queer and homosexual identities in their relation to criminal law and criminal justice institutions, queer criminology commits to an all-encompassing view of LGBTQI+ population in their different capacity as victims, offenders, and professionals (judges, attorney, etc.) within the criminal justice system.

Similarly, the volume by Pelissero and Vercellone draws heavily on a nuanced approach to criminal justice vis-à-vis LGBTI+ people. The stance taken by the authors rejects a simplistic and unifying view of the status of LGBTQI+ individuals in the criminal justice domain. While doing so, the chapters devoted to studying the position of queer and lesbian/gay identities vis-à-vis criminal law, provide an important contribution to the scholarly debate in that they offer unique insights into the legal and societal developments of a continental jurisdiction belonging to the 'civil law' tradition. This provides an important addition to the mostly English-speaking and common law-inspired literature on these topics.

As a matter of fact, the Italian legal system constitutes an interesting case study to reflect on the role of criminal law vis-à-vis gender identities and sexual orientations. Such a relevant point of view reflects the characteristics of the Italian legal system, a jurisdiction with a Basic Law which explicitly includes anti-discrimination clauses (see, in particular, Article 3 of the Italian Constitution). In addition, Italian laws are bound to respect the liberties enshrined in the European Convention on Human Rights (ECHR) and, in particular, the right to be free from discrimination (Article 14 ECHR).[14]

[12] C. L. Buist and E. Lenning, *Queer criminology*, (Abingdon and New York: Routledge, 2016) 8; J. Blair Woods, 'Queer Contestations and the Future of a Critical "Queer" Criminology' (2014) 22 *Critical criminology*, 5-19.
[13] C. L. Buist, E. Lenning and M. Ball, 'Queer criminology' in S. De Keseredy and M. Dragiewicz (eds.) *Routledge Handbook of Critical Criminology*, (Abingdon and New York: Routledge, 2018) 96-106; J. Blair Woods, 'Queering criminology: Overview of the state of the field', in D. Peterson and V.R. Panfil (eds.) *Handbook of LGBT Communities, Crime, and Justice*, (New York and Heidelberg: Springer, 2013) 15-41.
[14] B. Rainey, E Wicks and C. Ovey, *Jacobs, White & Ovey. The European Convention on Human Rights* (Oxford: Oxford University Press, 2014) 567-593.

Despite these specificities, most of the contributions in the volume by Pelissero and Vercellone confirm broader criminal policy trends highlighted by the international literature. At the same time, some of the undertones of the current scholarly debate allow to single out the uniqueness of the Italian approach to the 'criminal law dilemma' while discussing the protection of vulnerable minorities and addressing the phenomenon of 'hate crime victimization'. Admittedly, when compared to the 'legal experience' of jurisdictions in the Anglosphere, questions that trouble Italian criminal lawyers might come across as rather peculiar. Still, such issues are reflective of special features which, as comparative criminologists warn,[15] inform the legal debate of each jurisdiction and, by extension, speak to the core elements of their legal culture.

In effect, the legal specificities emerging from the contributions collected in the volume by Pelissero and Vercellone are ostensibly entrenched into Italian legal culture; more specifically, these may only be understood in light of the deep-seated theoretical foundations of Italian criminal law theory. Such foundations include the harm principle (in the peculiar characterization given to it by Italian scholars, which frame it as *offensività* or 'harmfulness'),[16] the principle of *ultima ratio*, and the strict reading of the principle of legality (*nullum crimen sine lege caerta et parlamentaria*) which features prominently in Italy, as much as in other 'civil law' legal systems.[17] The special features of the Italian debate on the status of LGBT individuals within criminal justice are not only down to doctrinal peculiarities. Quite the contrary, the magnitude of Italy's specific approach to the subject matter can only be seized by considering legislative choices (or the lack thereof) against the background of political priorities and the prospects of criminal justice reform.

Pelissero and Vercellone's book highlights the long-standing failure to reform Italian criminal laws in such a way as to secure a self-standing protection of queer and lesbian/gay identities against hate speech and other discriminating behaviors. Such a failure reflects the criminal policy agenda of recent Italian governments and the broader penal climate in the country. At the same time, when discussing the distinct facet of LGBTQI+ people as vulnerable individuals held in custody, authors in the reviewed volume effectively point to the central role played by the notion of 'social reintegration' as a guiding principle of the post-sentencing phase (as

[15] D. Nelken, *Comparative Criminal Justice: Making Sense of Difference* (London: Sage, 2010).

[16] For a reflection on this topic, addressing an English-speaking public, see L. Pasculli, 'Harm, Offence and Offesa in the English and the Italian Criminal Law. For a Constitutionalisation of a Unitary Principle of Harm in the English Legal System, also as Criterion of Judicial Interpretation' in (2016) 47 *Diritto Penale XXI Secolo*, 302-349. Also for an interesting reflection regarding the limits to criminalization posed by the 'harm principle', as conceived of in the work of Joel Feinberg, and the corresponding criteria one can derive from the notion of *offensività*, M. Donini, 'Danno e offesa nella c.d. tutela dei sentimenti. Note su morale e sicurezza come beni giuridici, a margine della categoria dell''offence' di Joel Feinberg' in A. Cadoppi (ed.) Laicità, valori e diritto penale. The moral limits of the criminal law. In ricordo di Joel Feinberg (Milano: Giuffrè, 2010) 67-69.

[17] C. Peristeridou, *The principle of legality in European criminal law* (Antwerp: Intersentia, 2015).

mandated by Article 27(3) of Italian Constitution). Such a feature illustrates the potential of penological principles to address specific forms of vulnerability.

3. From sodomy laws to the protection of 'equality' through criminal law.

In Italy, sodomy laws incriminating same-sex relationships were contemplated in some pre-unitarian codes, e.g. in the Criminal Code of Lombardy and Veneto and in the Criminal Code of the Kingdom of Sardinia. However, the first codified texts in the newly unified Kingdom of Italy (the 'liberal' code 'Zanardelli' from 1889 and the more 'authoritarian' code 'Rocco', adopted by the fascist regime in 1930) remarkably fell short of criminal provisions targeting homosexuality.[18] By contrast, the collapse of the fascist regime and the end of World War II ushered in an era of tolerance. The new approach by the legislatures of the time was greatly inspired by the anti-authoritarian ideals of equality and human dignity, which laid the groundwork for the establishment of progressive and modern anti-discrimination laws. In comparison with other western jurisdictions, the approach to homosexuality has historically been lenient, revealing the tendency of Italian institutions to deal with (what was once referred to as) 'sodomy' by means other than criminal law.

The demise of a crime control approach did not lead to the recognition of queer individuals as vulnerable victims. The 'pendulum effect' which scholars have observed in other jurisdictions was simply absent in Italy. In sum, the fact of giving up on the criminalisation of gays and lesbians as deviants, if not sex offenders, did not lead to what Jordan Blair Woods has referred to as a 'new visibility' for LGBT people.[19] This happened (or rather, did not happen) in spite of a set of criminal law provisions aimed at securing the enforcement of prohibitions against a wide (and gradually expanding) array of discriminatory behaviors. In this respect, an essential feature of the Italian debate on LGBT matters has been the question of whether existing hate crime laws may apply to acts or words discriminating on grounds of sexual orientation or gender identity.

In this connection, the book chapters by Goisis and Pelissero retrace the historical development of the criminal justice apparatus designed to enforce non-discrimination clauses. Such laws date back to the entry into force of post-war Italian Constitution. More specifically, statutes outlawing racist propaganda are grounded on the general principles of equality and dignity enshrined in Article 2 and 3 of the Italian Constitution. Such provisions display a tight

[18] E. Dolcini, 'Omosessualità, omofobia, diritto penale. Riflessioni a margine del volume di M. Winkler e G. Strazio, L'abominevole diritto. Gay e lesbiche, giudici e legislatori' in (2012) 18 *Stato, Chiese e pluralismo confessionale*, 1-10.

[19] J. Blair Woods, 'LGBT Identity and Crime', cit., p. 696.

connection with the prohibition to re-organise the disbanded Fascist Party – set forth by the final provisions annexed to the Constitution and incorporated by the Act of 20 June 1952 n. 645. Such provisions prohibit, among others, to establish a political formation whose means include 'racist propaganda'. The prohibition to circulate 'ideas based on racial superiority', along with a ban on the incitement to commit acts of discrimination and other acts of hate violence was originally included within the Act of 13 October 1973 n. 654.

Interestingly, both authors delve into the history and the current scope of application of criminal laws targeting discrimination, which – they observe – have witnessed a gradual expansion to incorporate all forms of discriminatory behaviour on grounds of race or ethnicity. In this respect a major step forward was the adoption of the so-called *Legge Mancino* (Act 25 June 1993, n. 205). Besides tweaking the scope of application of existing criminal offences, the statute introduced a wide-ranging aggravating circumstance applicable to all criminal offences motivated by reasons of discrimination or hate 'on ethnic, national, racial and religious' grounds. Significantly, such antidiscrimination laws did not fall short of criminalizing non-physical expressions and target verbal utterances of discriminatory thought (e.g. racist propaganda). These are quintessentially 'hate crime laws' which, however, did not (and do not) include sexual orientation or gender identity among the grounds for discrimination. Unsurprisingly, such lacuna has been the subject of several critiques.[20]

As Pelissero explains in his chapter,[21] a recent attempt to pass a bill (the so-called *d.d.l. Zan*) reforming the existing antidiscrimination apparatus (and its criminal provisions) has encountered stark political resistance, failing to gain the necessary votes in Parliament. The bill would have expanded the grounds for discrimination covered by present criminal provisions – Articles 604-bis and 604-ter of the Criminal Code which penalize, *inter alia*, racist propaganda and the act of abetting racist discrimination or violence, along with the acts of discrimination and discriminatory violence – with a view to include further 'factors' such as a person's 'gender', 'gender identity', 'sexual orientation' and 'disability'. The lack of an *ad hoc* hate crime legislation tackling anti-LGBT discrimination is fiercely criticized by the volume (see, in particular, the chapters by Goisis[22] and Pelissero[23]), which develops a robust response to those who opposed the introduction of a renewed legal framework introducing homo- and transphobic hate crimes.

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[20] P. Caroli, 'La giurisprudenza penale italiana di fronte alle discriminazioni delle persone LGBTQIA+' in (2022) 8 *Diritto penale contemporaneo – Rivista trimestrale*, 102 ff.

[21] M. Pelissero, 'Il disegno di legge Zan: una riflessione sul percorso complesso tra diritto penale e discriminazione', in M. Pelissero and A. Vercellone (eds), *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 256.

[22] L. Goisis, 'Crimini d'odio omofobico, diritto penale e scelte politico-criminali' in M. Pelissero and A. Vercellone (eds), *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 225.

[23] M. Pelissero, 'Il disegno di legge Zan: una riflessione sul percorso complesso tra diritto penale e discriminazione', cit., 249.

4. Criminalizing homophobia and transphobia: a response to critics

The book by Pelissero and Vercellone deserves praise for its attempt to provide a fairly objective overview of the (rather heated) debate around the adoption of new provisions on homophobic and transphobic hate crimes. Hence, the book gives an account of both sides of the argument. It does so, however, while taking a firm stance in favor of a stronger criminal law response, one implying the extension of the scope of application of existing criminal law provisions on hate crimes (Articles 604-bis and 604-ter of the Criminal Code). This position (which runs through several chapters in the second part of the edited volume) is however far from apodictical. The debate around the so-called *d.d.l Zan* is illustrative of some characterizing features of Italian legal culture and offers an important snapshot of the legal narratives underpinning the proposed introduction of new hate crimes.

The choice of criminalizing gender-based discrimination and other forms of biases, grounded on sexual orientation and gender identity, problematically lies at the intersection between the protection of vulnerabilities (which may stem from human rights obligations to prosecute and punish crimes)[24] and the right to freedom of expression. As Pelissero astutely argues in his chapter, the prohibition to express and divulge discriminatory ideas has suffered a relativisation as the question of compressing the freedom of thought through criminal laws has gradually come to the fore in several western societies. This development was favoured by the idea that discrimination shall not be taken as an expression of biological/anthropological superiority, but rather as a cultural phenomenon. In this perspective, discrimination would be permissible so long as it shifts its focus from the inherent (and physical/psychological) characters of individuals or social groups to their 'actions'.[25]

In Italy, as much as in other western countries, this 'new' approach had the effect of watering down the moral condemnation against 'racism' and other heinous forms of hate crime. In practice, this has taken to the conclusion that the 'right' to express views (as long as they can be regarded as legitimate 'cultural' opinions) could be weighed against the rights of those targeted by those views. Such a claim may be easily rebutted by arguing – as Etienne Balibar put it – that 'racism' (similarly to other forms of identity-based discrimination) has always been

[24] On the doctrine of positive obligations in human rights law, see *inter alia* L. Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in J. Roberts and L. Zedner (eds), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (Oxford: Oxford University Press, 2012), 135-157.

[25] M. Pelissero, 'Il disegno di legge Zan: una riflessione sul percorso complesso tra diritto penale e discriminazione', cit., 249.

in essence a 'total social phenomenon'.[26] On this basis one can contend that there is no such thing as a non-cultural (i.e. merely biological) racism. This assertion makes any attempt of defending a purported right to express 'controversial' discriminatory views much more delicate.

Be that as it may, the legislative and policy choices made by national governments in this context shall be read in light of international initiatives to counter discrimination. Remarkably, in her chapter, Caielli[27] turns her eye to standards set by supranational bodies, such as the Council of Europe. The author reminds that Council of Europe's recommendations (which are policy-oriented non-binding texts) are univocal in suggesting that national authorities shall tackle hate crimes and, in particular, hate speech targeting LGBTQI+ individuals. In addition, both Caielli and Goisis[28] remind that, in the view of the European Court of Human Rights, measures interfering with the freedom of expression aimed at tackling hate crimes are legitimate under the Convention, even when they are carried out through criminal provisions. As the European Court itself held in *Identoba v. Georgia*,[29] 'sexual orientation' and 'gender identity' are not to be seen as mere elements of one's private life. Rather, they have a social dimension which warrants a robust protection by antidiscrimination law, as a corollary of the right not be discriminated enshrined in Article 14 ECHR.

Beyond the arguments based on the right to free speech (and other rights, e.g. the right to religious freedom as the criminal law protection of 'gender identity', understood as free individual choice, would endanger the belief in a well-defined partition between genders descending from 'divine revelation'),[30] skepticism has been expressed against the criminalisation of homophobic hate speech (in the terms outlined by the bill) on grounds pertaining to some foundational principles of criminal law. Authors in the reviewed volume, refute some of these critiques to argue in favour of an *ad hoc* legal framework for hate crimes motivated by such attitudes as homophobia and transphobia. Interestingly, within the Italian debate, one of the criticisms raised against the proposed criminal legislation is the fact that certain definitions included in the bill would not comply with the principle of *lex caerta*. Notions such as 'sexual orientation' and 'gender identity' – critics argue – are too vague and would thus allow for an unbridled application of the proposed criminal laws by courts.

However, as Caielli, Goisis and Pelissero contend, definitions and normative elements narrowing down the scope of such concepts may be found in supranational legal texts (see the

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[26] E. Balibar, 'Is there a neo-racism?' in T. De Gupta et al. (eds), *Race and Racialization: Essential Readings*, (Torono: Canadian Scholar Press, 2007), 83.

[27] M. Caielli, 'Tutelare l'identità di genere attraverso la repressione dell'hate speech', in M. Pelissero and A. Vercellone (eds), *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 220

[28] L. Goisis 'Crimini d'odio omofobico, diritto penale e scelte politico-criminali', in M. Pelissero and A. Vercellone (eds), *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 233.

[29] ECtHR, *Identoba v. Georgia*, Appl. no. 73235/12.

[30] These are some of the doubts expressed by the Secretary of State of the Holy See, as reminded by M. Caielli, 'Tutelare l'identità di genere attraverso la repressione dell'hate speech', cit., 218.

Resolutions of the European Parliament, adopted in 2006 and 2012)[31] which have consistently defined the term 'homophobia'; at the same time, the very concept of 'gender identity' is mentioned in a number of national legal texts, including the Italian prison act, which forbids discriminations based on a prisoner's 'gender identity'. Meanings of such concepts can be fleshed out also by reference to the case law of the European Court of Human Rights. When it comes to 'gender identity' the Court unmistakably rejects the idea that this concept could be based only on biological terms (e.g. requiring surgery). Rather, states must acknowledge and give protection to one's identity as it emerges from 'physical appearance' and 'social identity', even before a gender reassignment surgery is completed.[32]

In sum, arguments based on the lack of 'clarity' of the proposed legislation don't seem to have much 'bite' – especially when compared to the law and practice of other jurisdictions. Yet a broader critique endorsed by several Italian scholars has called into question the very legitimacy of using criminal law as a tool against discrimination. It has been argued that criminal law intervention should target exclusively harms inflicted on individual legal interests (or *Rechtsgüter*).[33] Such interests must be well-identified by the law and, possibly, anchored to values enshrined in the Constitution. According to the critics, discrimination through hate speech does not affect personal legal interests but relates – almost, by definition – to a collective and social dimension[34]; one that criminal law would not be fit to address in light of the principle of *ultima ratio*.[35]

This critique ultimately ties into a long-lasting (and greatly commendable) line of liberal criminal theory, one that taps into the principles enshrined in the Constitution to cast criminal law as a means of last resort. From the Constitution one can infer that the use of the most intrusive means into a citizen's fundamental freedoms could only be justified by a materially

[31] Homophobia is regarded as 'the irrational fear of, and aversion to, male and female homosexuality and lesbian, gay, bisexual and transgender (LGBT) people based on prejudice, and is similar to racism, xenophobia, anti-Semitism and sexism, and whereas it manifests itself in the private and public spheres in different forms, such as hate speech and incitement to discrimination, ridicule and verbal, psychological and physical violence, persecution and murder, discrimination in violation of the principle of equality and unjustified and unreasonable limitations of rights, which are often hidden behind justifications based on public order, religious freedom and the right to conscientious objection', see European Parliament resolution of 24 May 2012 on the fight against homophobia in Europe, (2012/2657(RSP))

[32] ECtHR, *S.V. v. Italy*, App. no. 55216/08, para. 70

[33] In the context of Italian criminal law theory, the concept of *Rechtsgut* or *bene giuridico* is authoritatively elaborated on in a classic of criminal justice scholarship: F. Bricola, *Teoria generale del reato*, in *Novissimo Digesto Italiano* (Torino: Utet, 1973) 3. See also F. Angioni, *Contenuto e funzioni del bene giuridico*, (Milano: Giuffrè, 1983).

[34] G. Riccardi 'Omofobia e legge penale. Possibilità e limiti dell'intervento penale' in (2013) 1 *Diritto penale contemporaneo – Rivista trimestrale*, 102 ff

[35] A. Pugiotto, 'Aporie, paradossi ed eterogenesi dei fini nel disegno di legge in materia di contrasto all'omofobia e alla transfobia', in (2015) 1 *GenIUS*, 10

identifiable harm caused to individual legal interests which must be 'graspable' (*afferrabili*).[36] Following this line of reasoning, it has been argued that a reference to human dignity would not suffice to anchor firmly the choice to criminalize homophobic and transphobic discrimination.[37] At the same time, it has been argued that the rationale for the new provisions would not reflect an emphasis on a (potentially) harmful conduct. Rather, the proposed legislation would incriminate the mental state of the agent: that is, the determination to discriminate (discriminatory motive).[38]

Similarly, a large component of Italian scholarship has been arguing that offences criminalizing hate speech – see again 604-bis and 604-ter of the Criminal Code – should remain 'an exception rather than a rule', as a token of deference for the right to free speech (Article 21 of the Italian Constitution). Some authors have gone as far as to say that, as sexual orientation is in essence a 'choice', any discrimination thereof would not warrant the same reaction as other forms of hate speech (e.g. on grounds of race and ethnicity).[39] By contrast, Pelissero argues that the real focus of the proposed criminal provisions is 'human dignity'. After all, human dignity is a founding tenet of the Italian Constitution (see Article 2) and represents an overarching value informing the ECHR.[40] Human dignity ties into the notion of 'autonomy' mentioned above, as it defines the sphere of liberty and self-determination of each person. Admittedly, it remains to be seen if 'dignity' can provide a solid enough rationale for criminalization.

After all, by invoking the related notions of 'dignity' and 'identity' one can come up with a seemingly endless string of arguments in favour of new provisions criminalizing any 'offense'[41] to the one's personality. Hence, criteria for criminalization would remain in essence void of any selective role. The object of criminal law protection would be everything but 'graspable', thus raising the odds of an arbitrary (and borderline authoritarian) application of criminal provisions by courts and other criminal justice officials. This would pour grit into the mill of

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[36] V. Manes, 'Il principio di offensività nel diritto penale', (Giappichelli: Torino, 2005). See in this respect also the ruling of the Italian Constitutional Court, n. 250/2010.

[37] G. Riccardi 'Omofobia e legge penale', cit., 100.

[38] G. Ruggiero, 'Dal discorso di odio al crimine d'odio. Un bilanciamento difficile' in (2022) 23 *Stato, chiese e pluralismo confessionale*, 33 ff.

[39] L. Eusebi, 'Colant omnes quemque. Tornare all'essenziale dopo il ddl Zan', in (2021) 2 *Jus. Rivista di scienze giuridiche*, 287: in the cases considered by the proposed provisions on homophobia and transphobia, unlike other cases covered by existing antidiscrimination law, the elements of one's identity at stake result from 'behavioural choices of victims', a choice on which an 'ethical disagreement' might still exist (*scelte comportamentali delle persone offese* [...] *in merito ai quali sussistano sul piano sociale differenti valutazioni etiche*).

[40] M. Pelissero, 'Il disegno di legge Zan: una riflessione sul percorso complesso tra diritto penale e discriminazione', cit., 249

[41] See, for the definition of 'offense' as opposed to the notion of 'harm' in the Millian sense heralded by Joel Feinberg, M. Donini, 'Danno e offesa nella c.d. tutela dei sentimenti. Note su morale e sicurezza come beni giuridici, a margine della categoria dell'"offence" di Joel Feinberg', cit., 67-69

critics arguing that prospective criminal law provisions targeting homophobic and transphobic discourse are indeed contrary to the principle of *lex caerta.*

However, it might be useful to note that the understanding of dignity proposed here is not one that values and protects every single choice regarding a person's individuality, nor the mere perception of self. Such a broad interpretation would effectively pave the way for what some critics see as the risk of criminalisation of any disagreement with one's views on almost every single aspect of social life (including views and orientations as trivial as the choice of supporting a football team).[42] But, as Pelissero convincingly argues, a distinct way of understanding dignity – in keeping with the values underpinning Italian constitution – requires to take seriously a person's identity as a source of a 'relationship of recognition'. These arguments echo contemporary philosophical orientations such as Honnet's theory of recognition. In Honnet's terms, a denial of recognition, like that implied by *any* form of hate speech, does not only harm others by restricting their freedom to act; it also affects their understanding of self, one that they have acquired (sometimes with pain) through 'inter-subjectivity'.[43]

Dignity and identity are in fact related terms as they reflect the place each individual has within broader social formations. In other words, dignity must be understood as a concept which speaks to the recognition one receives from other members of the community. In this peculiar understanding, the notion of dignity forms a pre-condition to express one's individuality towards others and the society as a whole. As this interpretation may be inferred directly by Article 2 of the Constitution,[44] one can consistently argue that punishing hate speech and any form of incitement to homophobic discrimination does not sit at odds with the harm principle or *offensività*. Quite the contrary, a limited resort to criminal law provisions (understood as *ultima ratio* within a legal continuum that includes non-criminal measures to prevent discrimination) must feature within the 'policy toolbox' of liberal and pluralistic democracies which are called on to secure 'social solidarity' and the co-existence of different ethical codes through communicative and procedural strategies.[45]

In order to take the notion of 'identity' seriously, one has to recognize that identity is not rigid (determined once and for all) but develops during life as a result of social dynamics. Such dynamics may be protected by the law, if necessary, by using criminal provisions so as to prevent

[42] See again L. Eusebi, *ibidem*.

[43] A. Honneth, 'The social dynamics of disrespect', cit., 255 ff.

[44] As the Italian *Corte costituzionale* put it in its ruling n. 221/2015, gender identity is an essential element of the right to a 'personal identity', falling within the scope of individual fundamental rights as protected by Article 2 of the Constitution.

[45] The model of communicative action as a 'strategy' to overcome and handle cultural conflicts within a democratic state has been developed by Jürgen Habermas in his works on the law. See, especially, J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt: Surhrkamp, 1992), 435-468, with regard to multiculturalism the Author claims that the exclusion of some citizens from the public discourse raises new issues of legitimacy for liberal democracy and must be compensated through a translation process of such views into 'secular terms' belonging to the state's 'civic vocabulary'.

a denial of recognition and a refusal of one's identity. A comparison with other areas of criminal law may be of interest to clarify this point: such as bodily integrity and sexual autonomy relate to important spheres of liberty – beyond the tangible harm caused to the person – so are gender identities and sexual orientations. They conjure up to define 'what it means to be a person'[46] and go beyond the material reality of a body in a functional way. While we should be careful using an all-encompassing notion of dignity to expand the scope of criminal law, attacks on one's identity that – to quote the German Constitutional Court[47] – negate the 'subject quality of a human being in principle' may be prevented by threatening the use of criminal punishment.

Arguments based on human dignity cannot be conflated with those underpinned by the principle of equality. The notion of equality, as it emerges from Article 3 of the Constitution, requires that the identity of LGBTQI+ persons is protected in a way that acknowledges their peculiar identity in a pluralistic society.[48] These considerations justify the use of aggravating circumstances when crimes are driven by a homophobic motive.[49] In essence, the approach to hate speech in this case reflects an ideal of 'equal dignity' of all citizens before a state's coercive power.[50] These arguments compound and corroborate the previously exposed dignity-based rationale for criminalization. They bring to the fore the notion of 'sexual citizenship', which considers 'how gender and sexuality are bound up with the conditions of membership in political communities.'[51]

At the same time, as Goisis reminds,[52] human dignity and equality, thus the 'equal' protection/recognition of each one's identity (including their sexual identity), are a *Rechtsgut* in itself as suggested by the already existing body of antidiscrimination laws. Articles 604-bis and 604-ter have been included in the Criminal Code under the heading of 'crimes against equality'. Hence the notion of equality, as it provides a legal basis to punish racist and

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[46] T. Hörnle, 'Rights of others in criminalisation theory' in A.P. Simister, A. Du Bois-Pedain, U Neumann (eds.) *Liberal Criminal Theory. Essays for Andreas von Hirsch* (Oxford: Hart, 2014), 185.

[47] Federal Constitutional Court in (Entscheidungen des BVerfGE) Vol. 30, 1 (25 f.); Vol. 109, 279 (312 f.); see also T. Hörnle, 'Criminalizing Behaviour to Protect Human Dignity' in (2012) 6 *Criminal Law and Philosophy*, 307–325.

[48] Different circumstances warrant a different treatment. In this context, one cannot claim the risk of 'reverse-effect discrimination' determined by a lower protection secured to non-biased criminal behaviours. As empirical evidence shows bias crimes have a peculiarity which lies in the special vulnerability of their victims, see L. Goisis, 'Crimini d'odio omofobico, diritto penale e scelte politico-criminali', cit., 234.

[49] Such a claim echoes the arguments used in the US to justify the establishment of state and federal 'penalty-enhanced statutes' for bias crimes. As Frederick Lawrence put it: 'a society that is dedicated to equality must treat bias crimes differently from other crimes, and must enhance the punishment of these crimes', see F. Lawrence, *Punishing Hate Bias Crimes under American Law* (Harvard: Harvard University Press, 1999), 110.

[50] R. Thoreson, 'Discriminalization: Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law' in (2022) 2 *California Law Review*, 431-488.

[51] R. Thoreson, ult. loc. cit.

[52] L. Goisis 'Crimini d'odio omofobico, diritto penale e scelte politico-criminali', cit., 238.

xenophobic hate crimes (and hate speech, in particular), may be a solid enough ground to justify the new criminal provisions on homophobia and transphobia.[53] Admittedly, however, one cannot underestimate the fact that the ideals of dignity and equality are inherently double-edged. On the one hand, dignity-based arguments foster the criminalization of what can be seen as 'insufficiently dignified' sexual practices (such as prostitution and sex work). On the other hand, they illustrate the paradox of protecting dignity and equality through means (such as incarceration) which may cause 'harms to liberty, equality, and other rights that might be exacted by the state in the process'.[54]

5. Criminal law and conversion therapies.

On a separate (but related) note, the reviewed volume deals with the question of how to handle the practice of conversion therapies. Such therapies are defined as "any formal therapeutic attempt to change the sexual orientation of bisexual, gay and lesbian individuals to heterosexual".[55] While clearly at odds with the growing recognition of LGBTQI+ identities as non-deviant and expressive of self, conversion therapies remain widely promoted, privately advertised and often institutionally endorsed as a tool to deal with non-heterosexual identities. Evidently, the question that comes to the fore is whether a room for such therapies can be maintained under the law, at least when these treatments take place as a conscious, informed and non-coerced medical practice.

As far as the content of such therapies is concerned, the American Psychological Association uses the term "sexual orientation change efforts" (SOCE) to describe methods that aim to change a person's same-sex sexual orientation to an other-sex sexual orientation.[56] These methods typically include behavioural techniques, psychoanalytic techniques, medical approaches, and religious and spiritual approaches. In her chapter,[57] Scaroina makes a strong argument in favour of criminalizing such practices. Not only are conversion therapies, as the

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[53] Arguing against the criminalization of hate speech (in particular, holocaust denialism) as a behaviour which would not be grounded on a harm caused to a clearly identifiable legal interest (or *Rechtsgut*), E. Fronza, *Il negazionismo come reato*, (Milano: Giuffrè, 2012) 137-138

[54] R. Thoreson, 'Discriminalization: Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law', cit., 470

[55] Canadian Psychological Association, *CPA Policy Statement on Conversion/Reparative Therapy for Sexual Orientation*, (2015).

[56] American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009), 12.

[57] E. Scaroina, 'Terapie di conversione e diritto penale', M. Pelissero and A. Vercellone (eds), *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 293.

author claims, deprived of any scientific ground; they are also a vessel for ideals that cast homosexuality as 'evil', a pathology that should be cured or a form of deviance that requires a remedy.

In keeping with the palette of constitutional principles one can derive from the Italian Basic Law, Scaroina argues that such therapies should be punishable in that they harm a person's moral liberty and their dignity.[58] The scope of criminal laws targeting conversion therapies should be as wide as possible, protecting anyone – including under-aged individuals – who could be subject to the therapies in question. While such criminal provisions are absent in Italy, Scaroina offers a wide comparative overview of the law and practice of jurisdictions that have implemented criminal laws to ban conversion therapies. Strategies used to tackle such phenomenon vary widely across jurisdictions. Interestingly, the Italian criminal justice system belongs to a group of legal systems that chose to address this form of 'coercion' by means of other existing criminal offences: these include criminal provisions on grevious bodily harms, domestic violence, and crimes involving fraud.

In this connection, the most pressing question is whether an *ad hoc* set of criminal provisions would be needed and, if so, under which conditions therapeutic conversions must be penalized. Clearly, a key distinction in this respect is whether victims of such therapies are minors – people at an age in which non-conforming identity might still be developing – whose will may be nudged, misled or even coerced into a treatment. By contrast, adults can provide, more or less spontaneously, their consent to treatment. As far as children are concerned, parental authority is limited by the minor's right to express and develop their 'personality'.[59] In cases involving adult individuals, a crucial question is whether a person can provide informed and effective consent to a conversion therapy. An important pre-condition in this respect is that therapies offered are, at least *in abstracto*, conducive to the result they purport to achieve. Such a principle may be extracted, by analogy, from the case law of the Italian Constitutional Court and is outlined in the Oviedo Convention which outlaws any treatment of individuals who are legally unable to provide consent unless the required therapy is directly beneficial to the patient.[60]

The question of whether conversion therapies involving adults shall be penalized rests on the critical issue of consent. Interestingly, some jurisdictions – such as France's and Canada's –

[58] In doing so, the author draws heavily on the understanding of human dignity as a self-standing legal interest which warrants and provide legitimacy to criminal law intervention: see, for a similar view, A. Spena, *Riflessioni in tema di dignità umana, bilanciamento e propaganda razzista*, (Torino: Giappichelli, 2013).

[59] According to German law, criminal provisions do not apply to the person(s) holding parental authority unless they grossly violated their duty of care or upbringing, see D. de Groot, 'Bans on conversion 'therapies' The situation in selected EU Member States' in *EPRS | European Parliamentary Research Service*, PE 733.521 – June 2022, 5.

[60] Accordingly, some jurisdictions – including France – have provided for an enhanced penalty when crimes of conversion are committed against vulnerable victims, among them minors, and foresee the accessory penalty of revoking parental authority whenever such crimes are committed against children.

have taken a hard line against conversion therapies, criminalizing any such treatment because of their inherent 'harmfulness'.[61] However, most jurisdictions – as Scaroina observes – have preferred to resort to criminal provisions only when those subject to conversion treatments are regarded as 'vulnerable individuals'. The underlying thought is that informed consent would operate as a defense, thus excluding – at least partially – the 'unlawfulness' of the material act. However, to respect people's agency and self-determination, the requirement of consent must not be understood as purely formal. In accordance with the Oviedo Convention, the author argues that a conscious adherence to conversion therapies must be grounded on informed consent, after being made cognizant of "prognosis, benefits, and risks" involved in the therapy.

This notion of informed consent is inspired by rulings made by the European Court of Human Rights[62] and the Italian Constitutional Court,[63] most recently in connection to questions involving the lawfulness of euthanasia or assisted suicide.[64] Yet in such cases, any medical protocol proposed to the patients is based on solid scientific evidence. According to Scaroina's argument, in the case of conversion therapies, consent would have to be given to treatments which – in the very author's words – lack a robust scientific basis. While some jurisdictions – such as Germany – rule out criminalisation when patients are able to provide effective (and thus, not only apparent) consent (regardless of the scientific plausibility of the proposed treatments), it seems more convincing to conclude that every treatment deprived of a scientific grounds would harm the individual.[65] As the American Psychological Association put it 'to

[61] Similarly, see the legislation in the Australian state of Queensland where the offence is committed by the sole fact of providing the therapy. The request or consent of the patient is no defense. By contrast, in the Australian state of Victoria, the offence is integrated by the fact of providing the therapy when the defendant (at least) negligently causes an injury to the patient. According to the state legislation injuries are defined as 'as physical injury or harm to mental health, whether temporary or permanent'; yet, in such cases 'causation is likely to be a complex issue [...] if a patient who seeks help for gender dysphoria presents with other mental health problems, it may be difficult, if not impossible, to discern whether subsequent mental health difficulties were caused by the prohibited therapy' see P. Parkinson and P. Morris, 'Psychiatry, psychotherapy and the criminalisation of "conversion therapy" in Australia' in (2022) 4 *Australasian Psychiatry*, 409-411

[62] ECtHR, *Pretty v. the United Kingdom*, Appl. no. 2346/02

[63] Italian Constitutional Court, judgement of 25 September 2019 n. 242, informed consent to assisted suicide may be expressed under the terms regulated by Article 1 of the Act 22 December 2017, n. 219: in a nutshell, the patient must be informed about the "diagnosis, prognosis, benefits and risks of diagnostic investigations and health treatments indicated".

[64] Yet an important caveat in this respect concerns the different legal interests 'compressed' by the otherwise unlawful activity; while euthanasia and assisted suicide impinge most significantly on the right to life (which informed consent *may* allow to lawfully dispense with), conversion programs are coercive treatments that may only affect a person's right to bodily integrity.

[65] I. Trispiotis and C. Purshouse, 'Conversion Therapy' as Degrading Treatment' in (2022) 42 *Oxford Journal of Legal Studies*, 104-132: from a human rights perspective it is argued that all forms of 'conversion therapy' are 'disrespectful of the equal moral value of LGBTIQ+ people and violate specific protected areas of liberty and equality that are inherent in the idea of human dignity'.

date there are no scientifically rigorous data about selection criteria, risks versus benefits of the treatment and long-term outcomes of the reparative therapies'.[66]

Most recently, Canada has imposed a blanket ban on conversion therapies as these are labelled as a 'fraudulent, deceptive and unscientific practice known to cause significant harm to vulnerable people.'[67] In sum, according to Canadian law-makers, a conversion therapy is not a therapy at all. While this new piece of legislation does not make consensual treatment punishable *per se*, it does provide an excuse only to the extent that 'no money or other material benefit is received for providing such therapy'.[68] More specifically new section 320.104 of the Canadian Criminal Code makes it an offence to 'knowingly promote or advertise to provide conversion therapy'. On a different note, new section 320.105 of the Code makes it an offence to 'receive a financial or other material benefit in the knowledge that the benefit is being obtained, directly or indirectly, through the provision of conversion therapy'. Arguably, this provision raises new questions as regards the balancing between criminal protection and the right to free speech.

In general, Canadian law has been regarded as going as far as to treat any provision of conversion therapy as a criminal offence, even when consent is present. Such a stringent approach to conversion therapies arguably offers a convincing solution to the inherent harm caused by medical activities which provide no demonstrable benefit to their clients. From the perspective of criminal law theory, the legitimacy of criminalization rests on the actual harm, or the mere threat, to the equality and liberty of victims. Once again, the rationale for criminalization does not lie exclusively in the tangible harm caused to bodily integrity. Rather a medical activity is 'harmful' in that it consciously restricts personal autonomy as a right to develop one's own identity. Not only are such behaviours inherently discriminating 'by placing physical and psychological health of LGBTQI+' at real risk of grave harm, they 'can arouse in their victims feelings of fear, anguish and inferiority capable of debasing them'. [69] In this respect, it may be argued that, in Europe, positive obligations under Article 3 ECHR (the prohibition of inhuman and degrading treatment) place national authorities under a duty to

[66] American Psychological Association, *Therapies focused on attempts to change sexual orientation. Position statement*, Maggio 2000. If most recent meta-studies 'preclude strong assertions that therapy-assisted change in sexual orientation is never possible, they also do not support strong assurances that therapy-assisted change is generally achievable in the sexual minority population', see D.P. Saullins, C. Rosik, P. Montero, 'Efficacy and risk of sexual orientation change efforts: a retrospective analysis of 125 exposed men' in www.ncbi.nlm.nih.gov, last accessed 1 June 2023.

[67] K. Wells *Conversion therapy in Canada: A guide for legislative action* (MacEwan University, 2020) Available at https://www.cbrc.net/conversion_therapy_in_canada_a_guide_for_legislative_action (retrieved on 1 June 2023), 9.

[68] Legislative summary an Act to Amend the Criminal Code (Conversion Therapy) Publication No. 43-2-C6-E 7 September 2021, 2

[69] I. Trispiotis and C. Purshouse, 'Conversion Therapy as Degrading Treatment' cit., 130.

act against 'therapy' providers through a combination of criminal law provisions, administrative measures geared towards prevention, and civil remedies.[70]

6. Corrections, prison, and the status of LGBTQI+ individuals behind bars.

A related topic – adequately explored in the volume by Pelissero and Vercellone – concerns the status of LGBTQI+ individuals behind bars and the way in which life as prisoners matches their 'queer' identity. The idea that 'pains' of corrections (to paraphrase seminal 1958 Gresham Sykes' volume, *The Society of Captives*)[71] have specific implications for homosexual and transgender people in prison has been lying at the center of the queer criminology's debate for the last few years.[72] In the US, a Bureau of Justice Statistics' study found that 8% of prison inmates and, most crucially, 20% of youth in custody self-identified as non-heterosexual. In Italy, however, the quantitative dimension and the legal status of such a special group of inmates (and the peculiar issues raised by their experience of custody) remains widely under-researched.[73] The chapter by Laura Scomparin and Martina Maria Marchisio[74] portrays a vivid picture of detention conditions imposed on transgender persons; while Fabio Gianfilippi's contribution[75] offers a broad overview of the practice of imprisonment for both homosexual and transgender persons in the Italian penitentiary system.

Scomparin and Marchisio's chapter bears witness of the increasing awareness between judges and correctional staff of the risks of discrimination LGBT individuals suffer when deprived of

[70] I. Trispiotis and C. Purshouse, 'Is 'conversion therapy' tortious?' in (2022) 42 *Legal Studies*, 23-41

[71] G. Sykes, *The Society of Captives, A Study of a Maximum Security Prison*. (Princeton: Princeton University Press, 1958).

[72] J. L. Buist and E. Lenning, *Queer criminology*, cit.; J. L. Buist and L. Kahle Semprevivo, 'Introduction: Towards Freedom, Empowerment, and Agency: An Introduction to Queering Criminology in Theory and Praxis: Reimagining Justice' in J. L. Buist and L. Kahle Semprevivo (eds.), *Queering Criminology in Theory and Praxis Reimagining Justice in the Criminal Legal System and Beyond Criminal Legal System and Beyond* (Bristol: Bristol University Press, 2022) 1-12.

[73] Official statistics on the number of people with non-conforming identities in prisons are traditionally difficult to obtain, recent studies report that individuals detained in 'protected sections' for so-called *omosex* inmates in Italy were only 64 in 2022, see A. Rossi, 'I diritti LGBT+: Il carcere alla prova del principio di non discriminazione verso la differenza sessuale e di genere' in *XVII Rapporto Antigone sulle condizioni di detentione*, in https://www.rapportoantigone.it/diciottesimo-rapporto-sulle-condizioni-di-detenzione/, last accessed 1 June 2023.

[74] L. Scomparin and M. M. Marchisio, 'La detenzione delle persone transgender nel sistema penitenziario italiano', in M. Pelissero and A. Vercellone (eds), *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 297-314.

[75] F. Gianfilippi, 'Omosessuali e transgender in carcere: tutela dei diritti e percorsi risocializzanti', in M. Pelissero and A. Vercellone (eds), *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 315-331.

liberty. Non-binary identities, in particular, are a special challenge to the rigid and traditional partition along gender lines of sections within the same prison complex. The practice to safeguard individuals with transitioning identities has so far consisted in the establishment of 'protected sections'. While such practice reduces the risk of episodes of physical and psychological violence, it lays bare the profound social isolation of non-conforming identites within 'total institutions'. The insulation of transgender inmates within prison, along with the relative exiguity of their numbers, reduces the opportunity for correctional practitioners to offer adequate rehabilitative programs. Prison staff often lack adequate training and, as reminded by the Italian Ombudsman on persons deprived of liberty, the vulnerability raised by sexual orientation and sexual identity should not be dealt with by establishing separate prison sections, but rather through "specific training and education to the respect of differences".[76]

The issue of what kind of 'rehabilitation' can be offered to LGBT people in prison is addressed by Gianfilippi in his chapter. The lack of adequate programs aimed at re-entry of LGBT prisoners increases the odds of further sigmatisation and marginalization of former 'queer' inmates upon release. Therefore, the author argues vigorously in favour of new methods and practices geared towards a human treatment of justice-involved individuals belonging to the LGBTQI+ community. Such a change of attitude would increase the awareness of rights among homosexual and transgender inmates and foster the identity-searching process through education and scholarisation when needed. Such a paradigm shift requires a change in the use of prison terminology (strongly binary and often archaically male-centered), working towards a more inclusive language for all justice-involved people. The requirement of a more effective re-entry process for queer folks can only be met by overcoming stereotypes and prejudices among both incarcerated persons and correctional staff. As far as transgender or transitioning people are concerned, the rehabilitative challenge requires to secure therapeutic processes (e.g. free hormonal treatments)[77] to accompany the process of 'rectification' of one's gender identity.

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[76] L. Scomparin and M. M. Marchisio, 'La detenzione delle persone transgender nel sistema penitenziario italiano', cit., 310.

[77] F. Gianfilippi, 'Omosessuali e transgender in carcere: tutela dei diritti e percorsi risocializzanti', cit., 330; on this point, see also A. Lorenzetti, 'Carcere e transessualità: la doppia reclusione delle persone transgeneri' in (2017) 4 *GenIUS*, 53-68.