

GenIUS

RIVISTA DI STUDI GIURIDICI
SULL'ORIENTAMENTO SESSUALE E L'IDENTITÀ DI GENERE

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Hate Crimes in a Comparative Perspective.
Reflections on the Recent Italian Legislative
Proposal on Homotransphobic, Gender
and Disability Hate Crimes

PUBBLICAZIONE TELEMATICA SEMESTRALE REGISTRATA PRESSO IL TRIBUNALE DI BOLOGNA · ISSN 2384-9495

online first
destinato a GenIUS 2020-1

Hate Crimes in a Comparative Perspective. Reflections on the Recent Italian Legislative Proposal on Homotransphobic, Gender and Disability Hate Crimes

Summary

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Abstract

Il saggio tematizza la categoria dei crimini d'odio, alla quale vanno ascritti anche i crimini d'odio omotransfobico, di genere e per disabilità, come dimostra la prospettiva comparata. Svolta la ricostruzione comparatistica, il saggio sviluppa alcune riflessioni sulla recente proposta di riforma legislativa italiana, attualmente approvata alla Camera, volta a modificare gli artt. 604-*bis* e *ter* c.p., in materia di violenza o discriminazione per motivi di sesso, di genere, di orientamento sessuale, di identità di genere o per disabilità. La novella introduce misure di prevenzione e di contrasto a tali forme di discriminazione, accanto alle misure già previste per le discriminazioni razziali, etniche e religiose, ed è finalizzata a combattere due fenomeni assimilabili quali l'omofobia e la misoginia (o meglio il sessismo), fenomeni non più accettabili per le società moderne, così come per il diritto penale contemporaneo, nonché a completare il quadro di tutela dei soggetti disabili.

The essay thematizes the category of hate crimes, to which homotransphobic, gender-based and disability-based hate crimes are also ascribed, as shown by the comparative perspective. Having completed the comparative survey, the essay develops some reflections on the recent Italian proposal, approved in the Chamber, aimed at amending Articles 604-bis and ter of the Criminal Code, on violence or discrimination on grounds of sex, gender, sexual orientation, gender identity or disability. The reform introduces measures to prevent and combat these forms of discrimination, alongside the

* Associate Professor, University of Sassari. This essay retraces – in summary and revised form – some of the reflections carried out during the hearing before the *Justice Commission* of the Italian Chamber of Deputies, which we held on 18th of February 2020, on the combined drafts of law from Hon. Boldrini, Hon. Zan, Hon. Scalfarotto, Hon. Perantoni, Hon. Bartolozzi, related to homotransphobia and gender discrimination. Contributo sottoposto a doppio referaggio anonimo.

measures already envisaged for racial, ethnic and religious discrimination, and is aimed at combating two similar phenomena such as homophobia and misogyny (or rather sexism), phenomena no longer acceptable for modern societies, nor for contemporary criminal law, as well as to complete the frame of protection of disabled persons.

1. Introduction. Hate crimes

Only by studying the category of hate crimes¹ can we grasp the need for a law against homotransphobia, gender discriminations and ableism.

Accepting the most accredited definition of hate crime, which emerged in Europe thanks to the proactivity of the Organization for Security and Cooperation (the classification in criminological and criminal law doctrine is much more uncertain), these are crimes that are made up of two elements: first of all, conduct that constitutes a crime (any type of crime); secondly, the commission of such conduct must be inspired by a reason of prejudice (bias) against a “protected characteristic” belonging to a group, such as race, language, religion, ethnicity, nationality or other similar characteristics, which include gender, sexual orientation and gender identity, as well as, sometimes, disability. Homotransphobic hate crimes must therefore also be ascribed to this category, as well as hate crimes based on gender, which include gender violence, subject to an obligation of criminalization, as is well known, following the ratification of the Istanbul Convention by Italy with law n. 77/2013². Disability-based

¹ OSCE, *Hate Crime Laws. A Practical Guide*, Odihhr, 2009, p. 16. See, *funditus*, L. GOISIS, *Crimini d’odio. Discriminazioni e giustizia penale*, Napoli, Jovene, 2019, *passim*.

² For a broad thematization of gender-based violence, also in the light of international documents on the subject, as well as gender analysis in criminal law, reference is made to *Id.*, *cit.*, p. 339 ss., 348 ss., 353 ss. Although, unlike homophobic hate crimes, the existence of an international obligation to incriminate gender hate crimes from the well-known Istanbul Convention is indisputable, the figure of the so-called gender-based hate crime is particularly controversial. The most recent statistics on gender-based violence indicate that gender violence is an alarming phenomenon, both quantitatively and qualitatively. It is therefore not surprising that it represents a theme at the center of the doctrinal as well as political debate. Indeed, it constitutes an acquisition that the concept of gender is a construct which has now penetrated and established itself in the criminological debate (where historically the concept of femicide was born) and in penal ones. This happened, as is well known, thanks to the Istanbul Convention which provided for express obligations to incriminate *gender violence*, defined by the pact, in accordance with the sociological notion, as *violence against women as a woman*. Above all, the Convention gives the indication to introduce a *gender perspective* in the context of one’s own legislation. Given that the Italian legislator has already fulfilled – most recently in the context of the provision called “Red Code” – the obligations of criminalization provided for in the Convention, *the question relating to the inclusion of a gender perspective in the Criminal Code remains open*. In our opinion, this aspect leads to the opportunity to foresee a *gender hate crime*. When gender is considered as a characteristic susceptible of protection from hate crime laws, opposing arguments are confronted. On the one hand, it is argued that the gender does not fall within the traditional hate crime model, characterized by interchangeable victims with no previous acquaintance with the offender. Those who advocate gender hate crime laws affirm, otherwise, that gender belongs to those social categories that historically have given rise to enhanced protection and, as such, deserves to be considered a protected characteristic. Despite these doctrinal positions, the inclusion of gender among the protected characteristics is strongly opposed by public opinion, as well as by the same women’s movements that say they are opposed on the basis of the consideration that in this way gender violence would be hidden as well as the dignity and the autonomy of women underestimated (an echo of these arguments is also found in the debate raised by the feminist movements on the recent legislative proposal on misogyny under discussion in the Italian Chamber). In the face of the heated debate on the

hate crimes are also included in the category, according to a part of the hate crime doctrine.

2. The comparative perspective

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

The comparative experience allows, in fact, to conclude, in the first place, in the sense of the inalienability and urgency of a law to contrast homophobia – law present in almost all European countries as well as in the common law countries overseas: a look at foreigner legislations leads us to affirm that a country that wishes to call itself civil cannot renounce to the imperative of enhanced protection of sexual minority groups due to their vulnerability, confirmed by statistical data and by the empirical and criminological reality of hate crimes, as well as by reason of the greater criminal value of conduct inspired by homophobic motives³.

From the comparative study we also obtain a second valuable indication: among the criminal instruments to combat hate crimes, in particular homophobic, the recourse to the provision of an aggravating circumstance appears to be extremely effective, where the crime is inspired by hatred on the basis of sexual orientation, a solution considered preferable by a part of the criminal law doctrine⁴. Particularly, many legal systems resort to the common aggravating circumstance: significant is the provisions of Articles 132-76 and 132-77 of the French Penal Code, which provide for the aggravating circumstance of racial, xenophobic, anti-Semitic, sexist and homotransphobic hatred; we also point out Art. 22, par. 4 of the Spanish Criminal Code which similarly provides for the common aggravating circumstance where there is a racist, anti-Semitic, ideological motive or linked to personal beliefs, religious, homophobic, transphobic, sexist, or in relation to the disability or infirmity of the victim; similarly, the Croatian Penal Code provides for the common aggravating circumstance, in Art. 89, par. 20, of racial, religious, ethnic, national hatred, due to disability, gender, sexual orientation or gender identity. Sanctioning aggravations in the presence of the homotransphobic motive are also provided for in the Anglo-Saxon legal systems.

The formulation of the aggravating circumstance is characterized, in almost all the systems referred to, through the use of the formula “sexual orientation”, to which is added the reference to “gender identity”, to understand the transphobic motive, in addition to gender (and sometimes to sex): “by reason of the victim’s sex, sexual orientation or gender identity, true or assumed” in France

legitimacy of gender hate crimes, a compromise solution was therefore proposed in doctrine: that is, it was suggested to consider such only those gender crimes in which the victim is, so to speak, “fungible”. There seems no doubt that crimes committed for a gender motive must be framed within hate crimes, as forms of gender hate crimes. In this direction, as we will say, it also pushes comparative experience, where gender hate crimes, gender hate speeches are envisaged, in addition to the common aggravating circumstance of “gender hatred”.

³ See, on vulnerability of the LGBT group, E. DOLCINI, *Omosessualità, omofobia, diritto penale. Riflessioni a margine del volume di M. Winkler e G. Strazio, L'abominevole diritto. Gay e lesbiche, giudici e legislatori*, 2011, in *Stato, Chiese e pluralismo confessionale*, 2012, p. 1. See, on the criminal disvalue of homophobic hate crimes, M. PELISSERO, *Omofobia e plausibilità dell'intervento penale*, in this *Review*, 2015, 1, p. 24. On vulnerability of female victims, see L. GOISIS, *Crimini d'odio*, cit., p. 373 ss.

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

(as amended in 2017); “for discriminatory reasons related to the sex, sexual orientation or identity of the victim, for reasons of gender” in Spain; “because of gender, sexual orientation or gender identity” in Croatia.

The “sexual orientation and gender identity” hendiadys, which is invariably accompanied by gender, therefore, seems to be the most effective in providing for an aggravation of sanctions in the case of crimes motivated by homotransphobia: a hendiadys that also allows to overcome the objection of a possible violation of the principle of equality, referring to any sexual orientation. Note how these three protected categories “run”, so to speak, on complementary tracks: homophobic, transphobic and gender-based violence are united in all legislations. Considering, in the Anglo-Saxon context, only the US legal system, we recall that according to the American ADL Model, since the nineties, gender is counted among the characteristics protected by the hate crime laws. As of 2016, thirty-one states of the confederation provide for gender hate crimes. This characteristic is now also contemplated at the federal level in the so-called Matthew Shepard Act. It should also be noted, as just mentioned, in the comparative panorama, the French legislation, the Spanish legislation, the Croatian one, all legislations which provide, within the Criminal Code, the common aggravating circumstance entitled, among others, to “gender hatred”⁵.

Aggravation of sanctions for disability-based hate crimes are often accompanying those same provisions.

It should be noted, however, that the comparative experience – that of France as well as that of Spain, that of common law countries, as well as that of Germany, as well as Belgium, Croatia and other European countries – allows us to believe, in the presence of provisions respectful of the principle of precision, in the opportunity also of autonomous crime figures: a reinforced protection for the contrast of homotransphobic as well as gender and disability hate crimes – recognized as crimes of particular gravity by the unanimous criminological doctrine – can only pass through a political-criminal strategy that makes use of both legislative techniques, even if the repression of hate crimes must be accompanied by a strategy to prevent them, such as, among others, homotransphobic, gender-based and disability-based hate crimes: a task that cannot fail to pass through the mediation of culture⁶.

It is appropriate to recall the most significant comparative experiences from common law and civil law countries. Let’s look first at the Anglo-Saxon context where the concept of hate crime was born and in particular we look overseas. In the United States, according to the Federal Civil Rights Law of 1964, 18 U.S.C. par. 245 (b) (2), violence (or attempted violence) and also interference in the exercise of the individual rights of persons on grounds of race, color, religion or nationality constitute a crime. Starting from 2009, with the so-called Matthew Shepard Act, also known as Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act, named after a black man was murdered in Texas in the 1990’s for his sexual orientation, alongside these discrimination factors, was also added sexual orientation as well as gender identity, gender, and disability so that today there is specific protection against acts of homophobic, transphobic and sexist violence, as well as violence against disabled persons. This law contains an all-encompassing indictment of all crimes committed “due to actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, and disability”. In particular, in the wake of these facts, *the majority of American states have today adopted hate-crime laws* which provide for a tightening of the sanctioning treatment – laws that have therefore chosen the path of providing for an aggravating circumstance, as well as the figure of an autonomous crime – for homophobic violence, motivated by the so-called sexual orientation of the victim, as well as motivated by racial, religious hatred, or by gender identity, by gender and disability. Similarly, in the Anglo-

5 L. GOISIS, *Crimini d’odio*, cit., p. 456 ss.

6 See, on the theme, ID., *Crimini*, cit., *passim*.

Saxon panorama, the experience of the United Kingdom is to be noted. In the United Kingdom there is no specific legislative definition of homophobia, however this phenomenon is punished in the more general framework of the repression of crimes characterized by racial or religious hatred towards victims, which is equated with discrimination on the basis of sexual orientation. English law provides for both the hypothesis of homotransphobic and disability hate crime and hate speech, albeit with clauses aimed at safeguarding respect for freedom of expression for the first⁷.

In the European panorama, the French experience is certainly emblematic. In particular, even in the French legal system, the protection against discriminations was entrusted primarily to an aggravating circumstance, just recalled. Without going into the details of the very recent legislative reforms, we point out that French legislation is characterized by the provision of discrimination as an autonomous figure of crime according to Articles 225-1 and 225-2 of the Criminal Code: any distinction made between individuals, based on factors of discrimination, punished with a three-year imprisonment penalty and a fine of 45,000 euros, a norm considered exemplary in doctrine in terms of precision and useful model also for the Italian legislator. This norm contemplates a lot of factors of discrimination: between them, surely, sex, sexual orientation, gender identity and handicap.

As for Germany, where – remember – homosexuality was a crime until 1969, in the well-known provision of § 175 StGB and where until 1994 male homosexuality among minors was penalized, the *Strafgesetzbuch* provides for a repressive discipline of homophobic violence in § 130, Section 1. This provision provides that anyone who, in such a way as to disturb public peace, incites to hatred or violence against elements of the population or harms the dignity of other people through insults or offenses, is punished with imprisonment from three months to five years. Section 2 of § 130 also provides for a custodial sentence of up to three years or a pecuniary penalty for those who commit the same offenses through the dissemination of written works. The definition given in § 130, which is designated mainly for racial and xenophobic violence, also includes discrimination based on sexual orientation, although the law does not make an explicit reference to the homophobic background of the perpetrator of the crime. In this legal system, as in the United Kingdom, recently, with a view to remembrance of the forgotten victims of the Holocaust, a law was enacted that overturns the convictions for the crime referred to in § 175 StGB. A choice that goes hand in hand with numerous legislative projects aimed at protecting LGBT minorities, including through an aggravating circumstance where the crime is committed due to the victim's sexual orientation (*sexuelle Orientierung des Opfers*). German doctrine believes that also other factors can be read in the norm: without doubt, *gender and disability*. There is also another norm which is called to protect victims of hate crimes, according to this doctrine: § 46, 2 StGB. The norm on sentencing, which has been recently reformed providing an aggravation of the sentence where the crime is motivated by “racial, xenophobic hatred or other unhuman motives”: so as to include all types of hate crime. Sometimes doctrine recalls also, on the terrain of hate crimes, § 211 StGB, titled Mord, which envisages the homicide for “vile motives”.

Finally, remember the Spanish legal system. In *Spain*, within the Criminal Code there are provisions regarding discrimination on the basis of sexual orientation, made the subject of autonomous criminal offenses, and the homophobic motive, as well as transphobic and sexist, and also by disability, is considered as a common aggravating circumstance: “*son circunstancias agravantes: (...) Cometer el delito por motivos racistas, antisemitas u other clase de discriminación referente a la ideología, religión or creencias de la víctima, la etnia, raza o nación a la que pertenencia, su sexo, orientación o identidad sexual, razones de género, la enfermedad que padezca or su discapacidad*”. At Chapter IV of the Spanish Criminal Code, dedicated to crimes committed in the exercise of fundamental rights and public freedoms guaranteed by the Constitution, in particular under Articles from 510 to 521, re-

⁷ For the legislations of common law countries, see ID., *cit.*, p. 45 ss.

cently revised, a detailed discipline is envisaged that incriminates acts of discrimination for homophobic, transphobic, sexist and by disability reasons, through the hypothesis of hate crime and hate speech⁸.

It should also be emphasized that in recent times almost all European legislations have been placed in the direction of the protection of sexual minorities, even those distinguished by a lower attention to human rights, such as Georgia, traditionally considered one of the most backward countries in the protection of rights of LGBT people⁹, and Hungary. The European legislations that have followed this path, incriminating incitement to hatred, violence or discrimination on the basis of sexual orientation are, in addition to those already mentioned, the following: Albania, Bulgaria, Cyprus, Austria, Denmark, Estonia, Greece, Malta, Lithuania, Ireland, Iceland, Holland, Romania, Sweden, Norway, Finland, Luxembourg, Monaco, Montenegro, Portugal. In addition to those we have cited, there are also many European legislations that provide for the aggravating circumstance of homophobic hatred in 2019¹⁰.

Ultimately, in the main common law systems as well as of civil law, a detailed discipline of hate crimes is envisaged and homophobic, transphobic, sexist, sometimes disability-based hate crimes are indicted and also, widely, speeches of homotransphobic, sexist, by disability hatred, with some clauses protecting freedom of expression in the Anglo-Saxon legal systems in homage to free speech¹¹. The comparative lesson is clear in this sense.

A mapping that signals the backwardness, as we will say, of the Italian legislation on the protection against homotransphobic, gender and disability hate crimes¹².

3. The Italian legislative framework. A *de iure condendo* proposal regarding homotransphobic, gender and disability hate crimes

When compared with the legislative landscape that emerges from the comparative survey, the Italian experience in the field of homotransphobic, sexist and by disability discrimination is distressing. Italy does not have any anti-homophobia law, nor does it provide for criminal rules, of ordinary rank, which incriminate or aggravate the sanctioning treatment for discrimination based on the victim's sexual orientation, gender identity or gender. Very scarce also the ad hoc norms aimed to protect disabled persons.

⁸ For a comparative study on these (France, Germany and Spain) and others civil law countries, see ID., *cit.*, p. 58 ss.

⁹ In the mapping published by *Ilga Europe*, Italy is positioned, in a scale from -7 to 17, at 0, with Lithuania and Malta. Georgia is positioned under zero, with many others European countries. See M. CHIULLI, *Maledetti froci & maledette lesbiche. Libro bianco (ma non troppo) sulle aggressioni omofobe in Italia*, Roma, Aliberti Castelveccchi ed., 2010, p. 62.

¹⁰ L.R. MENDOS, *State Sponsored Homophobia*, Ed. Ilga World, XIII edition, 2019, p. 175, p. 265 ss., at <https://ilga.org>. Similarly, the aggravating circumstance of homophobic hatred is foreseen in: Albania, Andorra, Bosnia and Herzegovina, Denmark, Finland, Greece, Kosovo, Lithuania, Luxembourg, Malta, Montenegro, San Marino, Portugal, Norway, Serbia, Slovakia. See *ibidem*, p. 260 ss.

¹¹ Interesting is the clause to safeguard freedom of expression envisaged in Australian legal system, in the *Federal Racial Anti-Discrimination Act*, which provides a clause of lawfulness of the fact for any declaration with academic, artistic or scientific purposes or with any other genuine purpose of public interest. See L. GOISIS, *Crimini*, *cit.*, p. 132 ss.

¹² See CAMERA DEI DEPUTATI, *Norme per la tutela delle vittime di reati per motivi di omofobia e transfobia*, Roma, 2009, at <http://documenti.camera.it>; see also L. GOISIS, *Omofobia e diritto penale: profili comparatistici*, in *Diritto penale contemporaneo*, 2012, p. 14 ss.

On homotransphobic discrimination, in particular, in the Italian context, however, there has been debate for some time about the appropriateness and legitimacy of punishing acts of discrimination committed against homosexuals and transsexuals, as well as to punish with an aggravated sentence, thus providing for an aggravating circumstance, those crimes committed due to the homosexuality/transsexuality of the victim¹³.

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

In the second direction – the provision of a common or special aggravating circumstance – went the unified draft law AC 2802 and AC 2807, presented by Hon. Paola Concia in November 2010: the bill provided for the introduction in the special part of the Criminal Code of two aggravating circumstances at Articles 599-*bis* and 615-*quinquies* of the Criminal Code. There was no lack of proposals for the introduction of the homophobic aggravating circumstance in the body of Art. 61 of the Italian Criminal Code, with the provision of a paragraph 11-*quater*, exclusively applicable to non-culpable crimes against individual life and safety, or individual personality, personal freedom, moral freedom¹⁴.

The Italian Parliament rejected the various bills presented, most recently in November 2012, accepting on several occasions two preliminary questions, based on the principle of equality pursuant to Art. 3 of the Constitution, as well as on the principle of legality (in particular on the principle of precision) pursuant to Art. 25, paragraph 2 of the Constitution¹⁵. Issues that in reality both appear unfounded: above all the so-called argument of “reverse discrimination” is disavowed only if one thinks of the most recent statistical data on hate crimes (we will mention the data later) which testify of the diffusion and pervasiveness of homophobic violence, establishing in the sense of a condition of weakness and vulnerability of a group, that of LGBT people, also proven by the criminological findings on the gravity of homophobic hate crimes, a condition that the imperative of equality not only suggests, but requires to protect, according to a principle of differentiated protection of objectively different situations, in compliance with the principle of reasonableness. An argument which is also linked to the greater criminal value of crime inspired by homophobic hatred¹⁶.

Seemed to welcome the warning of the doctrine the relatively recent intervention of the legislator on homophobia, transfused into the bill AS 1052, the so-called “*d.d.l. Scalfarotto*”, approved in the House on 19th of September 2013. The bill, in line with the European idea of an assimilation between racial hatred and homophobic hatred¹⁷, extended the incriminating norms of the Reale-Mancino law to conducts based on “homophobia or transphobia”. However, in our opinion, not inappropriately, the bill excluded the extension for the crime of propaganda of racist ideas pursuant to Art. 3, paragraph 1, lett. a), part I, l. n. 654/1975. The legislator, in making this omission, seems in fact to have

13 E. DOLCINI, *Omofobia*, cit., p. 25 ss.

14 ID., *cit.*, p. 30.

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

16 ID., *Omofobia*, cit., p. 25 ss.

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

acknowledged the need to avoid the creation of new crimes of opinion.

“There is only one serious objection that can be advanced today against the proposal to extend – by the legislator – the provisions of the Reale law and the Mancino law to homophobic behavior (...). The problem concerns the reconciliation of the contrast to homophobia with the freedom of expression of thought (Article 21 of the Constitution)”¹⁸, as observed in the doctrine. Although, in our opinion, the balance between the juridical goods at stake, freedom and equality/dignity of the person, as well as the interpretation in light of the concrete danger and the contextualization of the propaganda and instigation offences, conducted by the judiciary, allows partially to overcome the doctrinal criticisms against the Italian anti-discrimination system based on hate speeches¹⁹.

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

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

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

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

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

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

19 See L. GOISIS, *Crimini*, cit., p. 202 ss.

With regard to gender discrimination, it is enough to observe how the daily incidence of gender-based violence is visible to all and proven by statistical data. There seems to be no doubt that crimes committed for a gender motive must be framed within hate crimes, as forms of gender hate crimes. Looking at the Italian constitutional structure, in light of the principle of equality enshrined in Art. 3 of the Constitution, it is certain that gender, to be understood as the “social definition of belonging to sex”, or according to the well-known Istanbul Convention, as “socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men”, is a protected characteristic included among those concerning formal equality, which guarantees the equal value of “differences”, therefore worthy of protection by the legislation against hate crimes. In this direction, as we have mentioned, also pushes comparative experience.

An aggravating circumstance entitled to gender hatred, as well as the provision of gender hate crimes would make it possible to effectively punish some manifestations of violence, where the gender motive is proven. Such a solution would be coherent with the new reforms, most recently the so-called Red Code, on gender violence, also naming gender in the Criminal Code, as prescribed by the Istanbul Convention. Evidently, the aforementioned option leaves out many other cases of gender-based violence and in particular all those cases in which violence matures in a gender context without, however, there being hatred and gender discrimination. From this point of view, although innovative and original, the recent perspective that has emerged in the Spanish legal system aimed at the generalized application of the sexist hate aggravating circumstance to all gender crimes – regardless of the risks of *ne bis in idem* – application urged especially in the case of murder and sexual violence, would not appear without foundation, if one accesses the thesis of male violence as an expression of the desire to reaffirm a given social hierarchy and the result of sexism. The phenomenon of gender-based violence, it must be emphasized, should be fought on the cultural and social terrain, even before juridical. As it was recently stated, “punishing is not enough”²⁰. However, it is not possible to renounce the protection of criminal law, where primary prevention has failed, due to the involvement of fundamental rights of female victims.

On the other side, ableism is widespread and the legislation to protect disabled persons is *weak*, except for Art. 36 of the law n. 104/1992, a special aggravating circumstance for crimes against disabled, and Art. 61, n. 5 *c.p.*, a common aggravating circumstance for vulnerable victims, so called “minority defence”.

With a view to reform, we therefore believe, in light of the comparative study, a proposal must be formulated that conforms to the principle of legality. On the other hand, comparative experience shows unequivocally that the objective of respecting the principle of legality-precision can also be achieved in this ‘ethically sensitive’ matter.

First of all it is possible, in our opinion, to define the contours of the expression “sexual orientation”, whether it is used in the context of an autonomous crime or in the context of an aggravating circumstance, an expression that appears in many of the foreign legislations mentioned, without it involving daring interpretations and which also appears in numerous international conventions, as well as being already explicitly contemplated in Italian ordinary legislation – in legislative decree 10th of September 2003, n. 276 – where in Articles 10 and 18, paragraph 5, employment agencies are prohibited from carrying out any investigation or otherwise processing data, based, among other things, on sex and sexual orientation. Not only. Similarly, in the penitentiary system, following legislative decree n. 123 and n. 124 of 2018, Art. 1 states the prohibition of discrimination based on sex, gender identity, sexual orientation. Nor, on the other hand, are the terms homophobia and transphobia, in light of the

²⁰ F. BASILE, *Violenza sulle donne e legge penale: a che punto siamo?*, in *Criminalia*, 2018, p. 13. On the Spanish legal system, see L. GOISIS, *Crimini*, cit., p. 391 ss.

vast European and international regulatory production, without defining referents. However, the reference to sexual orientation, to which gender identity must be approached, in order to contemplate the phenomenon of transphobia, is, in the light of comparative experience, more linear and less connotative than the expression “homophobia and transphobia”: among other things, contemplating different sexual orientations, it could also overcome a possible exception in terms of the principle of equality²¹. The same bill AC 245 of 2103 was committed to an exhaustive definition of the concepts of “sexual orientation”, “gender identity”, as well as “sexual identity”²². As regards gender, it is sufficient to observe that a clear definition of the term is contained in the Istanbul Convention: this could therefore be referred to, as indeed ordinary jurisprudence on gender violence already does.

Even if it must be underlined that there are critical issues with reference to the introduction of legislative definitions in this section of the Criminal Code. First of all, the discipline in question does not contain, nor has it ever contained an express definition of the traditional factors of discrimination such as race, ethnicity, nationality, religion. Nevertheless, jurisprudence has always easily reconstructed the meaning of these terms for the purposes of criminal law in the hermeneutic context, also through the reference of international sources. Well, creating an *ad hoc* definition only for “sexual orientation, gender identity and gender” would entail an unreasonable inequality of treatment, so to speak, with respect to the original factors of discrimination and would obviously expose the discipline thus introduced to a critique of unreasonableness and inequality.

In our opinion, there is a second consideration: the terms sexual orientation, gender identity and gender are terms, as mentioned, that already have a consolidated definition in the Italian interpretative panorama. Not only. These are terms that enjoy international normative references: think of gender, the most debated concept, today engraved in the Istanbul Convention. Here the criminal judge will have at his disposal wide legislative references, national and international, for the reconstruction of these concepts. Of the two, either: either all the discrimination factors are defined or none is defined. In our opinion, this second path is the most coherent, given the hermeneutic solidity of the concepts involved (race, ethnicity, nationality, religion, gender, sexual orientation, gender identity, disability).

Definitely more decisive in our opinion that the criminal legislator undertakes to define what constitutes an act of discrimination: the French experience demonstrates this²³. It should also undertake to provide for a safeguard clause for freedom of expression, as in the Anglo-Saxon legal systems.

Our proposal *de iure condendo* should therefore be of the following content. First of all, the ag-

21 M. PELISSERO, *cit.*, p. 19.

22 By “gender identity” we mean the perception that a person has of himself as a man or a woman, even if it does not correspond to his biological sex. “Sexual orientation” is defined as emotional or sexual attraction towards people of the same sex, of the opposite sex or of both sexes. See F. PESCE, *Omofobia e diritto penale: al confine tra libertà d’espressione e tutela di soggetti vulnerabili*, in *Diritto penale contemporaneo*, 2015, p. 22.

23 In the French Criminal Code, we find the following definition of discrimination: Art. 225-2 c.p. - “*La discrimination définie aux articles 225-1 à 225-1-2, commise à l’égard d’une personne physique ou morale, est punie de trois ans d’emprisonnement et de 45 000 euros d’amende lorsqu’elle consiste: 1. A refuser la fourniture d’un bien ou d’un service; 2. A entraver l’exercice normal d’une activité économique quelconque; 3. A refuser d’embaucher, à sanctionner ou à licencier une personne; 4. A subordonner la fourniture d’un bien ou d’un service à une condition fondée sur l’un des éléments visés à l’article 225-1 ou prévue aux articles 225-1-1 ou 225-1-2; 5. A subordonner une offre d’emploi, une demande de stage ou une période de formation en entreprise à une condition fondée sur l’un des éléments visés à l’article 225-1 ou prévue aux articles 225-1-1 ou 225-1-2; 6. A refuser d’accepter une personne à l’un des stades visés par le 2° de l’article L. 412-8 du code de la sécurité sociale. Lorsque le refus discriminatoire prévu au 1° est commis dans un lieu accueillant du public ou aux fins d’en interdire l’accès, les peines sont portées à cinq ans d’emprisonnement et à 75 000 euros d’amende”.*

gravating circumstance referred to in Art. 604-*ter* of the Criminal Code could be amended to include gender, sexual orientation and gender identity, as well as disability. This is what the norm would sound like (unless you want to make it a common aggravating circumstance rather than ‘almost common’): “for crimes punishable with a penalty other than life imprisonment committed for the purpose of discrimination or ethnic, national, racial or religious, gender-based, by reason of sexual orientation, gender identity or disability hate, or in order to facilitate the activity of organizations, associations, movements or groups that have the same purposes among their finalities, the penalty is increased by up to half”.

Furthermore, sexual orientation and gender identity as well as gender and disability should also be contemplated in the provisions of Art. 604-*bis* of the Criminal Code, with the exception of the case of propaganda referred to in letter a), in order to avoid any complaints in the light of Art. 21 of the Constitution, as well as the hypothesis of the so-called aggravating circumstance of denial, referred to in paragraph 3, for the same reasons. The extension should be made for acts of discrimination and instigation to commit acts of discrimination on racial, ethnic, national or religious grounds, for acts of violence (as well as provocation of violence and instigation to commit such acts) for racial, ethnic, national or religious reasons, for the establishment and promotion of organizations, associations, movements or groups that have among their purposes the incitement to discrimination or violence on racial, ethnic, national or religious grounds, as well as for participation to such organizations. Thus, letter a) (except for propaganda) and b) of the first paragraph and the second paragraph of Art. 604-*bis* *c.p.* would have the following tenor: “for racial, ethnic, national or religious, gender-based reasons, founded on sexual orientation, gender identity or disability”.

Finally, alongside a definition of what constitutes discrimination, like the provisions of the French law in Articles 225-1 and 225-2 of the Criminal Code, it seems to us that the choice to envisage a safeguard clause for freedom of expression could be useful. This clause may apply either to homophobic conduct only, as happens in the English legal system²⁴, but it would seem discriminatory²⁵, or – and it would seem to me the preferable and more consistent solution along the lines of what is proposed in the legislative decree Scalfarotto – to be applied to all the criminal offences provided for in Section I-*bis* of Chapter III, Title XII: in this case the content of the clause could partially follow the Australian model, where a clause excluding the illegality of the fact aimed at protecting artistic, academic, scientific or research expressions, as well as the exposure of matters of public interest and personal comments on matters of public interest is drawn²⁶.

Lastly on the sanctioning profiles: it would be necessary to evaluate the appropriateness of providing for the ancillary sanction of community service pursuant to Art. 1 of the law n. 205 of 1993, not repealed by legislative decree n. 21/2018, as a substitute sanction for the custodial sentence envis-

24 Where it is anticipated that discussion or criticism of sexual conduct or practices or same-sex marriage cannot be regarded as threatening or intended to engender hatred. This formulation could perhaps appease those who opposed the 2013 bill, and today oppose the recent Italian draft of law, the so called *d.d.l. Zan et Alii*, showing that she/he does not really understand its significance, on the basis of the argument that “the greatest risk (...) is that we will be able to prohibit (...) any manifestation of opinions opposed to homosexuality”. See F. PESCE, *cit.*, p. 31.

25 M. GATTUSO, *Che cosa dice veramente la legge sull'omofobia: ovvero, il bambino e l'acqua sporca*, in *Articolo29*, 2013, p. 3.

26 The clause limiting the typical fact or excluding the illegality of the fact or excluding the punishment, depending on which legal nature is to be attributed, could sound, recalling in part the wording of the Scalfarotto bill, as follows: “they do not constitute discrimination, or instigation to discrimination, the free expression and manifestation of beliefs or opinions attributable to the pluralism of ideas, provided that they do not instigate hatred or violence, where they are an expression of academic, artistic or scientific purposes or of public interest, as well as comments, on issues of public interest, expression of the genuine conviction of the person who expresses them”.

aged for these types of crimes. Finally, a system of statistical data collection on racial, homotransphobic, gender-based or disability violence would be desirable.

There has been no lack of attempts in jurisprudence to bring the aims of homophobic discrimination back to the Mancino law through a broad reading of the concept of discrimination, however, as an authoritative scholar observes, “whoever brings the aims of homophobic discrimination back to the Mancino law is strongly suspected, in definitive, to place itself on a collision course with the principle of precision of the criminal norm, pursuant to Art. 25, co. 2, Constitution: if there is a gap in the Mancino law, this gap can only be filled by the legislator”²⁷.

The legislator has attempted to remedy this obvious legislative gap with reference to the categories of gender, sexual orientation and gender identity²⁸ and, finally, disability – only by filling which the principle of equality can be truly respected – through the recent draft of law, named *d.d.l. Zan et Alii*, today, 4th of November 2020, approved by the Assembly of the Italian Chamber of Deputies.

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

4. The recent bill approved in the Italian Chamber of Deputies

It is known that the so called *d.d.l. Zan et Alii*, named by the rapporteur, has been approved as a unified text (AAC 107, 569, 868, 2171 and 2255) – the result of the various proposals from Hon. Boldrini and others, Hon. Zan, Hon. Scalfarotto and others, Hon. Perantoni and others, Hon. Bartolozzi – on 30th of July 2020 within the Justice Commission of the Italian Parliament. This draft of law, titled “*Amendments to Articles 604-bis and ter of the Criminal Code, on violence or discrimination on grounds of sex, gender, sexual orientation or gender identity*”, consists of 10 Articles, which focus on

²⁷ E. DOLCINI, *Omofobi*, cit., p. 15 ss.

²⁸ There are numerous general and specific arguments raised in the debate on homophobia against the criminalization of homophobic and transphobic hate crimes. We would like to draw our attention to the objection relating to the violation of the principle of equality and the so-called “reverse discrimination”, to the detriment of heterosexuals, as well as the elderly and disabled. On this point, it seems necessary to highlight the reasonableness of a discrimination based on the principle of “differentiated treatment of the distinguished”: the vulnerability of the victims of hate crimes, and in particular of the victims of homotransphobic hate crimes, of which criminological and psychiatric science show evidence, undoubtedly makes, in our opinion, necessary the choice of providing for a penal discipline to contrast homotransphobia. As has been authoritatively underlined, “on the other hand, it is a well-known phenomenon in our legal system that a *particular vulnerability of the victim*, connected to a specific personal condition and/or to a specific space-time context, establishes a *disparity in criminal protection*: it suffices think of the common aggravating circumstance of Art. 61, n. 5, *c.p.* (so-called aggravating circumstance of the minority defense)” (E. DOLCINI, *Omofobi*, cit., p. 17). However, in our opinion, even if the greater vulnerability of sexual minorities is denied, there is undoubtedly the greater criminal value of the conducts inspired by transphobic and homophobic motivation: the reason for the greater gravity (as well as the greater degree of guilt) of the conducts inspired by racial, homotransphobic, gender or disability hatred. A further criticism refers to the presence in Italian Penal Code of the so-called aggravating of abject and futile reasons, referred to in Art. 61, n. 1 *c.p.* (F. PESCE, *cit.*, p. 21, p. 31). However, the argument is without foundation because it ignores the fact that at the jurisprudential level there are no applications of the aggravating circumstance in question to the reasons of homotransphobia. In fact, jurisprudence emphasizes that this aggravating circumstance must be recognized on the basis of the average assessments of the community at a given historical moment: it is now evident that the acceptance of homosexuality is by no means the object of unanimous agreement in Italian society. See L. GOISIS, *Crimini*, cit., p. 519 ss.

both repressive and preventive strategies (also protective), in order to counter forms of homotransphobic discrimination and misogynist violence, which, as stated in the accompanying report to the unified bill, are continuously growing according to statistical surveys. *Today*, after the approval in the Chamber, the discipline has been correctly extended also to disability.

Articles 2 and 3 of the *d.d.l.* modify the *Crimes Against Equality* provided for by Articles 604-*bis* and *ter* of the Criminal Code to add discriminatory acts based on “sex, gender, sexual orientation, gender identity or disability” to discrimination on racial, ethnic, national and religious grounds. The extension concerns offence of instigation to carry out or carry out discriminatory and violent acts referred to in letters a) and b) of paragraph 1 of Art. 604-*bis* of the Criminal Code, as well as the associative hypothesis referred to in the second paragraph of the same article, excepting, for the reasons that we have already explained, the extension of the propaganda, thus avoiding entering into potential collision with the freedom of expression (as well as the hypothesis of denial). Art. 3 similarly extends the aggravating circumstance so called of racial hatred to conducts based on sex, gender, sexual orientation, gender identity or disability. Art. 4 contains a clause of safeguard for freedom of expression and pluralism of ideas. Art. 5 amends Art. 1 of the law 25th of June 1993, n. 205, on the one hand, introducing the possibility of carrying out unpaid activities in favor of the community provided for therein also in the case of conditional suspension of the sentence and suspension of proceedings with probation. It is also envisaged that the community service can be carried out in associations and organizations that are interested in protecting the victims of the crimes referred to in Art. 604-*bis* of the Criminal Code, considering the reasons that led to the conduct²⁹.

Furthermore, Art. 6 of the *d.d.l.* amends Art. 90-*quater* of the Code of Criminal Procedure, including among the vulnerability conditions of the offended person relevant for the purposes of the criminal trial also those arising from the fact that the crime is committed for reasons related to sex, gender, sexual orientation, gender identity or disability. Finally, Articles 7, 8, 9 provide for policies to promote the equal dignity of LGBT people and support actions in favor of victims of crime. Art. 7 establishes the National Day against homophobia, lesbophobia, biphobia and transphobia; Art. 8 integrates the catalog of competences of the Office for the Fight against Discrimination of the Prime Minister (Unar); Art. 9 disciplines anti-discrimination centers, with reference to discrimination based on sexual orientation and gender identity, aimed at accommodating victims of newly created crimes and victims vulnerable in general due to sexual orientation and gender identity; Art. 10 requests Istat (Italian Institute of Statistics) to carry out surveys, at least every three years, on discrimination, violence and the characteristics of the subjects most exposed to risk, in order to verify the application of the reform and implement policies to combat racial and ethnic discrimination, religious, or based on sexual orientation or gender identity.

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

On the one hand, it can be observed that the terminology used is respectful of the principle of precision: as we said, in fact, the terms sexual orientation, gender identity and gender, the same term sex, probably added in the unified text at the request of the feminist movements and in our opinion not necessarily introduced, are able to guarantee the precision and clearness of the type of offence, as also demonstrated by the experiences of foreign legislations that invariably make use of it, also avoiding discriminatory outcomes: in fact, these are terms widely used in Italian legal system (in labor law,

²⁹ It is necessary to underline some critical aspects of the reform. With the amendment of paragraph 1-*quater* (letter a), n. 3 and 4, relating to community service, the maximum duration of 12 weeks is eliminated: this involves the application of Art. 37 of the Criminal Code, which establishes the principle of equivalence with respect to the main penalty, which could produce unreasonable outcomes. See CAMERA DEI DEPUTATI, Servizio Studi, Dossier n. 219/1.

in the penitentiary law, in the language of the Constitutional Court, as well as of the supranational courts, and in international documents). Art. 1, lastly introduced in the text of law, defines all these terms according to the most accepted interpretation, so that the precision is guaranteed³⁰. Even if it would have been more appreciable, for the reasons explained above, the choice not to include definitions for criminal purposes in the bill (despite the warning to this effect from the Constitutional Affairs Commission and the Legislation Committee): definitions risk not only excluding certain categories of subjects, but above all to create an unreasonable disparity with respect to the categories originally protected by the discipline in question: race, ethnicity, nationality, religion.

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

Regarding the establishment of a National Day against homophobia, lesbophobia, biphobia and transphobia, our suggestion would be to provide a day against hate crimes more generally, in order to consider all the discrimination factors: this for reasons of reasonableness with respect to all the factors that the anti-discrimination discipline contemplates and also in line with the recent Special Commission established in the Senate on the initiative of the Hon. Segre precisely for the fight against such crimes, all equated in the discipline of Crimes Against Equality referred to in Articles 604-*bis* and *ter* of the Italian Criminal Code.

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

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

First of all, the bill does not extend the protection to the propaganda, but only to the instigation to discrimination and violence, as well as to acts of discrimination and violence. This argument alone would be enough to rule out any concern about future restrictions on freedom of expression. However, the objection is also instrumental because it does not consider the consolidated jurisprudential approaches in the Italian legal system: it is undisputed that constitutional as well as ordinary jurispru-

³⁰ Art. 1. – “For the purposes of this law: a) by sex we mean biological or personal sex; b) gender means any outward manifestation of a person that is in conformity or in contrast with the social expectations connected with sex; c) sexual orientation means sexual or emotional attraction towards people of the opposite sex, the same sex, or both sexes; d) by gender identity we mean the perceived and manifested identification of oneself in relation to gender, even if not corresponding to sex, regardless of having completed a transition path”. The same notion of discrimination can be found in the national and international anti-discriminatory legislation (as usually made by ordinary jurisprudence), even if a definition, similar to the French Criminal Code, could have been useful, as we pointed out.

dence³¹ has constantly interpreted the instigating offences in the light of the concrete danger, balancing the interests at stake – freedom of expression and human dignity – in favor of the second, equal dignity precisely, the juridical good protected by Crimes Against Equality. The ECtHR operated according to the same logical process. In other words, freedom of expression is not endangered by this reform: nor is it clear why the objection should apply only to homotransphobic and gender discriminations (today also to ableism) and not to racial and religious ones, which have always been the subject of criminal protection. However, it could be appropriate to provide, in order to dispel any doubts on this point, as well as in foreign legal systems, a clause to safeguard freedom of expression, outlined as we have proposed above: in this direction, we can greet with favor, albeit in perfectibility of the formulation, the so called Costa amendment, which, accepting the suggestion of the Constitutional Affairs Commission, has recently inserted a new Art. 3 (today Art. 4) in the text of the unified draft of law, containing precisely such a clause, which has been correctly rewritten by the Assembly and now reads as follows: “pursuant to this law, free expression of beliefs or opinions is permitted as well as legitimate conduct attributable to the pluralism of ideas or the freedom of choices, as long as not able to determine the concrete danger regarding the fulfillment of acts of discrimination or violence”³².

This formulation of the clause – which seems to be a clause excluding the possibility of punishment – is respectful of the judicial interpretation just mentioned, claiming the concrete danger of the conduct: however, the tenor of the clause from us suggested before would be, in our opinion, more complete.

5. Conclusion. The need for legislative intervention in the light of international documents and the recent jurisprudence of the ECtHR, as well as victimological data

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

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

The set of international provisions on the subject first of all contemplates those agreements which provide for a prohibition of discrimination. At the European level, Art. 14 of the ECHR which provides for a general prohibition of discrimination; the same Treaty on European Union, in Art. 2, defines respect for human dignity, equality and fundamental human rights; moreover, more specifically, Art. 21 of the Charter of Fundamental Rights of the European Union prohibits all forms of discrimination based, among other things, on sexual orientation. Similarly, the Treaty on the functioning of the

³¹ See, on this jurisprudence, L. GOISIS, *Crimini*, cit., p. 202 ss.

³² L. MILELLA, *Omofobia: la maggioranza con Forza Italia su emendamento salva-opinioni*, in *la Repubblica*, 23 luglio 2020. See the site of the Italian Chamber for the reports to Assembly of Hon. Zan, held starting from 3rd of August 2020 until 4th of November 2020.

European Union, in Art. 10, clarifies that, in the definition and implementation of its policies, the Union aims to combat discrimination based on sex as well as sexual orientation, a prohibition of discrimination reinforced by Art. 19 of the same Treaty³³.

There are also important soft law instruments, albeit not legally binding: stand out the Resolutions on homophobia of the European Parliament of 2006 and 2012, which suggest, indeed require, the intervention of criminal law in the fight against homophobia³⁴. These soft law instruments, if they do not clearly imply, due to their intrinsic nature, as evidenced in the doctrine, an express obligation to incriminate homophobic hate crime³⁵, nevertheless represent a non-negligible warning for the national legislator. What is certain is that, on an international level, it is excluded that there may be prohibitions on the indictment of homophobic hate crime and above all of homophobic hate speech³⁶. It is stated, at European level, also in the light of the legislations that have taken a similar path, in the sense that “defining the incitement to hatred, violence or discrimination against LGBT people as a crime can coexist with respect for freedom of expression”³⁷. This framing of the homophobic hate speech shows how there is unanimity of views at the international level on the advisability of resorting to criminal law in the fight against homophobic hate speech, reinforced in our opinion also by the presence of a more general international obligation, imposed on the national legislation from Art. 117, paragraph 1 of the Constitution, to the criminal repression of other forms of hate speeches, racial, religious and national, where they prove to be concretely dangerous. This is due to, among other things, the New York Convention of 1965, the ECHR, the same Statute of the International Criminal Court³⁸. So much so that it could be assumed that an obligation of criminalization, on the basis of the rules mentioned above, also exists for homophobic hate crimes.

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

Not only. The analysis of the jurisprudence of the European Court of Human Rights in the field of homophobia allows us to grasp the orientation towards enhanced protection of sexual minorities. Suffice it to mention the well-known *Vejdeland* case³⁹. The sentence is noted because it chooses to give a positive response to the debated problem of the use of criminal sanctions in the fight against hate crimes: like racial hate crimes, homophobic hate crimes can also be countered through recourse to criminal law. In a similar direction, but even more eloquent, that of an obligation to criminalize, the subsequent sentence *M. C. and A.C. v. Romania* of 12th of April 2016⁴⁰. In fact, European judges point

33 F. PESCE, *cit.*, p. 7 ss.

34 See, on similar soft law international documents, M. PELISSERO, *Omofobia*, *cit.*, p. 16.

35 See *ID.*, *cit.*, p. 18.

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

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

38 G. PAVICH-A. BONOMI, *Reati in tema di discriminazione: il punto sull'evoluzione normativa recente, sui principi e valori in gioco, sulle prospettive legislative e sulla possibilità di interpretare in senso conforme alla Costituzione la normativa vigente*, in *Diritto penale contemporaneo*, 2014, p. 15 ss.

39 European Court of Human Rights, 9th of February 2012, *Vejdeland et alii v. Svezia*, N. 1813/07. See L. GOISIS, *Libertà*, *cit.*, p. 418 ss.

40 European Court of Human Rights, *M. C. e A.C. v. Romania*, 12th of April 2016, N. 12060/12. See C. DANISI, *Omofobia e discriminazione: la continua evoluzione nell'interpretazione della Cedu*, in *Articolo29*, 2016, p. 1 *et seqq.*, www.articolo29.it, and also C. FATTA, *Hate Crimes all'esame della Corte di Strasburgo: l'obbligo degli Stati di proteggere i membri della comunità LGBTI*, in *Nuova*

to the need to introduce specific instruments – including of a criminal nature – against violence motivated by homophobic hatred, thus effectively providing for an implicit obligation to incriminate homophobic hate crimes. As had been done by the Court in the previous *Identoba et alii v. Georgia*, of 12th of May 2015⁴¹. The European Court reaches similar conclusions in the recent *Lielliendahl v. Iceland*, of 11th of June 2020, ruling in which the violation of Art. 10 of the ECHR, which protects freedom of expression, is excluded in the case of the Icelandic law against homophobic hate crimes, by reason of the recognition of a need to protect “the rights of others” and the equalization of discrimination on the basis of sexual orientation to racial ones. Similar *dictum* in *Beizaras and Levickas v. Lithuania* of 14th of January 2020, where the Court condemned the State involved for not having prepared suitable measures to repress homotransphobic phenomena⁴².

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

Pacific is also the Court’s orientation in the fight against gender-based violence, considered a violation of Art. 3 of the ECHR, that is an inhuman and degrading treatment, an open manifestation of the violation of the human rights of female victims⁴³.

Lastly, the victimological data point to the inalienability of the law on homotransphobia, misogyny and ableism.

The evidence related to the spread of the phenomenon of homophobia, in all the forms described above, is given by the statistical surveys collected in numerous foreign countries and also in the Italian legal system on hate crimes. Despite the absence of sufficiently detailed official statistical data referring to Italy, both as regards racial hate crimes and homophobic hate crimes, the surveys provided by Oscad and Unar are currently available. The Observatory for Safety against Discriminatory Acts, Oscad, in collaboration with Unar, the National Office against Racial Discrimination, collects data on subjects who have suffered a crime in relation to race/ethnicity, religious belief, sexual orientation/gender identity and disability. According to the data provided by Oscad, 2,532 reports were recorded in Italy between 10th of September 2010 and 31th of December 2018 (a clearly not insignificant number), of which only a part constituting a crime, for which there were arrests and complaints. In particular, 59.3% (897) are ethnic/racial hate crimes, 18.9% (286) are religious hate crimes, 13% (197) are crimes of homophobic hatred, for 7.8% (118) of crimes against the disabled, for 1.0% (15) of hate crimes based on gender identity. For Italy, according to various Osce surveys, there was a further in-

giurisprudenza civile commentata, 2016, 10, p. 1330 ss.

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

42 See on these cases, respectively N. 29297/18 and N. 41288/15, the site of the European Court of Human Rights: hudoc.echr.coe.int.

43 See L. GOISIS, *Crimini*, cit., p. 435, p. 440 ss.; F. TUMMINELLO, *Violenza contro le donne nella giurisprudenza della Corte EDU: da Opuz c. Turchia al caso Talpis*, in *Iusinitinere*, 2018, www.iusinitinere.it.

crease in hate crimes in 2018⁴⁴.

In addition to these recently emerging data, the evidence of the presence of strong homophobic violence also in the Italian society are numerous and reliable: the reports drawn up by Arcigay on the basis of news relating to episodes of a clear homophobic nature recorded annually by the mass-media. The portrait that emerges from the 2019 report of homotransphobia cases, noted since May 2018, is worrying: 187 cases of homotransphobia recorded by the press are up, compared to 119 cases in the previous year. Obviously, this number does not exhaust the dimension of the phenomenon (not all discrimination or homotransphobic violence ends up in the newspapers), but the comparison of this indicator with those of past years traces a trend that cannot fail to alarm⁴⁵. Lastly, the data collected by Vox, the Observatory for Rights, took part to corroborate the statistical data and media surveys made by Arcigay network. The most updated data for 2019, provided by the fourth online hate mapping, confirm a slight decrease in homophobic hatred, but also indicate that, where homosexual families are debated, hatred re-emerges: negative tweets in 2019, in the period March-May 2019, are 7,808 against 3,933 positive tweets, out of a total of 11,741 tweets. In particular, the aggressiveness of homophobic hate messages, according to the content of the same and the language used, is particularly strong⁴⁶. Similar data are also confirmed by international agencies such as Ilga Europe⁴⁷.

The qualitative, as well as quantitative, resurgence of acts of homotransphobic violence is therefore a phenomenon also present in Italy: which clearly demonstrates the vulnerability of LGBT subjects, as systematic victims of aggression motivated only by aversion to their sexual orientation⁴⁸.

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

With reference to gender-based violence, most recently, according to the latest Istat surveys, updated to 2019, it is enough to recall one figure above all: it affects 6 million and 788 thousand women who have suffered physical or sexual violence during their lifetime⁴⁹. Istat observes how, in reality, despite an encouraging number relating to a slight decline in violence, negative and by no means negligible signs emerge. *"The hard core of violence"*, writes the research institution, *"is not affected: rapes and attempted rapes are stable as well as the most heinous forms of physical violence. The severity of sexual and physical violence has increased"*⁵⁰. In fact, in the last five years, compared with the five years prior to 2006 (the date of the first important Istat research on the subject), violence by partners and former partners has increased: the women who have suffered injuries increased (from 26.3% to 40.2%), very serious or medium-severe violence increased from 64% to 76.7%, women who feared for their lives following the violence they suffered increased from 18.8% to 34.5%. Gender-based violence, therefore, remains an alarming phenomenon, both quantitatively and qualitatively. Data that are also reflected in the Vox survey on hatred of women on the net: a hatred that is unleashed even when the news narrates cases of femicide and records 100,899 negative tweets in 2018 against 42,537 positives:

44 See www.interno.gov.it; hatecrime.osce.org/italy.

45 See ARCIGAY, *Omotransfobia, 187 casi nel report 2019 di Arcigay*, at www.arcigay.it. In fact, according to the report for the years 2013-2014, there were 75 reports of attacks in those years (about half compared to today). See V. BRANÀ, Ed., *Report Omotransfobia 2013-2014*, 2014, p. 1.

46 See www.voxdiritti.it.

47 See the site www.ilga-europe.org, where the Rainbow Map 2020 appears, which sees Italy as one of the most backward countries in the protection of equality for LGBT people.

48 On this vulnerability, see E. DOLCINI, *Omotofobia*, cit., p. 24.

49 A. BATTISTI, *La violenza contro le donne. Dai nuovi dati statistici ai nuovi strumenti di contrasto e di prevenzione*, Istat, 6.03.2019, www.istat.it.

50 A. BATTISTI, *La violenza*, cit., slide 15.

misogyny is constant also in 2019. Moreover, the Observatory documents a total of 3,100 femicides from 2000 to 2018, on average more than 3 per week, mostly at the hands of a partner, former partner or relative. Data which prove undoubtedly the necessity of the legislative intervention.

This makes, in our opinion and partially of the criminal law doctrine, urgent and fully justified⁵¹ the intervention of the legislator and above all the criminal legislator, who, precisely because of the “*differentiated treatment of objectively different situations*”, imposed by Art. 3 of the Italian Constitution, as declined in the light of the principle of reasonableness, will have to prepare a reinforced protection of subjects that the criminological reality proves to be in conditions of weakness and vulnerability⁵², which explains why in Europe the EU Directive 29/2012 included gender expression, gender identity, sexual orientation, in addition to gender and disability, among the protected victimological characteristics, due to the particular vulnerability of these victims.

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

⁵¹ See M. PELISSERO, *Omofobia*, cit., p. 18.

⁵² E. DOLCINI, *Omofobia*, cit., p. 25 ss.