LGBTQI+ Persons, Fundamental Rights, and Criminal Justice

Book Review: M. Pelissero and A. Vercellone, *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2022), 1-353.

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I. Introduction

The volume edited by Marco Pelissero and Antonio Vercellone, is the most extensive companion on law and LGBTQI+[1] persons in Italy to date. The book offers a comprehensive oversight on the debate in this field, drawing on contributions from legal scholars, practitioners and LGBTQI+ activists alike.2 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 are investigated in a separate book review, authored by Nausica Palazzo, published within this issue. The present review delves into the most pressing issues regarding criminal justice discussed by the authors in the volume. Such issues feature prominently in the second part of the book, in pages from 211 to 322. 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 queer discrimination, the practice of conversion therapies and their prohibition (265-296), and (last but not least) the delicate issues surrounding the incarceration of transgender (297-314) and LGBTQI+ persons in general (315-334) as vulnerable groups within prison population.

The question of criminal law enforcement of LGBTQI+ rights cuts across several chapters in the book, well beyond the second part of the volume (211-322), as it lingers in the background in many contributions. This is greatly due to the powerful symbolic nature of criminal law as well as to the communicative and value-enhancing function of punishment. It is submitted, however, that the centrality

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[1] The present review adopts the acronym chosen by the editors, 'LGBTQI+'.

[2] See G. Malaroda, 'Un po' di storia, tante storie', in M. Pellissero and A. Vercellone ed, Diritto *e persone LGBTQI+* (Torino: Giappichelli, 2022), 15.

of criminal justice in the debate around the role of resulting from the recognition of fundamental rights to homosexual, transgender and queer individuals, increasingly regarded as members of vulnerable groups.

After all, 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.3 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. Once heavily criminalized and dealt with by criminologists and criminal justice officials merely as sex offenders,4 queer and homosexual individuals are now increasingly regarded as 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.5

II. 'Queer' Individuals, Criminology and Punishment: The Case of Italy

To cope with this risk, criminologists have successfully sought to emphasize 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'.6 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.7 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

3 F. Tulkens 'The Paradoxical Relationship between Criminal Law and Human Rights' 9 *Journal of International Criminal Justice*, 577–595 (2011).

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

5 ibid 716.

6 C.L. Buist and E. Lenning, *Queer criminology* (Abingdon-New York: Routledge, 2016), 8.

7 C.L. Buist, E. Lenning and M. Ball, 'Queer criminology', in S. De Keseredy and M. Dragiewicz eds, Routledge Handbook of Critical Criminology (Abingdon-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, *Handbook of LGBT Communities, Crime, and Justice* (New York-Heidelberg: Springer, 2013), 15-41.

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 provides an interesting case study to reflect on the role of criminal law vis-à-vis gender identities and sexual orientations. Such an interesting point of view reflects the characteristics of the Italian legal system as a jurisdiction with the Constitution explicitly including anti-discrimination clauses and bound to respect the principles enshrined in the European Convention on Human Rights.

Accordingly, in this book review, I will go through the most salient aspects of the criminal law-related chapters of the volume, highlighting how the insights into the relevant Italian legislation confirm broader criminal policy trends highlighted by the international (mostly, English-speaking) literature. At the same time, the chapters discussed in this review allow to single out the uniqueness of the Italian approach to the 'criminal law dilemma' while debating 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 particularities which, as comparative criminal criminologists warn,[8] inform the legal debate of each jurisdiction and, by extension, speak to the core elements of their legal culture.

The book's overview on 'criminal justice' in Italy highlights the long-standing failure to reform 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. On the other hand, when discussing the distinct facet of LGBTQI+ people as vulnerable individuals held in custody, authors in the reviewed volume effectively highlight the central role played by the notion of 'social reintegration' as a guiding principle of the post-sentencing phase. Such a feature illustrates the potential of penological principles to address specific forms of vulnerability.

III. LGBTQI+ Rights and Crime Control under Italian Law

In Italy, sodomy laws incriminating same-sex relationships were contemplated in some pre-unitarian codes, eg 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

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

1889 and the more 'authoritatian' code 'Rocco', adopted by the fascists regimes in 1930) remarkably fell short of criminal provisions targeting homosexuality.[9] 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 the 'sodomy' by means other than criminal law.

The demise of a crime control approach did not lead to the recognition of LGBTQI+ as vulnerable victims. The 'pendulum effect' which one can notice in other jurisdictions was simply absent in Italy. In sum, giving up on the criminalization of LGBT as deviants, or even sex offenders, did lead to what Jordan Blair Woods has referred to as a 'new visibility' for LGBT people.[10] This, 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 and criminal justice is 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 chapters by Goisis and Pelissero retrace the historical development of the criminal justice apparatus underpinned by the principle of non-discrimination. Such laws date back to the entry into force of post-war Italian Constitution. More specifically, laws outlawing racist propaganda are grounded in the general principles of equality and dignity enshrined in Arts 2 and 3 of the Italian Constitution. Such provisions have a tight connection with the prohibition to re-organize the disbanded Fascists Party, established by the final provisions annexed to the Constitution and incorporated by the Act of 20 June 1952, no 645 by among others establishing a political formation based on 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, no 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, no 205). Besides tweaking the scope of application of existing criminal offences, the statute introduced a wide-ranging aggravating circumstance applicable to all criminal

[9] 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' *Stato, Chiese e pluralismo confessionale*, 1-10 (2012).

[10] J. Blair Woods, 'LGBT Identity and Crime' n 4 above, 696.

offences motivated by reasons discrimination or hate 'on ethnic, national, racial and religious' grounds. Significantly, such antidiscrimination laws do not fall short of criminalizing non-physical expressions and may also target verbal utterances of a discriminatory thought (eg racist propaganda). These are quintessentially 'hate crime laws' which however did not include sexual orientation or gender identity among the grounds for discrimination. Unsurprisingly, such lacuna has been the subject of several critiques.

As Pelissero explains in his chapter,[11] a recent attempt to pass a bill (so-called *ddl Zan*) reforming the existing antidiscrimination apparatus (including its criminal provisions) has encountered stark political resistance. The bill would have expanded the grounds for discrimination provided for by existing criminal provisions – Arts 604-bis and 604-ter of the Criminal Code, which currently penalize, inter alia, racist propaganda and the act of abetting racist discrimination or violence, along with the acts of discrimination and discriminatory violence – 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 Goisis and Pelissero, which develop a robust response to the critics of a renewed legal framework introducing homo- and transphobic hate crimes.

IV. New Provisions on Homophobic and Transphobic Hate Crimes?

The book 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. In doing so, the book gives an account of both sides of the debate, while taking a firm stance in favor of a stronger criminal response which would require extending the scope of application of the relevant provisions on hate crimes. This position (which runs through several chapters in the second part of the book) is however far from apodictical. The debate around the so-called *ddl Zan* is illustrative of some characterizing features of Italian legal culture and offers an important snapshot of the legal narratives underpinning the proposed establishment of new hate crimes.

The choice of criminalizing gender-based discrimination and other forms of bias based on sexual orientation and gender identity problematically lies at the intersection between the protection of fundamental rights (often expressed by means of positive obligations to prosecute and punish human rights infringements)[12] and the freedom of expression. As Pelissero astutely argues in his chapter, the

[11] M. Pelissero, 'Il disegno di legge Zan: una riflessione sul percorso complesso tra diritto penale e discriminazione', in M. Pellissero and A. Vercellone ed, n 2 above, 256.

[12] 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.

prohibition to express and divulge discriminatory ideas has suffered some sort of relativization as the question of compressing freedom of thought through the criminal law has gradually come to the fore in western societies. This development might have been favored by the idea that discrimination (including that based on racial bias) shall not be taken as an expression of biological/anthropological superiority, but rather as a cultural phenomenon which shifts its focus from the inherent (and physical/psychological) characters of some individuals or social groups to their 'actions'.[13]

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. As if the 'right' to express views (provided that they can be regarded as cultural manifestations within a pluralistic society) could be weighed against the right to identity of those targeted by those views. This claim may easily be rebutted by arguing – as Etienne Balibar put it – that 'racism' (similarly to other forms identity-based discrimination) has always been in essence a 'total social phenomenon'.[14] Be that as it may, the legislative and policy choices made by national governments in this context shall not be read in isolation.

Remarkably, in her chapter, Caielli[15] turns her eye to standards set by supranational bodies, such as the Council of Europe. The author reminds that recommendations 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[16] remind that, in the view of the European Court of Human Rights, restrictions on 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 Court itself held in *Identoba* v *Georgia*, '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 Art 14 ECHR.

Beyond the arguments based on the right to free speech (and other rights, eg the right to religious freedom, as the criminal law protection of 'gender identity' understood as free individual choice would endanger the belief of a well-defined partition between genders descending from 'divine revelation'),[17] skepticism has been expressed against the criminalisation of homophobic hate speech on grounds

[13] M. Pelissero, n 11 above, 249.

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

[15] M. Caielli, 'Tutelare l'identità di genere attraverso la repressione dell'hate speech', in M. Pellissero and A. Vercellone eds, n 2 above, 220.

[16] L. Goisis, 'Crimini d'odio omofobico, diritto penale e scelte politico-criminali', in M. Pellissero and A. Vercellone eds, n 2 above, 233.

[17] These are among the doubts expressed by the Secretary of State of the Holy See, as reminded by M. Caielli, n 15 above, 218.

pertaining to some foundational principles of criminal law theory. The authors in the reviewed volume, pick up on some of these arguments to argue in favour of an *ad hoc* legal framework for hate crimes motivated by such attitudes as homophobia and transphobia. Interestingly, in the Italian debate, one of the criticisms raised against the new criminal legislation is the fact thar 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 Resolutions of European Parliament, adopted in 2006 and 2012)[18] 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 (eg requiring surgery). Rather, states must acknowledge and give protection to the one's identity as it emerges from 'physical appearance' and 'social identity', even before a gender reassignment surgery is completed.[19]

In sum, arguments based on the lack of 'clarity' of the proposed legislation don't seem to have much 'bite' – especially when compared with 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 *rechtsguten*). According to the critics, discrimination through hate speech does not affect directly personal interests but relates – almost, by definition – to a collective and social dimension; one that criminal law would not be fit to address in light of the principle of *extrema ratio*.[20]

Similarly, a large component of Italian legal scholarship has been arguing that

[18] 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)), available at https://tinyurl.com/mzw6xdxt (last visited 20 September 2023).

[19] European Court of Human Rights, *S.V.* v *Italy*, App no 55216/08, para 70, available at www.echr.coe.int.

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

offences criminalizing hate speech – see again Arts 604-bis and 604-ter of the Criminal Code – should remain 'an exception rather than a rule', by deference to the right to free speech (Art 21 of the Italian Constitution). Some authors have gone as far as to say that, sexual orientation being a 'choice', any discrimination thereof would not warrant the same reaction as other forms of hate speech (eg on grounds of race and ethnicity).[21] To counter such arguments, Pelissero argues that the real focus of the proposed criminal provisions is 'human dignity', a founding tenet of the Constitution (see Art 2) and an overarching value informing the ECHR.[22]

The understanding of dignity in question is not one that values and protects every single choice regarding one's individuality, nor the mere perception of self. Such an interpretation would effectively pave the way for what some critics see as a risk of criminalization of any disagreement with each one's deep-seated views on almost every single aspect of social life (including views and orientations as trivial as the choice of supporting a football team).[23] But as Pelissero convincingly argues another way of understanding dignity requires to take seriously a person's identity as a source of a 'relationship of recognition'.

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 can be inferred directly by Art 2 of the Constitution,[24] 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. Quite the contrary, a limited resort to criminal law provisions (understood as extrema ratio within a legal continuum that includes non-criminal measures to prevent discrimination) must feature as a necessary instrument in the 'policy toolbox' of liberal and pluralistic democracy which must secure 'social solidarity' and the co-existence of different ethical codes through communicative and procedural strategies.

In addition, the notion of equality, as it emerges from Art 3 Constitution, requires that the identity of LGBTQI+ persons is protected in a way that acknowledges their peculiar identity in a pluralistic society.[25] These considerations justify the use

[21] L. Eusebi, 'Colant omnes quemque. Tornare all'essenziale dopo il ddl Zan', *Jus Rivista di scienze giuridiche*, 287 (2021): 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*).

[22] M. Pelissero, 'Il disegno di legge Zan' n 11 above, 249

[23] See again L. Eusebi, n 21 above.

[24] As the Italian Constitutional Courtput it in its ruling no 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 Art 2 of the Constitution.

[25] 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

of aggravating circumstances when crimes are driven by a homophobic motive,[26] but As Goisis reminds,[27] human dignity and equality, thus the 'equal' protection/ recognition of each one's identity, are a *rechtsgut* in itself as suggested by the already existing antidiscrimination laws. Arts 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 xenophobic hate crimes (and hate speech, in particular), must be a solid enough ground to justify the new criminal provisions on homophobia and transphobia.

V. Crime Control, Criminal Justice and Conversion Therapies

On a separate 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'.[28] 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 when it takes place as a conscious, informed and non-coerced 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.[29] These methods typically include behavioral techniques, psychoanalytic techniques, medical approaches, and religious and spiritual approaches. In her chapter,[30] Scaroina makes a strong argument in favor of criminalizing such practices. Not only are conversion therapies, as the author claims, deprived of any scientific ground; they are also a vessel for ideals that cast homosexuality as 'evil', a pathology that should cured or a form of deviance that requires a remedy.

In keeping with the palette of constitutional principles one can derive from

special vulnerability of their victims, L. Goisis, n 16 above, 234.

[26] Such a claim echoes the arguments used in the US to justify the establishment of state and federal 'penalty-enhanced statues' 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

[27] L. Goisis, n 16 above, 238.

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

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

[30] E. Scaroina, 'Terapie di conversione e diritto penale', in M. Pellissero and A. Vercellone eds, n 2 above, 293.

the Italian basic law, Scaroina argues that such therapies should be punishable in that they harm a person's moral liberty and their dignity.[31] 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 discourage conversion therapies. The 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 tackle such form of coercion by means of other existing criminal offences: these include grievous bodily harms, domestic violence, and other crimes of 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 – whose LGBTQI+ is developing – and may be coerced into a treatment, or adults which provide, more or less spontaneously their consent to treatment. As far as children are concerned, parental authority encounters a limit in the minor's right to express and develop their 'personality'. Such principle may be found in 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.[32]

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 – have taken a hard line against conversion therapies, criminalizing any such treatment because of their inherent blameworthiness. 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 blameworthiness of the act. 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.

[31] 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: A. Spena, *Riflessioni in tema di dignità umana, bilanciamento e propaganda razzista* (Torino: Giappichelli Editore, 2013).

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

This notion of informed consent is inspired by rulings made by the European Court of Human Rights and the Italian Constitutional Court, most recently in connection to questions involving the lawfulness of euthanasia or assisted suicide. Yet in such cases, any medical protocol proposed to the patients is based on solid scientific knowledge. According to Scaroina's argument, in the case of conversion therapies, consent would have to be given to treatments which are – in the very author's words – lacking 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.[33] As the American Psychological Association put it

> 'to date there are no scientifically rigorous data about selection criteria, risks versus benefits of the treatment and long-term outcomes of the reparative therapies'.[34]

VI. Corrections, Prison, and the Status of LGBTQI+ Individuals Behind Bars

The two last chapters of this most intriguing volume explores the status of justice-involved individuals and the relationship of life behind bars with their identity of LGBTQI+ people. The understanding that 'pains' of corrections (to paraphrase seminal 1958 Gresham Sykes' volume, *The Society of Captives*) have specific implications for homosexual and transgender people behind bars lies now at the center of the queer criminology's debate. In the US, Bureau of Justice Statistics study found that 8% of prison inmates and, most crucially, 20 per cent 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) is widely under-researched. The chapter by Laura Scomparin and Martina Maria Marchisio[35] portray a vivid picture of

[33] I. Trispiotis and C. Purshouse, 'Conversion Therapy' As Degrading Treatment' 42 *Oxford Journal of Legal Studies*, 104 (2022): 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'.

[34] American Psychological Association, 'Therapies focused on attempts to change sexual orientation. Position statement', May 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 et al, 'Efficacy and risk of sexual orientation change efforts: a retrospective analysis of 125 exposed men' available at https://tinyurl.com/3e3vk9wm (last visited 20 September 2023).

[35] L. Scomparin and M.M. Marchisio, 'La detenzione delle persone transgender nel sistema penitenziario italiano', in M. Pellissero and A. Vercellone eds, n 2 above, 297-314.

detention conditions imposed on transgender persons; at the same time, Fabio Gianfilippi's contribution[36] 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 liberty. Non-binary identities, in particular, are a special challenge for the rigid and traditional partition along gender lines of sections within the 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 their profound social isolation within 'total institutions'. The insulation of transgender inmates within prison, along with the relative exiguity of their numbers, reduces the ability of correctional practitioners to offer adequate rehabilitative programs. Prison staff often lack adequate training and, as reminded the National Ombudsman on persons deprived of liberty, the vulnerability raised by sexual orientation and sexual identity should not be deal with by establishing separate prison sections, but rather through 'specific training and educating to the respect of differences'.[37]

The issue of what kind of 'rehabilitation' can be offered to LGBT people in prison is addressed head-on by Gianfilippi in his chapter. The lack of adequate programs aimed at re-entry risks to raise the odds of further stigmatization 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 scholarization when needed. Such a paradigm shift also requires a change in the use of words, 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 the overall prison population and the correctional staff. As far as transgender or transitioning people are concerned, the rehabilitative challenge requires to secure therapeutic processes (eg free hormonal treatments) to accompany the process of 'rectification' of one's gender identity.

[36] F. Gianfilippi, 'Omosessuali e transgender in carcere: tutela dei diritti e percorsi risocializzanti', in M. Pellissero and A. Vercellone eds, n 2 above, 315.

[37] L. Scomparin and M.M. Marchisio, n 35 above, 310.