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GENDER IDENTITY ON THE WORKPLACE

A Critical Analysis of Trans Workers' Legal Condition in Italy in light of the International and European Standards

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ABSTRACT

Trans persons, and the LGBTQIA+ community in general, experience a remarkably high rate of discrimination in Italy. With particular regard to the employment context, because of the still strong existent stereotypes and stigma, trans persons face many hurdles in accessing jobs, being selected for positions that reflect their educational background, or, even if they have been recruited, finding good working conditions. The present study has the scope to shed light on the critical conditions of trans workers in Italy, by examining the limits of the national labour legislations applicable and also considering the strength and shortcomings of relevant International and European standards. It shows that none of the International, European, and Italian labour laws expressly take into consideration gender identity as a ground of discrimination. Although extensive interpretation of the existent anti-discrimination laws by the labour courts is emerging and grass root good labour practices are adopted and implemented by companies and employees' representatives, these actions are not sufficient to strongly and remarkably affirm trans workers' rights. Therefore, it reaches the conclusion that an express protection by law is pivotal to eliminate inconsistent and unpredictable interpretative approaches, to foster trans workers' trust in the legal framework, and to push a more progressive mind-set through the educational role of the law.

Key words: trans workers; Italy; legal gender recognition; labour laws; international standards; European standards; good labour practice.

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To my family. My everything.

ACRONYMS

CBA	Collective bargaining agreement
CGIL	Confederazione Generale Italiana del Lavoro
CoE	Council of Europe
CtESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ECtSR	European Committee of Social Rights
ESC	European Social Charter
EU	European Union
FRA	European Union Agency for Fundamental Rights
FtM	Female to Male
LGBTQIA+	Lesbian, Gay, Bisexual, Trans, Queer, Intersexual, Asexual plus
LGR	Legal Gender Recognition
ICESCR	International Covenant on Economic, Social and Cultural Rights

IE SOGI	Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity
ILO	International Labour Organization
ISTAT	Italian National Statistics Institute
MtF	Male to Female
OHCHR	UN High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
SOGIESC	Sexual Orientation, Gender Identity and Expression, and Sex Characteristics
TFEU	Treaty of Functioning of the European Union
TSA	Italian Transsexual Act
UN	United Nations
YP	Yogyakarta Principles (2007)
YP+10	Yogyakarta Principles plus 10 (2017)

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INTRODUCTION

Work is a fundamental dimension of the life and identity of each of us when we enter adulthood. As a matter of fact, it functions as an engine of social integration: it turns out to be one of the main elements that determine the boundary line between integration and social marginalization of an individual[1]. And, indeed, work takes on a central role in social inclusion due to two main reasons: firstly, the income resulting from the working activities allows individuals to develop their own autonomy; secondly, work gives a clear and accepted social status[2]. Overall, having a stable, socially accepted, equally remunerated and satisfactory employment relationship encourages the formation of one's own identity[3]. However, still nowadays many groups of people, because of, for instance, their ethnicity, religion, political ideas, gender, sexual orientation and so on, have a troublesome and controversial relationship with the labour market, both in accessing it and obtaining fair and just working conditions[4].

An emblematic example of the foregoing assertion is the still misunderstood condition of trans persons. Indeed, although particularly important steps forward have been achieved with regard to LGBTQIA+ rights, according to Massimo Mariotti, founder of the CGIL queer desk[5], being trans may be considered the "last taboo" in the context of anti-discrimination actions[6]. In fact, trans persons still suffer severe discrimination in countless areas of their public and private life: education, health, welfare, work, social life, and many others[7]. Moreover, transphobia regrettably manifests itself in "*rights violations ranging from physical assault, torture, and murder*"[8]. The main reason behind this still strong mistreatment of trans persons is the stigma constantly accompanying them, while the stigma is grounded on the pervasive lack of

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[1] Monica J Romano, 'Diversity & Inclusion: la condizione transgender nel mondo del lavoro' <https://www.monicaromano.it/transgender-lavoro-discriminazione2/> accessed 6 March 2021.

[2] Carlo D'Ippoliti and others, 'Le Buone Pratiche Antidiscriminatorie a Livello Internazionale Nello Specifico Ambito Dell'orientamento Sessuale' 47 <http://www.pariopportunita.regione.puglia.it/documents/10180/21216/LE+BUONE+PRATICHE+ANTIDISCRIMINATORIE+rapporto_finale_new.pdf/dd256d68-ad09-4f86-9e19-7a17a933b652> accessed 30 April 2021.

[3] AGEFORM, 'Indagine Sui Fabbisogni e Le Buone Pratiche per l'inclusione Socio-Lavorativa Di Persone Transessuali' (2002) *Regione Emilia- Romagna*.

[4] Marcella Di Folco, *Transessualismo: Dall'esclusione Totale Ad Un'inclusione Parziale* (Aspasia 2002).

[5] See Chapter 3 to know more.

[6] Andrea Gianni, 'Trent'anni Di Lotte Sul Lavoro: "Transessuali, Ultimo Tabù"' *Il Giorno Milano* (Milan, 25 June 2021) <https://www.ilgiorno.it/milano/cronaca/trentanni-di-lotte-sul-lavoro-transessuali-ultimo-tabu-1.6523691> accessed 18 June 2021.

[7] Osservatorio Nazionale sull'Identità di Genere, 'Le Difficoltà Sociali' <http://www.onig.it/drupal8/node/14> accessed 1 June 2021.

[8] Elizabeth Baisley, 'Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38 Human Rights Quarterly 134, 134.

understanding of what being trans means. As a matter of fact, trans persons strongly call into question and, in a way, subvert the ordinary concept of binarity, with which most of us are comfortable. They undermine the socially accepted and mainstream norm according to which males are males and females are females[9]. Certainly, "[g]*ender stereotypes dominate our media, our workplaces, and our lives*"[10]. The confusion on what gender identity is and on the concept that for some persons sex and gender may not overlap, which flows from severe ignorance, need of preservation of the status quo, and familism[11], has fostered the conviction that trans persons are necessarily associated to some sort of either sexual promiscuity or mental health condition[12].

Although, by all means, all these beliefs should be strongly rejected, their pervasive nature creates endless difficulties to trans persons. With particular regard to the employment context, because of the still strong existent stereotypes and stigma, trans persons face many hurdles in accessing jobs, being selected for positions that reflect their educational background, or, even if they have been recruited, finding good working conditions. Indeed, they frequently do not successfully pass the selection processes, or they are subject to horizontal and vertical discriminatory and abusive treatments (such as mobbing, straining, harassment, lack of promotions etc.)[13]. These conditions force trans persons to live in situations of economic and social degradation, and to revert towards underemployment solutions.

In light of everything above, the present study will examine the legal conditions of trans workers in Italy considering also the International and European standards. The choice to focus on the Italian legal system is due to the fact that, unlike other industrialized western countries, Italy experiences a remarkably high rate and frequency of discrimination against trans persons and LGBTQIA+ community in general[14]. Indeed, trans persons in Italy suffer a higher social marginalization and a lower quality of life than in the majority of the other western countries[15]. Therefore, the study, by examining the limits of the labour legislations applicable in Italy, has

[9] Osservatorio Nazionale sull'Identità di Genere (n 7).
[10] Jo Michael, 'Our Own Words: The Importance of Enumerated Anti-Discrimination Protections for Gender Identity in Employment Law' (2012) 34 University of La Verne Law Review 89, 89.
[11] Romano, 'Diversity & Inclusion: la condizione transgender nel mondo del lavoro' (n 1).
[12] Kevin L Nadal, 'Transgender Women and the Sex Work Industry: Roots in Systemic, Institutional, and Interpersonal Discrimination' (2014) 15 Journal of Trauma & Dissociation 169.
[13] MV Lee Badgett and others, 'Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination' (2009) 84 Chicago-Kent Law Review 559.
[14] D'Ippoliti and others (n 2) 18.
[15] ibid.

the scope to shed light on the critical conditions of trans workers. In particular, the research questions that this thesis aims to find answers to are the following:

- What are the reasons behind such still pervasive discrimination against trans workers in Italy?
- In particular, is the current Italian labour legislative framework, also considering the European and International standards, adequate to endorse trans workers' rights?
- Are the International and European human rights standards suitable enough to guide Italy towards a more inclusive and accessible labour markets?
- Are either progressive interpretative attempts of the courts or implementation of good labour practices by employer or employees' representatives able to fill the eventual regulatory gaps?

Indeed, after a thorough explanation of the relevant terminology at stake, the first Chapter will examine the legal gender recognition standards set out by International and European human rights bodies and the way they have been implemented at national level. The choice to start from an aspect which is not strictly labour-related is justified by the fact that the mismatch between identifying documents and gender identity of trans workers is one of the main reasons of discrimination on the workplace. As it will show, despite the several guidelines at International and European level, Italy has adopted a legal gender recognition procedure which is still strongly medicalized, loosely inclusive, and addressed only to transsexual persons. The result is that many trans persons in Italy are prevented from obtaining rectification of personal documentation. This Chapter will also show the lack of hard laws at international level and some consistent failures of the European system in this regard, by affirming, in the latter case, that the European Court of Human Rights jurisprudence on legal gender recognition is still very much anchored to a binary conception of gender and to a medicalized approach to rectification. The second Chapter will go more to the heart of the research: a critical and comparative analysis among the International, European, and Italian labour laws will show that none of them expressly take into consideration gender identity as a ground of discrimination. This Chapter will hold that extensive interpretation of the existent anti-discrimination laws by the labour courts in order to also include gender identity is not sufficient to strongly and remarkably affirm trans workers' rights. Therefore, it will be pointed out that an express protection by law is pivotal to eliminate inconsistent and unpredictable interpretative approaches, to foster trans

workers' trust in the legal framework, and to push a more progressive mind-set through the educational role of the law.

Finally, the third Chapter will consider the importance of grass root good labour practices adopted and implemented by companies and employees' representatives. It will be a collection of recommendation on virtuous actions, such as, for instance, trans-specific company policies, gender-neutral dress codes and use of correct names and pronouns, that if adopted by employers, work councils, and trade unions are likely to encourage an inclusive working environment. However, it will show that, in the lack of an express mandatory and binding law protecting trans workers, the endorsement of such measures is mostly left to the willingness of righteous companies. And, indeed, as it will be reported, Italian companies do not place themselves in a good position in this regard.

This work employs a desk-based research methodology, which makes use of both existing primary and secondary sources. Primary sources mainly include the following: International and European human rights laws and instruments; EU laws; Italian laws; relevant international, European, and Italian jurisprudence. The work also uses secondary sources including journal articles, books, reports by both governmental and nongovernmental organisations, papers, and commentaries. While the primary sources have been analysed and compared among each other in order to detect their strengths and shortcomings, the secondary sources have been useful to construe the critical architecture of the work. Overall, this work focuses on the legal aspects of the research problem, thus slightly and rarely engaging, only when strictly needed by the context, in social, cultural, and political discourses. The biggest obstacle to this work has been the almost absolute lack of statistical data and the scarce literature by Italian scholars on the topic.

A. Terminology

Before going to the heart of the research, a note on terminology is here necessary. Indeed, in most present societies, including the significantly advanced western ones, the terms "sex" and "gender" are perceived as overlapping and are automatically and unquestionably used in an interchangeable way. As a matter of fact, even the most progressive realities are still deeply

linked to the idea that "*you can't be, what you can't see*"[16]: the physical appearance systematically determines the inclusion in a sex-segregating and highly compartmentalised system of boxes, in which a person could only be labelled as male or female.

However, this approach is rather incorrect and does not consider the deep differences in meaning among these two terms. Indeed, while sex strictly refers to our biological and physical anatomy, namely the sex or biological gender assigned to us at birth, the concept of gender, partially or totally, transcends the body. In this regard, sex encompasses physical attributes such as "*external genitalia, sex chromosomes, gonads, sex hormones, and internal reproductive structures*"[17]. Conversely, gender is a more complex intersectional concept: it is the meeting point of sex, gender identity and gender expression. Consequently, it is apparent that the concept of gender cannot be visually represented by boxes, but rather by a spectrum, a continuum. Gender should not be perceived as something socially, culturally, and historically constructed, but rather a characteristic that deeply relate to the self.

Given the foregoing, it is however worth briefly noting that both these notions do not fit in the rigidly enforced binary system. Indeed, most are unaware of the fact that a representation of sex as a two-party system is scientifically inaccurate and would not consider the condition of "intersexuality", that indicates a biological structure which is neither exclusively male nor exclusively female, but rather both at once or not clearly defined. Interestingly, the development geneticist, Dr. Anne Fausto-Sterling, has concluded that at least five sexes (male, female, herm, ferm and merm) exist in nature[18]. Anyway, this work is not going to go more in depth on the meaningful social and legal conditions of intersex persons, but this shows that the conception of duality, when it comes to sex and gender, should be definitely abandoned[19].

Back to gender, among the components that construct its understanding, there is the "gender identity" discourse. According to the authoritative Yogyakarta Principles, that will be amply discussed in the next chapters, the concept of gender identity should be defined as follows:

> *"Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not*

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[16] Michael (n 10) 96.

[17] Justin Healy, 'Sexual Orientation, Gender Diversity and Intersex', *Sexual Orientation and Gender Identity*, vol 378 (1st edn, The Spinney Press 2014) 1.

[18] Anne Fausto-Sterling, 'The Five Sexes: Why Male and Female Are Not Enough' (1993) 33 The Sciences 20, 21.

[19] Alexandra Kralick, 'We Finally Understand That Gender Isn't Binary. Sex Isn't, Either.' *Slate* (2018) <https://slate.com/technology/2018/11/sex-binary-gender-neither-exist.html> accessed 12 June 2021.

> *correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."*[20]

Gender identity, therefore, represents the personal and psychological perception of individuals of their own gender, irrespective of the sex assigned to them at birth or of their body characteristics. Likewise, the way in which people outwardly behave or manifest and present their own gender identity is indicated as "gender expression"[21]. The entanglement of all these components creates different gender nuances. Indeed, if the gender identity and the gender expression is consistent with the sex assigned at birth, the person is considered as "cisgender" or "cis". Conversely, in case of any misalignment among these three components, the person falls under the umbrella term of "transgender" or "trans".

Indeed, trans persons may define themselves in vastly different ways. For instance, a term that should not be confused with trans is the narrower condition of being "transsexual": transsexual persons identify themselves in the gender role opposite to that socially and culturally corresponding to the sex assigned at birth and may desire to undergo a transitioning process to alter their physical primary and/or secondary sex characteristics, such as surgical and/or hormonal treatments. A transsexual woman can also be addressed as "MtF" (Male to Female), while a transsexual man as "FtM" (Female to Male). Transsexual persons are identified as binary since they still perceive themselves as belonging either to the male or female identity. Consequently, while all transsexual persons are (binary) trans, not all trans persons are transsexual. Indeed, persons that appreciate themselves as "gender variant" or "gender non-conforming" ("*individuals with a gender expression that differs from the cultural norms prescribed for people of a particular gender*"[22]), "gender queer" ("*persons whose gender*

[20] Philip Alston and others, 'The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (2007) 6 <http://yogyakartaprinciples.org/>.
[21] European Commission, 'Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity and Gender Expression' (2012) 13 <https://op.europa.eu/en/publication-detail/-/publication/9b338479-c1b5-4d88-a1f8-a248a19466f1> accessed 3 March 2021.
[22] European Commission, 'Legal Gender Recognition in the EU: The Journeys of Trans People towards Full Equality' (2020) vii <https://ec.europa.eu/info/sites/info/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf> accessed 3 April 2021.

identity is not included or transcends the male/female binary"[23]), "bi-gender" (individuals whose gender expression fluctuate among the female and the male one), "agender" (individuals who are gender neutral or genderless), or "cross-dresser" (individuals who wear clothes typical of the opposite gender) are trans persons with a non-binary identity.

On a side note, it is worth briefly noting that only in 2019 the World Health Organisation has replaced the classification of gender identity-related health issues as mental and behavioural disorders with "gender incongruence", thus finally overruling the diagnosis of mental health condition[24]. Another term used by the American Psychiatric Association, and generally welcomed by the trans community, to describe the "*psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity*"[25] is "gender dysphoria".

Overall, due to its inclusivity and broadness, this work will adopt the term "trans" to indicate all those persons that are not cisgender. References to specific groups of trans persons, such as transsexual persons or non-binary trans persons, may be necessary in respect of certain issues.

To conclude, it is convenient, since will be frequently evoked in the next chapters, to recall the intrinsic differences among sex or gender and the concept of "sexuality" or "sexual orientation", which refer to the capacity of feeling profound emotional, affectional, and sexual attraction to, and having intimate and sexual relations with, other persons[26]. Heterosexuality, homosexuality, bisexuality, asexuality, pansexuality etc. all fall under the realm of sexuality. Indeed, persons are trans or cis irrespectively of their sexual orientation.

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[23] International Labour Standards Department, 'Information Paper on Protection against Sexual Orientation, Gender Identity and Expression and Sexual Characteristics (SOGIESC) Discrimination' (2019) Normes/2019 42 <https://www.ilo.org/global/standards/WCMS_700554/lang--en/index.htm> accessed 27 February 2021.

[24] World Health Organization, 'WHO/Europe Brief – Transgender Health in the Context of ICD-11' <https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/whoeurope-brief-transgender-health-in-the-context-of-icd-11> accessed 5 May 2021.

[25] American Psychiatric Association, 'What Is Gender Dysphoria?' <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> accessed 5 May 2021.

[26] Alston and others (n 20) 6.

1st CHAPTER: LEGAL GENDER RECOGNITION

1.1 Introduction: why is Legal Gender Recognition so relevant?

One of the main hurdles that trans persons face in their path to be integrally accepted by the society for and to fully live in accordance with their preferred gender identity is the perilous process of rectification of their documents (such as, birth certificate, passport, identity card, driving licence, health insurance card, etc.). This procedure is generally referred to as Legal Gender Recognition (hereinafter, "LGR"), which technically consists in "*[t]he process(es) by which individuals request the changing of their first name and gender marker in their administrative records so that official registers and their documents, including identity documents, birth or civil status certificates, match their gender.*"[27].

It is of utmost relevance to deepen this topic beforehand because the failure in obtaining LGR or the related extremely lengthy, burdensome, or intrusive requirements (such as mandatory sterilization, hormonal treatments, or psychological and medical assessments) heavily affect the personal, social, and economic life of trans persons, including access to the labour market and their working life in general. Research has shown "*the high risk of being a victim of harassment at the workplace or being fired, and the difficulty of* [trans] *persons in finding a job when their appearance does not fit with their documents*"[28]. Indeed, a problematic recruitment process, a company badge indicating the deadname[29], or a dress-code that does not fit the gender expression of the trans worker are just few of the negative consequences of a mismatch between the documents and the gender identity, which do not only involve the employment stability but also the mental health of the worker. As a matter of fact, there is no doubt that a quick and inclusive process of LGR based on the principle of self-determination is a first – but not the only one - big step to increase the well-being of trans people in all aspects of their existence.

Accordingly, this Chapter will firstly consider the relevant guidelines in the field at International and European level, by also critically highlighting the regulatory gaps. It will later

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[27] European Commission, 'Legal Gender Recognition in the EU: The Journeys of Trans People towards Full Equality' (n 22) vii.

[28] European Parliament, 'Transgender Persons' Rights in the EU Member States' (2010) 27 <https://www.europarl.europa.eu/RegData/etudes/note/join/2010/425621/IPOL-LIBE_NT%282010%29425621_EN.pdf> accessed 3 March 2021.

[29] "Deadnaming" means calling a trans person by their old name, which often represents their assigned sex at birth. This abusive practice will be amply discussed in the 3rd Chapter below.

examine the specific case of the Italian LGR process looking at the most recent legal and jurisprudential developments. The purpose of this Chapter is to show that the current Italian LGR process is not inclusive and still overly focus on a binary and medicalized approach, in contrast with the exhortation by International and European bodies.

1.2 The International and European LGR standards: a race towards the progress

1.2.1 International Standards

As it will be thoroughly discussed in the next Chapter, the intervention of the United Nations (hereinafter, "UN") in the context of SOGIESC (sexual orientation, gender identity and expression, and sexual characteristics) human rights, including LGR and working rights, has been rather slower than other regional human rights bodies[30].

Indeed, the first real and authoritative action in the field was taken by a distinguished independent group of international human rights experts, who in 2007 published the so called "Yogyakarta Principles" (hereinafter, "YP"), a set of international human rights laws relating to several matters of sexual orientation and gender identity. Although such principles should be considered as soft law with no binding nature, they have become of utmost importance and have constituted a structural base for subsequent international, regional, and national legal operations on the topic. Indeed, regarding LGR, Principle 3, which sets out the "Right to Recognition Before the Law", provides as follow:

> *"Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation, or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected*

[30] Dominic McGoldrick, 'The Politics of LGBQT: Human Rights in the United Nations System', *Oxford Encyclopedia of LGBT Politics and Policy* (Oxford University Press (OUP) 2019).

> *to pressure to conceal, suppress or deny their sexual orientation or gender identity."*

Through an exceptional progressive approach for that time, such provision outlines that the LGR should be based on the principle of self-determination and should avoid any sort of forced and mandatory medicalization, as it is also provided by Principle 18 "Protection against medical abuses"[31]. Such conditions shall, therefore, require the states the adoption of fair and non-discriminatory legal and administrative measures to effectively permit trans persons the recognition of the self-perceived gender identity, also through procedures that allow the issue of rectified official documents with selected name and/or gender marker. Such procedures should not be pursued in an intrusive manner and should result in identification documents universally recognised[32].

Thanks to this input, also the UN started to intervene on the requirements of LGR. Both in 2011[33] and 2015[34], the UN High Commissioner for Human Rights (hereinafter, "OHCHR") expressed concerns in relation to lack, in many countries, of any arrangements of LGR or to LGR providing for sterilization surgery as a condition of recognition and/or mandatory divorce as a consequence of it. Notably, in 2016, the UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment confirmed that enforced sterilization, gender reassignment surgery and other coercive medical procedures "*violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture*"[35]. Eventually, in order to address concerns related to acts of violence and discrimination perpetrated globally, the Human Rights Council with the Resolution 32/2 of 2016, established

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[31] Principle 18, "Protection against medical abuses":
"*No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.*"

[32] Alston and others (n 20) 12.

[33] Office of the High Commissioner for Human Rights, 'Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights' (2011) 22.

[34] Office of the High Commissioner for Human Rights, 'Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the Office of the United Nations High Commissioner for Human Rights' (2015) 18–19 <https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/A_HRC_29_23_One_pager_en.pdf> accessed 5 April 2021.

[35] Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) Thirty-first Session, Agenda item 3 para 49.

the UN Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity (hereinafter, "IE SOGI"). The IE SOGI, recognizing that LGR is a fundamental condition to "*generally* [improve] *health, well-being, and quality of life*"[36] of trans persons, defined more specific requirements. Indeed, the IE SOGI recommended that such procedures should be "*quick, transparent and accessible, without abusive conditions, and respectful of the principle of free and informed choice, and of personal integrity*"[37]. Furthermore, it endorsed the view that the gender recognition systems should follow these best practices:

> *(i) Be based on self-determination by the applicant;*
> *(ii) Be a simple administrative process;*
> *(iii) Be confidential;*
> *(iv) Be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing;*
> *(v) Acknowledge and recognize non-binary identities, such as gender identities that are neither "man" nor "woman" and offer a multiplicity of gender marker options;*
> *(vi) Be accessible and, to the extent possible, cost-free.*[38]

Interestingly, in this recommendation, the inclusivity of LGR has been broaden. Indeed, it provides that also non-binary identities should obtain official recognition by the states through a widening of the gender marker options, which should not be limited only to "male" or "female". This is an extremely important step forward, since, as it will be detailed in the following sections, non-binary trans persons are frequently disregarded in the LGR discourse. Indeed, on this note, a year before, the 2017 additional principles to the YP (hereinafter, "YP+10"), according to Principle 31, namely "The Right to legal recognition", were already explicitly requiring, alongside a quick, transparent, and accessible LGR procedure, to "*end the*

[36] Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 'Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (2019) para 22 <https://undocs.org/A/74/181> accessed 3 April 2021.
[37] Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 'Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (2018) para 98 <https://www.pgaction.org/inclusion/pdf/resources/2018-05-Report-Independent-Expert-protection-against-violence-discrimination-SOGI.pdf> accessed 3 April 2021.
[38] Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 'Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (2018) 23–24 < https://undocs.org/A/73/152> accessed 3 April 2021.

registration of the sex and gender of the person in identity documents"[39], and, if sex or gender continued to be registered, to "*make available a multiplicity of gender marker options*"[40]. Overall, the standards imposed at international level, even if not binding in nature, have been authoritative pushing factors towards a more progressive conception of gender identity both at legal and administrative level.

1.2.2 European standards

The actions addressing the endorsement of adequate LGR procedures adopted at European level have been so far rather timely, decisive, and proactive. Indeed, both the Council of Europe (hereinafter, "CoE") and the European Union (hereinafter, "EU") have achieved relevant results both at jurisprudential and soft law level. In particular, "[t]*he positive obligation for European states to provide for legal gender recognition has been unequivocally established by the European Court of Human Rights*"[41]. As a matter of fact, although the European Convention of Human Rights (hereinafter, "ECHR") does not contain any provisions on LGR (and, as it will be discussed in the next Chapter, on "gender identity" in general), the European Court of Human Rights (hereinafter, "ECtHR" or the "Court") has repeatedly ruled on gender-identity recognition.

Indeed, the turning point has been the Grand Chamber judgement in the case of *Christine Goodwin v. UK*[42], concerning a transsexual woman, who, although had had gone gender reassignment surgery, was refused the legal recognition of her change of sex. On this occasion, the ECtHR, notably departing from precedents laid down in previous similar cases[43], recognized that there was "*an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment*" and "*a continuing international trend towards legal recognition*"[44]. Consequently, the Court found a violation of art. 8 ECHR

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[39] Mauro Cabral and others, 'The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (2017) 9 <yogyakartaprinciples.org>.

[40] ibid.

[41] TGEU, 'Legal Gender Recognition in Europe: Toolkit - 2nd Revised Version' (2016) 11 <https://tgeu.org/wp-content/uploads/2017/02/Toolkit16LR.pdf> accessed 1 April 2021.

[42] Case of Christine Goodwin v. the United Kingdom (2002) ECHR 2002-VI.

[43] *Inter alia*, Case of Rees v. the United Kingdom (1986) Series A no 106; Case of Cossey v. the United Kingdom (1990) Series A no 184.

[44] *Christine Goodwin v. the United Kingdom* (n 42) para 84.

(right to respect for private and family life)[45] since there were no *"significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment*", and therefore "*the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant*"[46] [47]. The principles affirmed in the Goodwin case have been recalled and integrated by the subsequent jurisprudence, which, in particular, specified the obligation upon member states to adopt laws expressly and clearly allowing and regulating gender-reassignment procedures[48], as well as the enforcement of fair trial requirements and short waiting periods to access LGR[49]: the implementation of general rules lacking concrete operationalization, thus resulting in malfunctional LGR procedures, are not tolerable.

Despite the utmost importance of these judgments, at that point in time the ECtHR sparingly ruled on cases concerning transsexual persons already undergone sex reassignment surgery, thus not considering neither the case of non-binary trans persons who are not willing to subject themselves to any surgery nor transsexual persons who have not yet undergone surgical procedures. This regulatory gap has started to be filled, as early as 2009, by the Commissioner of Human Rights of the CoE, who, by highlighting that "*transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation*"[50], recommended the member states, alongside expeditious and transparent procedures to rectify the identity documents, the abolition of any mandatory medical treatment as a necessary legal precondition to obtain LGR, as well as any divorce requirements[51]. On a more specific note, at EU level, the European Union Agency for Fundamental Rights (hereinafter, "FRA") underlined that there is no reason not to extend the LGR procedure also to "*cross dressers, and transvestites, people who live permanently in the gender 'opposite' to that on their birth*

[45] Article 8 – Right to respect for private and family life:
"*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[46] *Christine Goodwin v. the United Kingdom* (n 42) para 93.
[47] The Court has also found a violation of Art.12 ECHR (right to marry and found a family), since it "*finds no justification for barring the transsexual from enjoying the right to marry under any circumstances*" (para 103).
[48] Case of Grant v. the United Kingdom (2006) ECHR 2006-VII; Case of L. v. Lithuania (2007) ECHR 2007-IV.
[49] Case of Schlumpf v. Switzerland (2009).
[50] Commissioner for Human Rights, 'Human Rights and Gender Identity' (2009) 8 <www.commissioner.coe.int> accessed 27 February 2021.
[51] ibid 18.

certificate without any medical intervention and all those people who simply wish to present their gender differently"[52], thus openly advocating also for non-binary trans persons. Similar results could be found in the European Commission's[53] and the European Parliament's[54] reports on transgender rights, which strikingly provided for rejection of the strict binary logic. Remarkably, the Committee of Ministers in 2010, and the Parliamentary Assembly of the Council of Europe (hereinafter, "PACE") in 2015, have strengthened the LGR positive obligations on member states. Indeed, the two bodies endorsed the development of a "*quick, transparent and accessible*"[55] LGR procedure "*based on self-determination*"[56]. Moreover, PACE called for: the abolition of sterilisation, any other mandatory medical treatment as well as mental health diagnosis[57]; the removal of any divorce requirements[58]; inclusion of a third gender option in identity documents for non-binary trans persons[59]; state-funded gender reassignment procedures through public health insurance schemes[60]. Interestingly, PACE focused further on the best interest of children in relation to LGR[61], thus asking the member states to deal also with minors' gender recognition procedures, a field that is still very much not contemplated in many countries.

On the wave of these crucial interventions by the CoE and EU bodies, for the first time the ECtHR ruled on a case regarding LGR of pre-operative transsexual persons. Indeed, in *A.P., Garçon and Nicot v. France*[62], three trans persons saw their request of rectification of their gender and forenames on their birth certificates rejected on the ground that, although they were living in the society as the preferred genders and they were undertaking a course of hormonal

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[52] European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I - Legal Analysis' (2009) 131 <https://fra.europa.eu/en/publication/2010/homophobia-and-discrimination-grounds-sexual-orientation-eu-member-states-part-i> accessed 3 March 2021.

[53] European Commission, 'Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity and Gender Expression' (n 21).

[54] European Parliament (n 28).

[55] Committee of Ministers, 'Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity' (2010) para 21 <https://www.coe.int/en/web/sogi/rec-2010-5> accessed 27 February 2021.

[56] Parliamentary Assembly of the Council of Europe, 'Resolution 2048(2015) on Discrimination against Transgender People in Europe' (2015) para 6.2.1. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736> accessed 6 March 2021.

[57] ibid 6.2.2.

[58] ibid 6.2.3.

[59] ibid 6.2.4.

[60] ibid 6.3.1.

[61] ibid 6.2.5.

[62] Case of A.P., Garçon and Nicot v. France (2017) ECHR 2017.

treatment, they had not undergone irreversible gender reassignment surgery. The Court found that such a LGR system, which practically required trans persons to undergo "*sterilisation surgery or medical treatment entailing a very high probability of sterility*"[63], causes disruption in *"the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned*"[64]. Consequently, the ECtHR held that there had been a violation of Art. 8 ECHR, because the state, by conditioning the LGR procedure upon irreversible surgery, has failed "*to fulfil its positive obligation to secure their right to respect for their private lives*"[65]. On a slightly different note, the ECtHR, in the case S.V. v. Italy[66], that will be recalled more in details in the next sections, found a violation of Art. 8 ECHR due to the "*applicant's inability to obtain a change of forename over a period of two and a half years, on the grounds that the gender transition process had not been completed by means of gender reassignment surgery*"[67]. Eventually, in the very recent case *X and Y v. Romania*[68], the Court reiterated that posing trans persons before the "impossible dilemma" of choosing among the recognition of their gender identity, through a requirement of forced sterilisation, and their physical integrity, is a blatant violation of Art. 8 ECHR.

Despite its undoubted progressiveness, the Court still had not find, in the cases at stake, human rights violations in relation to the LGR requirements of prior mandatory medical examinations, as intrusive as intimate genital examination[69], and/or treatments, such as hormonal therapies. Indeed, the reluctance of the Court in prohibiting procedures which continued to be strongly based on medicalization and on a binary approach, not only departs from the more inclusive recommendations of the other European bodies, but also excludes from the protection under Art. 8 ECHR trans persons that are not willing to undergo any medical treatments (such as non-binary persons)[70]. As a matter of fact, besides the prohibition of sterilization, and the obligation to regulate LGR and to shorten the waiting periods, the ECtHR did not outline any other positive

[63] ibid 135.
[64] ibid 132.
[65] ibid 135.
[66] Case of S.V. v. Italy (2018).
[67] ibid 75.
[68] Case of X. and Y. v. Romania (2021).
[69] *A.P., Garçon and Nicot v. France* (n 62) paras 152–154.
[70] Peter Dunne, 'Legal Gender Recognition in Europe: Sterilisation, Diagnosis and Medical Examination Requirements' (2017) 39 Journal of Social Welfare and Family Law 497.

obligations upon member states, thus keeping the focus on transsexual persons only and continuing pathologisation of trans experiences[71].

Conversely, in an effort to reconcile all the CoE bodies recommendation on LGR, the European Commission against Racism and Intolerance (hereinafter, "ECRI"), in its 2021 Factsheet on LGBTI Issues, renewed the exhortation to the member states to adopt clear and explicit LGR legislations, which shall not include pre-conditions such as "*gender reassignment surgery, heavy hormonal treatment, sterilisation, divorce or extensive psychiatric examination*"[72]. Overall, despite the lack of hard laws and the limits of the ECHR jurisprudence, the guidelines from the European authorities on LGR have been clear and peremptory. However, as it will be further discussed about Italy, their concrete application by many member states remains problematic.

1.3 The Italian LGR system

1.3.1 The Italian Transsexual Act and the "twin rulings"

When on 14 April 1982, the Italian Parliament passed the Law no. 164/1982 on rectification of sex, both at anatomical and documental level, and name for transsexual persons (hereinafter, the "Italian Transsexual Act" or "TSA")[73], Italy was the third European country, after Sweden, in 1972, and Germany, in 1980, to adopt a legislation on the field[74]. However, irrespectively of that first exceptionally progressive step, the Italian Transsexual Act, who includes an understanding of gender identity historically connected to the time of its adoption, has been subject to very few adjustments to meet the developments reached on the issue.

The current version of the TSA includes only five articles. Firstly, the TSA provides that the rectification of sex on the birth certificate can be allowed only by a positive irrevocable decision from the competent civil court, and after a modification of the sex characters has occurred (in

[71] Pieter Canoot, 'The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition' (2019) 37 Netherlands Quarterly of Human Rights 14.

[72] European Commission Against Racism and Intolerance, 'Factsheet on LGBTI Issues' (2021) para 7 <coe.int> accessed 27 February 2021.

[73] Legge 14 aprile 1982, n. 164, "Norme in materia di rettificazione del sesso" (Italian Transsexual Act).

[74] Anna Lorenzetti, *Diritti in Transito: La Condizione Giuridica Delle Persone Transessuali* (Franco Angeli, 2014) 32.

Italian: *intervenute modificazioni dei suoi caratteri sessuali*)[75]. Secondly, the judicial decision allowing the rectification does not have retroactive effects and, if the applicant is in a marriage, results in an automatic divorce[76], unless the conversion into legal partnership, namely the Italian legal arrangements for same-sex couples, is requested[77]. Thirdly, once the rectification has been allowed, all the identification documents shall be amended accordingly[78].

It is worth noting that, at first, the TSA provided for a duplication of the LGR process: a first judicial procedure for the authorization to the surgical treatment and a second one for the rectification of the name and sex. However, after the above-mentioned case *S.V. v. Italy*, however, in which Italy was condemned precisely because of the burdensome consequences of this undue duplication, the TSA had been reformed in 2011[79], with the result that a second court ruling was no longer required and the amendment of the civil-status records could now be ordered by the judge in the same decision authorising the surgery[80]. It is important to stress, nonetheless, that the 2011 law reform has not achieved the expected results: the new LGR procedural system introduced has not really reduce either the lengthiness or the costs related to it, and it is still allowing some degree of duplication[81].

Another critical point is the confusion regarding the conditions underpinning LGR. Indeed, what does "modification of the sex characters" mean? Does it refer to both primary (genitalia and the reproductive apparatus) and secondary (such as, breasts, voice, and facial hair) sex characters? At first, according to the earliest prevailing case-law orientation, the TSA should have been interpreted as if requiring a mandatory surgical intervention on the primary sex characters. Therefore, a pre-condition of sterilization, through the removal of the gonads, was required[82], even though some exceptional examples departing from this strict interpretation can

[75] Italian Transsexual Act, Art. 1.
[76] Italian Transsexual Act, Art. 4.
[77] See Constitutional Court, ruling no. 170, 11 June 2014; Decreto Legislativo 1° settembre 2011, n. 150, "Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'articolo 54 della legge 18 giugno 2009, n. 69" (Law for simplifying the civil judicial proceeding) art. 31.
[78] Italian Transsexual Act, Art. 5.
[79] Legislative Decree no. 150/2011
[80] European Court of Human Rights, 'Factsheet on Gender Identity Issues' (2020) 7 < https://www.echr.coe.int/Documents/FS_Gender_identity_eng.pdf> accessed 17 February 2021.
[81] Walter Citti and others, 'La Condizione Transessuale: Profili Giuridici, Tutela Antidiscriminatoria e Buone Pratiche' [2017] Quaderni dei diritti 10, 17–23.
[82] *Inter alia* Civil Court of Pavia, 2 February 2006; Civil Court of Bologna, 5 August 2005.

be found[83]. It is just in the 2015, with the intervention of the so called "twin rulings", one from the Italian Supreme Court[84] and one from the Italian Constitutional Court[85], that this interpretative trend has been partially overruled. Firstly, the Italian Supreme Court, also in light of the ECtHR rulings and the European and International standards, expressly held that sterilizing or modificative surgeries on primary sex characters are not a mandatory pre-condition to obtain LGR, since such obligation on transsexual persons would disproportionally sway towards the protection of the public interest disregarding their constitutional right to psycho-physical integrity and self-determination. An equivalent conclusion has been reached by the Italian Constitutional Court, which stated that the prevalence of the constitutional right to health over the interest to align anatomical and documental sex leads to the conclusion that surgeries on primary sex characteristics are not mandatory pre-conditions for the rectification[86]. Although the twin rulings should be undoubtedly welcomed as important attempts to actualize the 1982 TSA, a lot of matters related to LGR are still anchored to a retrogressive perspective of gender identity. Indeed, the same Italian Supreme Court, in the abovementioned ruling, expressly provided that, on one hand, the transsexual persons shall in any case undergo a wide degree of psychological and medical treatments in order to assess the irreversibility of their choice, and, on the other, that was impossible to recognize a "*tertium genus*"[87], namely third or neutral gender marker for non-binary persons. Therefore, although the most severe and intrusive practice of surgical sterilization has been outlawed, the medicalization character of the Italian LGR procedure is still extraordinarily strong and, in any case, does not consider trans persons other than transsexual ones (i.e., binary trans persons). As a matter of fact, even though some recent case-laws have gone towards an always less medicalized LGR process[88], the 2015 situation seems to have been crystalized. To conclude, the necessity to clearly attribute a person to the "female" or "male" box is still an indefectible LGR condition under the current Italian legal framework.

[83] *Inter alia* Civil Court of Rome, 18 October 1997; Civil Court of Rome, ruling no 5896, 22 March 2011; Civil Court of Rovereto, 3 May 2011.
[84] Supreme Court, First Civil Section, ruling no 15138, 20 July 2015.
[85] Constitutional Court, ruling no 221, 5 November 2015.
[86] ibid 4.1.
[87] Supreme Court (n 84) 7.
[88] *Inter alia* Civil Court of Vercelli, ruling no 925, 27 December 2018, that recognized rectification even though the applicant has not underwent hormonal treatments.

1.3.2 Why Italy is failing International and European standards

In light of all the above considerations, it is unambiguous that Italy is not fully complying with the international and European standards on LGR, that, although lacking hard laws' strength and limited to general positive obligations, clearly provide for a more inclusive and less intrusive system of rectification. Indeed, according to 2020 EU Commission Report on legal gender recognition in EU, Italy is ranked as one of the Member States with the least accessible LGR procedures[89]. This low-grade position is due to a high number of severe weaknesses. Firstly, the TSA, in violation of the principle of certainty of law, does not set out explicitly the LGR requirements, leaving this task to case-law. Consequently, the different courts have frequently come up to inconsistent solutions, thus creating a lack of clear-cut set of standards. Secondly, although the requirements of sterilization and gender-reaffirming surgery have been ruled out by the twin rulings, medicalization to prove the irreversibility of the choice is still needed. Indeed, hormonal treatments, intrusive mental health diagnosis, and proofs that the applicants have been publicly living "*in accordance with their gender identity for a certain period of time*"[90] are the sole elements based on which the rectification is accorded.

Thirdly, even when the applicant is requesting authorization for gender-reassignment procedures, not all medical treatments are covered by public health insurance. Indeed, although as of 23 September 2020 the costs related to hormonal treatments are covered by the Italian national health system[91], such free-to-charge service is still linked to a medical diagnosis of gender dysphoria and does not apply to all gender reassignment surgeries.

Fourthly, the LGR process under a procedural point of view is excessively burdensome: a judicial proceeding, instead of an administrative one, has disastrous implications under a timing and cost point of view. Furthermore, the tendency of the courts to unduly duplicate the LGR process has had the only result to aggravate the whole system. In addition, the law does not clearly set out the procedural rules underpinning the LGR process, which is evaluated through a case-by-case assessment, thus making it much longer.

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[89] European Commission, 'Legal Gender Recognition in the EU: The Journeys of Trans People towards Full Equality' (n 22) 20–21.

[90] ibid 115.

[91] Laura Pasotti, 'Terapia Ormonale Transgender: In Italia Diventa Gratis, Ma Serve La Diagnosi' <https://www.osservatoriodiritti.it/2020/10/13/terapia-ormonale-transgender-cos-e-gratuita-italia-gratis/> accessed 5 May 2021.

Fifthly, the TSA does provide for a divorce requirement. In this regard, although in 2016 the Italian legislator has introduced a legal partnership scheme for same-sex couples[92], this legal institution does not provide for the same guarantees and protections (mainly, in relation to adoption) as marriage, which is still prohibited for homosexual couples. Therefore, even the opportunity to convert the previous marriage into a same-sex arrangement is still detrimental for the applicant. Finally, and most worryingly, the currently in placed LGR system is only addressed to transsexual persons. Indeed, no third or neutral gender marker is available. Consequently, non-binary trans persons are ruled out and to date have no rights in this respect under the Italian legal framework.

All in all, it is evident that the current legal system on LGR is deeply inadequate. As a matter of fact, it does not guarantee to trans persons equal recognition before the law, by either frequently forcing them to live in a way which does not represent their gender identity, or to be subject to undignified treatments and checks. The consequences of such regulatory gap are exceptionally frightening: the interests of those who are socially and legally invisible to the system are automatically not considered in the decision-making processes, and this creates a void of protection in several private and public areas, including, as it will be discussed in the next Chapter, the working life. That is why Italian trans associations have vehemently pushed towards the reform of the TSA by demanding for the initiation of discussions in this regard.[93]

In conclusion, an intervention by the Italian legislator, in order to align the TSA with the International and European standards, is urgently necessary and should be at the top of its agenda.

[92] Legge 20 maggio 2016, n. 76, "Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze" (Law on same-sex civil partnerships).

[93] Movimento Identità Transessuale, 'Una Proposta Di Piattaforma per La Riforma Della Legge 164/82' <https://mit-italia.it/una-proposta-di-piattaforma-per-la-riforma-della-legge-164-82/> accessed 3 March 2021.

2nd CHAPTER: LABOUR LAWS AND JURISPRUDENCE

2.1 Introduction: how to protect trans workers?

Because of the pervasive and stereotypical gender binary construct, "*discrimination against trans people is ubiquitous*"[94]. The areas in which prejudice, stigma and discrimination manifest themselves against trans persons are all those of daily life, including work[95]. In particular, according to Arcigay, the rate of discrimination against trans workers, substantiating in biased hiring proceeding, mobbing, less favourable working conditions, and termination, is still rather high in Italy[96]. In particular, the two main discriminatory dynamics are the following: the discrimination in accessing the labour market; vertical and horizontal mobbing, as well as unfair and unjust working conditions during the employment relationship[97].

So, the question that arises is: how to protect trans workers? One important tool is the legislative one, i.e., the adoption of laws that could protect trans workers from discriminatory and retaliatory mistreatments suffered on the workplace. Yet, as it will be amply explained in this Chapter, neither International and European nor Italian labour legislative frameworks provide for a special protection for trans workers and never mention the discriminatory ground of gender identity. Indeed, the following sections will critically analize the labour laws and standards at International, European, and Italian level by also focusing on jurisprudential developments and soft law tools. It will show that the lack of an express legislative protection severally hinders the rights of trans workers, who have to face an ambiguous and unpredictable legal structure, inconsistent judicial rulings, and cultural retrogressions. This Chapter will also prove that, although interpretation by analogy or fundamental-right approach of the existent legislation may help trans workers in the attainment of their own rights, this is still not sufficient. Therefore, it will, finally, advocate for the need to adopt an express legislation on the matter, also in light of the educative and shaping role that the law can have.

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[94] Michael (n 10) 100.
[95] Osservatorio Nazionale sull'Identità di Genere (n 7).
[96] Arcigay, 'Io Sono Io Lavoro' <https://www.arcigay.it/wp-content/uploads/Report-Io-sono-io-lavoro.pdf> accessed 2 February 2021.
[97] Monica J Romano, 'Le transizioni non finiscono mai' <https://purpletude.com/diversity/le-transizioni-non-finiscono-mai/?utm_content=85834441&utm_medium=social&utm_source=linkedin&hss_channel=lcp-28974108> accessed 6 March 2021.

2.2 Does International law protect trans workers' rights?

Although international law does provide, through the Universal Declaration of Human Rights, the nine human rights core treaties[98], and the International Labour Organization (hereinafter, "ILO") conventions, for a "*coherent framework…on non-discrimination*"[99], gender identity as a discrimination ground is almost never explicitly cited in international human rights laws[100]. Moreover, none of the human rights treaties provide for specific laws dedicated to trans workers.

Indeed, both the UN International Covenant on Economic, Social and Cultural Rights (hereinafter, "ICESCR"), and the ILO conventions, in particular the Discrimination (Employment and Occupation) Convention no. 111 (hereinafter, "ILO Discrimination Convention"), which are the main international labour laws in force, neither list in their non-discrimination clauses gender identity as one of the grounds nor require special protection for trans workers.

Starting with the former legal instrument, ICESCR does recognize to everyone the following: the right to work, to be intended also as "*the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts*"[101]; the right to the enjoyment of just and favourable conditions of work, such as fair and equal remuneration, safe and healthy working conditions, rest, and reasonable limitation of working hours[102]; the right to form and join trade unions, to carry out the relevant functions without undue limitations, and to strike[103]; finally, the right to social security and social insurance[104]. Nonetheless, according to article 2 of the ICESCR, the above rights shall be exercised "*without discrimination of any kind as to race,*

[98] The nine core UN human rights treaties include: the International Covenant on Civil and Political Rights (ICCPR) (1966); the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1966); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT) (1984); the Convention on the Rights of the Child (CRC) (1989); the Convention on the Rights of Persons with Disabilities (CRPD) (2006); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) (1990); and the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED) (2006).

[99] International Labour Standards Department (n 23) 4.

[100] Commissioner for Human Rights (n 50) 4.

[101] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESC) art 6.

[102] ibid art 7.

[103] ibid art 8.

[104] ibid art 9.

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". As a matter of fact, nothing is mentioned in relation to gender identity and trans workers specifically.

These remarks are similarly applicable to the eight fundamental ILO conventions[105], which provide for fundamental principles and rights at work, such as freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation[106]. In particular, according to the ILO Discrimination Convention, discrimination should be understood as following:

> "*(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies*"[107]

Clearly, no express coverage of gender identity is granted.

The main reason behind these legislative voids is linked to the fact that SOGIESC-related rights are "*perhaps the most contentious issue in contemporary human rights*"[108]. Indeed, the resistance in many states is mainly anchored to "*notions of tradition, culture, the degree of religiosity, and the effects of relative poverty*"[109].

Consequently, at first, such regulatory gap in international law has been dealt with soft law instruments formulated outside UN and ILO, and specifically (yes again!) with the 2007 YP. Indeed, YP, besides enunciating the general principle of non-discrimination on the basis of

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[105] The eight fundamental ILO Conventions are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

[106] International Labour Organization, 'Conventions and Recommendations' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 9 June 2021.

[107] ILO Discrimination Convention, art 1(1).

[108] Anthony Tirado Chase, 'Human Rights Contestations: Sexual Orientation and Gender Identity' (2016) 20 The International Journal of Human Rights 703, 704.

[109] McGoldrick (n 30) 4.

gender identity[110], explicitly spells out, under Principle 12, the right to work, which implies that "[e]*veryone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity*"[111]. Such principle practically entails that states should adopt the most appropriate measures to eliminate discrimination on the basis of gender identity both in public and private employment, and public service, throughout the entire working life, and in relation to all employment terms and conditions[112]. Moreover, according to Principle 13, such non-discrimination provision should also apply to the right of social security and other social protection measures, such as employment and unemployment benefits, parental leaves, health insurance, health benefits, pensions *et similia*[113].

Thanks to the influence of the YP, which continue to have an important benchmark role for international, regional, and national interventions in the area of SOGIESC, and the numerous bottom-up demands and struggles by marginalized groups on SOGIESC rights[114], also the UN and ILO bodies have started to take into consideration gender identity in their operations. In particular, the Committee on Economic, Social and Cultural Rights (hereinafter, "CtESCR"), which monitors the implementation of the ICESCR, in its 2009 General Comment no. 20, recognized that gender identity shall be included among the prohibited grounds of discrimination, given the fact that "*persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment … in the workplace*"[115]. Moreover, in the 2016 General Comment no. 23, the Committee pointed out that the right to equal remuneration for work of equal value should be granted without distinction of any kind, including gender identity[116], that states should adopt anti-harassment labour laws "*with explicit reference to … gender identity*"[117], and that the right to equal opportunity in hiring, promoting and termination should not be discriminatory when the candidate or the worker is trans[118].

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[110] Alston and others (n 20) 10.
[111] ibid 18.
[112] ibid 19.
[113] ibid.
[114] McGoldrick (n 30).
[115] Committee on Economic, Social and Cultural Rights, 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)' para 32 <https://www.refworld.org/docid/4a60961f2.html>.
[116] Committee on Economic, Social and Cultural Rights, 'General Comment No. 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)' para 11 <https://www.refworld.org/docid/5550a0b14.html> accessed 27 February 2021.
[117] ibid 48.
[118] ibid 31.

Overall, states should guarantee through law a minimum essential level of the right to just and favourable conditions of work "*without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, sexual orientation, gender identity, intersex status, health, nationality or any other status*"[119]. Furthermore, according to most recent 2019 report of ILGA World, CtESCR progressed from only 30% Concluding Observations being SOGIESC-inclusive in 2014 to "*a record-breaking 91% in 2019*"[120]. For instance, regarding the Concluding Observations on Switzerland, the CtESCR, noting the high number of cases of sexual harassment and discrimination on the workplace linked to gender identity, recommends the state to "*implement effective measures to protect victims of wrongful dismissal, sexual harassment and discrimination linked to sexual orientation and gender identity, including through the reversal of the burden of proof in legal proceedings*"[121].

Similarly, with the initiation in 2012 of the "Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work (PRIDE)" project, ILO has started to conduct research on discrimination against trans workers across the world[122]. In this context, ILO has strongly advised to pass labour legislations outlawing the discrimination against trans workers, as well as the implementation of good labour practices[123].

2.3 European labour laws and gender identity: an unsatisfactory protection

There are no doubts that all the main international human rights bodies, as well as the CoE Committee of Ministers, the CoE Commissioner for Human Rights, and PACE "*urge Europe to fight gender identity discrimination and show respect for gender identity minorities' dignity and equality issues*"[124]. However, the efforts in this respect, in the specific context of

[119] ibid 65(a).
[120] ILGA World, 'United Nations Treaty Bodies: References to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics - Annual Report 2019' 36 <https://ilga.org/annual-treaty-bodies-report-2019-resources> accessed 25 May 2021.
[121] Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of Switzerland' (18 November 2019) UN Doc E/C.12/CHE/CO/4, par 35.
[122] International Labour Organization, 'Discrimination at Work on the Basis of Sexual Orientation and Gender Identity: Results of the ILO's PRIDE Project' 1 <https://www.ilo.org/gender/WCMS_368962/lang--en/index.htm> accessed 15 April 2021.
[123] ibid 2–3.
[124] Katerina Sidiropoulou, 'Gender Identity Minorities and Workplace Legislation in Europe' (2019) 410 GLO Discussion Paper.

employment, seem not to be nearly satisfactory by both the relevant CoE bodies and the EU. Indeed, as it will amply described in the next two sections, regulatory silence, lack of hard laws tool, and/or strong focus on a binary notion of gender identity are still very much the norm in European labour laws.

2.3.1 Council of Europe and trans workers: a silence to be filled

Neither the ECHR nor the European Social Charter (hereinafter, "ESC"), and their relevant monitoring bodies, have ever mentioned or addressed gender identity issues in the context of employment. In particular, although the ECHR does not provide for an explicit protection of the right to work, since it more focuses on civil and political human rights, the ECtHR has ruled on cases of discrimination on the workplace, but only related to the ground of sexual orientation[125]. Indeed, so far, the ECtHR, when it comes to employment-related issues, "*has not addressed discrimination on the basis of gender identity*"[126]. In fact, even if in the *Goodwin* case, analysed above, as well as in *Grant v. the United Kingdom* both the applicants, transsexual persons, were subject to discrimination in accessing pension and social security rights, the ECtHR has focused only on the matter of lack of legal gender recognition legislation, thus not dealing with the relevant employment-related issues. On a more positive note, in *Identoba and Others v. Georgia*, the ECtHR has found that gender identity is to be considered a ground of discrimination under art. 14 of the ECHR[127][128], thus leaving open the possibility that this could be applied in future cases also to the employment area.

The above discourse and analysis are similarly applicable to the ESC. Indeed, although the ESC has, unlike the ECHR, a strong focus on the right to work, it has not listed gender identity among the grounds of discrimination, and its monitoring body, the European Committee of Social Rights (hereinafter, "ECtSR"), has so far never ruled on gender identity. In particular,

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[125] Case of Lustig-Prean & Beckett v. the United Kingdom (1999); Case of Smith & Grady v. the United Kingdom (2002) ECHR 2000-IX.

[126] Russian LGBT Network and ILGA Europe, 'Comments from the Russian LGBT Network and ILGA Europe on the 1st National Report on the Implementation of the European Social Charter Submitted by the Government of the Russian Federation (Articles 1§2 for the Period 01/02/2009 – 31/12/2010)' para 26 <https://rm.coe.int/168048892e> accessed 31 May 2021.

[127] Article 14 ECHR (Prohibition of discrimination):
"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[128] Case of Identoba and Others v Georgia (2015).

the ESC provides for the following rights in the area of employment: the right to work, to be understood as "*achievement and maintenance of as high and stable a level of employment as possible*" and "*the right of the worker to earn his living in an occupation freely entered upon*" (Art. 1); the right to just conditions of work, such as reasonable daily and weekly working hours, paid public and annual holidays, elimination of risks related to dangerous and unhealthy occupations, mandatory written form of the employment contract, and special nature of night work (Art. 2); the right to safe and healthy working conditions (Art. 3); the right to a fair remuneration (Art. 4); the right of workers and employers to organize in local, national and international organisations (Art. 5) and to bargaining collectively (Art. 6); the right to social security (Art. 6); finally, the right to be protected from employment termination and employers' insolvency and the right to be informed and consulted in case of collective redundancy (Art. 6). Moreover, Art. E of the ESC specifies that all the above rights shall be applied without discrimination as to "*race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status*". Therefore, it is clear that no mention is made to gender identity or specific trans workers' rights. Nonetheless, it is worth noting that according to ILGA Europe, the serious nature of the discrimination based on gender identity and the existing strong and peremptory guidelines by the CoE "*leave no doubt that such discrimination should fall within the Article E ground of "other status"*"[129]. Moreover, although so far none of the Decisions (on the collective complaints submitted against states) or Conclusions (on the reports submitted by states) contain explicit references to gender identity on the workplace[130], the ECtSR has always implicitly welcomed national labour laws which provide for gender identity as a ground of discrimination or specific protection for trans workers[131].

2.3.2 The EU labour law framework: a strongly binary approach

According to art. 153 of the Treaty of Functioning of the European Union (hereinafter, "TFEU"), the EU has the power to establish minimum standards "*for practically all aspects of*

[129] Russian LGBT Network and ILGA Europe (n 126) para 37.
[130] International Labour Standards Department (n 23) 18.
[131] *Inter alia*, Georgia Conclusions [Cycle 2020] Art. 1-2 – Session no 313; Malta Conclusions [Cycle 2020] Art. 1-2 – Session no 315.

labour law"[132], with the only exception of "*pay, the right of association, the right to strike or the right to impose lock-outs*"[133]. Indeed, several directives have been adopted on labour law matters, such as employment contracts, posted workers, working time, health and safety, pension, social security, collective representation, unemployment and so on. In particular, some relevant interventions have been made by the EU legislator in relation to equality on the workplace. In this regard, on a more general level, the same TFEU provides that the EU shall eliminate inequalities and promote equality among men and women (art. 8), shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (art. 10), and may take appropriate actions to combat discrimination on the previous grounds (art. 19).

In this regard, another important EU primary law resource is the Charter of Fundamental Rights of the European Union. Indeed, alongside the right to engage in work and to pursue a freely chosen or accepted occupation (art. 15), the Charter prohibits "*any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation*" (art. 21).

Moreover, with specific regard to the employment context, the EU has adopted two main directives: Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (hereinafter, "Employment Framework Directive"), and the recast Directive 2006/54/EC of 5 July 2006, implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (hereinafter, "Gender Recast Directive"). Although, as it will further discuss later, none of the either primary or secondary EU-discrimination laws "*contain an explicit prohibition of discrimination on the grounds of a person's gender identity*"[134], it is worth to analize beforehand some relevant rulings of the European Court of Justice (hereinafter, "ECJ" or "Court"), which in part came before the adoption of the above directives and, in any case, are useful keys to interpret them.

Indeed, in the 1996 case *P v S and Cornwall County Council*, the ECJ, for the first time, had to

[132] Manfred Weiss, 'The Future of Labour Law in Europe: Rise or Fall of the European Social Model?' (2017) 8 European Labour Law Journal 344, 345.
[133] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJC 326/1, art. 153 (5)
[134] European Commission, 'Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity and Gender Expression' (n 21) 32.

decide over the dismissal of a transsexual person for the sole reason arising from her gender reassignment. P. was working as manager in an educational establishment, and, after having informed her employer of her decision to undergo gender reassignment surgery, she was dismissed very shortly after[135]. The ECJ, upholding the claim of P., ruled that dismissal of a transsexual person on the ground of gender reassignment has to be considered a discrimination on the ground of sex, which at the time was prohibited by art. 5(1) of the Council Directive 76/207/EEC, now replaced by the Gender Recast Directive. The reasoning of the Court was based on the idea that "*where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment*"[136]. It is clear that the comparator used by the ECJ, which adopted a comparison-centred approach, has been a non-transsexual male[137]. However, another factor, which seemed to decisively influence the ECJ decision, has been the fundamental rights discourse[138]. Indeed, the Court held that "*to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard*"[139].

The radical nature of this ruling has been confirmed by three further cases. First, in the 2004 case *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, the claimant, K.B., was refused the possibility to award the widower's pension to R., her transsexual partner. Such refusal was solely based on the gender reassignment of her partner, since if "*R. had not undergone gender reassignment and if that did not prevent R. from marrying, R. would be entitled to a survivor's pension as a surviving spouse*"[140]. In this case, the Court found that the impossibility for the couple to get marry, which have been already prohibited by the ECtHR, resulted in a violation of the principle of equal pay among female and male workers, provided by art. 157 TFEU.

Secondly, in the 2006 case *Sarah Margaret Richards v Secretary of State for Work and*

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[135] Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-02143, paras 3-4.
[136] ibid para 21.
[137] Mark Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT' (1999) 5 European Law Journal 63, 66.
[138] Nicholas Bamforth, 'Discrimination on the Grounds of Sexual Orientation and Gender Identity', *Research Handbook on EU Labour Law* (2016) 505.
[139] P v S and Cornwall County Council (n 135) para 22.
[140] Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-00541, para 17.

Pensions, the claimant was refused the award of retirement pension at the age of 60 because of the fact she was a transsexual woman, and male retirement age was 65 years old[141]. The Court, similarly, to the previous two cases, held that the scope of the relevant sex equality directive (Directive 79/7) "*cannot … be confined simply to discrimination based on the fact that a person is of one or other sex*"[142] and it "*is also such as to apply to discrimination arising from the gender reassignment of the person concerned*"[143]. Consequently, since the unequal treatment to which the claimant was subject solely arise from her gender reassignment, this must have been regarded as discrimination prohibited under the relevant directive[144]. It is worth noting that, unlike in *P v S*, the non-transsexual male comparator has not been used in the *Richards* case. Indeed, while in the former the inequality arose from the fact that her gender reassignment was not considered, in the latter it is exactly the opposite[145].

Lastly, in the most recent 2018 case *MB v Secretary of State for Work and Pensions*, MB, a transsexual woman, was refused to access retirement pension at age 60 because of her certificate still indicating the male legal marker. The lack of rectification was due to the fact that the claimant did not annul marriage with her partner. The Court, similarly, to what ruled in KB case, held that the legislation amounted to direct sex discrimination: MB was treated in a detrimental way than a person who has not undergone reassignment surgery and is married.

Although in all four cases the Court has infused human rights (namely, human dignity and freedom) into equality EU laws thus stepping "*outside the rigid confines of formal equal treatment and the comparator test*"[146], it also true that the extension of the anti-discrimination provisions has been made only with reference to transsexual persons who have undergone reassignment surgery. Moreover, the EU legislator has been very much cautious in codifying the still limited findings of the ECJ. In fact, first and foremost, the Employment Framework Directive is totally silent with regard to gender identity or specific instances of trans' workers. Indeed, the Directive, which extends its protection to the entire working relationship in both the private and public sector (Art. 3), lays down "*a general framework for combating*

[141] Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585, para 2.
[142] ibid para 24.
[143] ibid.
[144] ibid para 30.
[145] Mark Bell, 'Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law' (2012) 60 The American Journal of Comparative Law 127, 142.
[146] ibid 143.

discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation" (Art. 1). Although sexual orientation successfully and in a progressive way managed to be one of the grounds of discrimination, the same did not happen to gender identity.

Conversely, the Gender Recast Directive positions itself on a slightly different note. Such Directive was adopted with the aim to replace and consolidate a series of previous directives regarding equal treatment among men and women by providing a simplified legal framework on the area of sex discrimination[147]. Indeed, it has the scope to fight discrimination, in both private and public sector, on the grounds of sex (including harassment and sexual harassment) in the context of access to employment, including promotion, and to vocational training, working conditions, including pay, and occupational social security schemes (Art. 1). Moreover, the Directive provides for several procedural measures, such as conciliation and judicial procedures, penalties, shift of burden of proof, and equality bodies, to make the principle of equal treatment effective[148]. Despite the fact that the Gender Recast Directive does not go as far as to insert gender identity among the grounds of discrimination as well, it, however, represents the first attempt from the EU legislators to codify the CJEU case-law. Indeed, under its Recital 3 of the Preamble, it is provided the following:

> "*The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person."*

Although the Preamble, unlike the articles, is not legally binding and therefore it is not very much clear whether Member States are required to implement this provision in their own national laws[149], the EU Commission has clearly stated that the Recital "*is intended to spell out*

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[147] ILGA Europe, 'Transgender People and the Gender Recast Directive - Implementation Guidelines' 5 <https://www.ilga-europe.org/sites/default/files/Attachments/transgenderpeople_and_the_gender_recast_directive_guidelines_dec2009.pdf> accessed 7 June 2021.

[148] ibid 11–12.

[149] Susanne Burri, Linda Senden and Alice Welland, 'Gender Equality in Employment and Occupation: European Implementation Assessment - ANNEX I: Legal Aspects and Direct and Indirect Discrimination' 17 <https://dspace.library.uu.nl/bitstream/handle/1874/323935/EPRS_STU_2015_547546_EN.pdf?sequence=1&isAllowed=y> accessed 3 June 2021.

that less favourable treatment on the grounds of gender reassignment is covered and prohibited by this Directive"[150]. Moreover, the same ILGA Europe holds that the interpretation of the Recast Gender Directive as mandatorily covering also discrimination based on gender assignment is "*unquestionable*"[151].

Along with the abovementioned two pieces of legislation, the EU legislator has adopted a number of gender directives focusing on specific aspect of the employment relationship, such as self-employed capacity[152], social security schemes[153], goods and services[154], pregnancy[155], and parental leaves[156]. Nonetheless, all these directives just focus on the binary approach men-woman, without mention to gender identity.

To conclude, based on the foregoing, it is apparent that, although it is notable and welcomed that the Gender Recast Directive has expressly incorporated, for the first time in the EU legal framework, gender reassignment, it does not go as far as including gender identity in the list of grounds as well. Consequently, it is still unclear whether the provisions currently in force could protect also trans workers who have not undergone or have no intention to undergo any degree of gender reassignment. On this point, FRA has stated that EU labour laws, and anti-discrimination laws in general, "*should protect all those who express a gender identity different to that assigned at birth such as crossdressers and transvestites and not only those who have had or are having surgery*"[157]. Similarly, the European Commission considered that, even though the ECJ has ruled only on gender reassignment, "*the approach should be materially*

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[150] European Commission, 'Amended Proposal for a Directive of the European Parliament and of the Council on the Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast Version)' 4 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0380:FIN:EN:PDF> accessed 3 June 2021.

[151] ILGA Europe (n 147) 20.

[152] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1

[153] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1978] OJ L 6/1

[154] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37

[155] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L 348/1

[156] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance) [2010] OJ L 68/13

[157] European Union Agency for Fundamental Rights, 'Challenges Facing Transgender Persons' 2 <https://fra.europa.eu/sites/default/files/fra_uploads/1228-Factsheet-homophobia-transgender_EN.pdf> accessed 3 March 2021.

similar"[158] also for gender identity. However, the question is not crystal-clear whatsoever. Indeed, the approach adopted by the EU authorities in the field of labour law still show "*little evidence of challenging the basic notion of a gender binary*"[159]. As a matter of fact, the EU legislator, by not comprising protection to all others trans' workers, seemed to refuse to go beyond the dictum of the ECJ[160].

2.4 Italy

To overcome ambiguities and possible reductive interpretations of the ECJ jurisprudence and EU labour laws, several Member States have intended to expressly include in their anti-discrimination legislation gender identity as new prohibited ground of discrimination, thus widening the scope of protection beyond the traditional concept of gender reassignment. For instance, Malta not only has inserted gender identity in its anti-discrimination legislative framework in 2012, but in 2014 it has also been the first ever Member State that has introduce gender identity in its own Constitution[161]. However, besides this virtuous example, the situation is very much fragmented. Indeed, according to 2021 Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People of ILGA Europe, 20 out of 27 Member States have adopted labour laws mentioning protection to gender identity[162]. Critically, Italy is to be numbered among the seven countries that have not implemented such laws yet. Indeed, as it will detailed in the next sections, although Italy has a rather strong anti-discrimination system in the context of employment, trans workers are never mentioned and do not benefit of any special protection. As a matter of fact, the only Italian law that directly address trans persons is the TSA, which, as widely highlighted in the previous Chapter, covers, with severe shortcomings, the issue of legal gender recognition. Moreover, there is a limited

[158] European Commission, 'Report on the Application of Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee' 4 <https://www.europarl.europa.eu/doceo/document/A-8-2017-0043_EN.html> accessed 20 March 2021.
[159] Bell (n 145) 137.
[160] Inês Espinhaço Gomes, 'Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity' 24.
[161] TGEU, 'Malta: Douze Points! First Constitution in Europe to Protect Gender Identity' <https://tgeu.org/malta-douze-points-first-constitution-in-europe-to-name-gender-identity-tgeu-statement/> accessed 7 June 2021.
[162] ILGA Europe, 'Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People 2021' <https://www.ilga-europe.org/sites/default/files/2021/full_annual_review.pdf> accessed 7 June 2021.

number of case law on the topic, which not only is due to a severe problem of under-reporting, but it also causes uncertainty on how to interpret the existent legislative framework in order to include trans workers in the scope of protection.

2.4.1 Italian labour legislative framework: an indisputable absence

As anticipated, despite a rather robust legislative structure in the context of employment, to the present date, a reference to the employment status of transgender persons is totally precluded. Indeed, neither the primary source, i.e. the Italian Constitution, nor secondary labour laws expressly mention gender identity or grant trans workers specific protections.

The Italian Constitution, affirming that "*Italy is a democratic Republic founded on labour*"[163], provides for several declarations of principles and effective rules related to employment issues: recognition to every citizen of the right to work (art. 4); protection of work in all its forms and practices (art. 35); right to fair remuneration, to limited daily working hours, and weekly rest and paid annual holiday (art. 36); equal rights to working women as men and protection of minor workers (art. 37); right to social insurance for old age, illness, invalidity, industrial diseases and accidents (art. 38); freedom of association (art. 39); finally, right to strike (art. 40). Such principles have been effectively implemented by secondary labour laws. In particular, the so-called Workers' Statute[164], which applies to both private and public sector, invalidates any agreement or action of the employer, expressly including hirings and dismissals, which constitutes discrimination for reasons of sex, race, language, religion, political opinion (art. 15)[165]. Moreover, it prohibits the employer, during the hiring process and throughout the entire employment relationship, to investigate on facts related to the candidate/worker that are not relevant in the context of the employment relationship, such as political and religious opinions, as well as affiliation to trade unions (art. 8).

[163] Costituzione della Repubblica Italiana, 27 dicembre 1947 (Italian Constitution) art. 1 (english version available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).
[164] Legge 20 maggio 1970, n. 300, "Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e dell'attività sindacale nei luoghi di lavoro e norme sul collocamento" (Workers' Statute).
[165] See https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158903/lang--en/index.htm.

With regard to gender labour laws, the Italian legislator has introduced the so-called Code of Equal Opportunities between Women and Men[166], which aims at achieving gender equality and erasing discrimination based on sex in all areas of society. In the employment context, both at private and public level, the Code, first, provides for a general prohibition of discrimination on the ground of sex with regards to all the aspects of the employment relationship, such as access to the labour market, training, promotion, and any other working conditions (art. 27). Moreover, the Code provides for the following specific protections: right to equal pay (art. 28); right to be given an adequate job title and to be equally promoted (art. 29); right to equal access to social security schemes (art. 30-31); right to equal access to public work, including military careers (artt. 32-34); finally, right not to be dismissed on the sole ground of getting married (art. 35). It is important to highlight that this Code perceives gender equality in the binary form man/women, thus not expressly taking into account other gender identities.

Furthermore, in order to implement at national level, the abovementioned EU Employment Framework Directive, the Italian legislator adopted the Employment Equal Treatment Law[167], which provides that candidates and workers, both at private and public sector, should not be discriminated on the grounds of religion, personal convictions, disability, age, and sexual orientation with regards to access (hiring processes, job interviews, etc.), performance (job title, remuneration, promotion, etc.), and termination (dismissal, mutual termination, resignation, pensions etc.) of the employment.

Finally, the Consolidated Law on Occupational Health and Safety[168] requires prevention of working burn-out also with respect to gender, age and nationality (art. 27).

Overall, it is clear that in the relevant Italian labour laws neither an express reference to gender identity nor a special protection to trans workers is contemplated. However, on another note, it is worth mentioning some regional laws[169] that have showcased a strong potential for the development of gender identity protection on the workplace. Indeed, Tuscany first, followed

[166] Decreto Legislativo 11 aprile 2006, n. 198, "Codice delle pari opportunità tra uomo e donna, a norma dell'articolo 6 della legge 28 novembre 2005, n. 246" (Code of Equal Opportunities between Women and Men).
[167] Decreto Legislativo 9 luglio 2003, n. 216, "Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro" (Employment Equal Treatment Law).
[168] Decreto Legislativo 9 aprile 2008, n. 81, "Attuazione dell'articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro" (Consolidated Law on Occupational Health and Safety).
[169] Italy is subdivided into 20 regions (*regioni*, singular *regione*), which, according to art. 117 of the Italian Constitution, have legislative powers in all subject matters that are not expressly covered by State legislation, as well as shared legislative power with the State on some issues, including "job protection and safety".

by Liguria, Marche, Piemonte and many other regions[170], have started to promote inclusion of trans persons in the context of active labour-market policies and professional training[171]. Although such legislative interventions do not directly address employment relationships because of the Regions' lack of legislative power on the subject matter[172], it is undeniable that they demonstrate that gender identity is indeed one of the grounds to be protected and may well give impetus to the central State to legislate on the topic[173]. Based on the foregoing, therefore, a question arises: does trans workers do not have any kind of protection under Italian law? The immediate answer is no, and in the next section it will be explained why.

2.4.2 Protection of trans workers in Italy: a "fundamental-right" interpretative approach

Given that it would be unacceptable not to protect a person discriminated solely based on gender identity, and in light of the absolute lack of a legislative framework dedicated to the protection of trans workers, it is especially important to understand how to legally extend the currently in force anti-discrimination structure also to trans workers. First, despite the lack of implementation of Recital 3 of the Recast Gender Directive, which, as highlighted above, extends the protection to trans workers who have undergone gender reassignment, "*some scholars stress the existence of protection for transgender workers under EU discrimination law*"[174]. Therefore, trans workers may be able to claim protection by directly invoking, first, the Recast Gender Directive, which has a very wide scope of application in the context of

[170] Legge 20 maggio 2016, n. 76, "Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze" (Law on same-sex civil partnerships); Legge Regionale Toscana 15 novembre 2004, n. 63, "Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere"; Legge Regionale Liguria 10 novembre 2009, n. 52, "Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere"; Legge Regionale Marche 11 febbraio 2010, n. 8, "Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere"; Legge Regionale Piemonte 23 marzo 2016, n. 5, "Norme di attuazione del divieto di ogni forma di discriminazione e della parità di trattamento nelle materie di competenza regionale"; Legge Regionale Emilia-Romagna 1° agosto 2019, n. 15, "Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere"; Legge Regionale Campania 7 agosto 2020, n. 37, "Norme contro la violenza e le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere e modifiche alla legge regionale 16 febbraio 1977, n. 14 (Istituzione della Consulta regionale femminile)"

[171] *Inter alia*, Legge Regionale Toscana 15 novembre 2004, n. 63, art. 2.

[172] Costituzione della Repubblica Italiana (n 158) art. 117.

[173] Daniele Ferrari, 'La Corte Costituzionale Si Pronuncia Sulla Legge Regionale Ligure Contro Le Discriminazioni Legate All'orientamento Sessuale e All'identità Di Genere: Una Nuove Apertura al Diritto Privato Regionale?' (2011) 3 Quaderni Regionali 885, 901.

[174] Anna Lorenzetti and Giacomo Viggiani, *Hard Work. LGBTI Persons in the Workplace in Italy* (Edizione ETS, 2016) 48.

employment, and, secondly, all the other gender directives, such as the self-employed directive or the social security scheme directive[175]. Moreover, art. 10 of the Italian Constitution provides that the Italian legal system should conform to "*the generally recognised principles of international law*". In this regard, despite the discussion on SOGIESC rights is still very much going on among states at international level, some could say that, in light of numerous recommendations and conclusions of human rights international and regional bodies, some degree of recognition of the relevance to protect trans persons has been achieved.

A second option would be that of interpretation by analogy: the protections granted under the labour legal framework currently in force and analysed in the previous section would be extended also to gender identity. For instance, the concept of gender equality under the Code for Equal Opportunities between Men and Women, which is literally intended in its binary men-woman meaning, could be understood as covering also trans persons[176]. On this point, it is however interesting to highlight that exceptionally authoritative scholar hold that, in the intent of the Italian legislator, the grounds of discrimination provided by the Italian labour laws should be considered an exhaustive list: the application of interpretation by analogy would not be feasible, and only an express reference to gender identity could permit the extension of protection[177]. Nonetheless, another part of the Italian legal doctrine supports the idea that anti-discrimination legislations should generally have the intent to protect as many weak groups as possible[178]. It is undoubtable that trans workers (and trans persons in general) are still strongly marginalized and discriminated against. Indeed, it would be illogical to protect a person that, for instance, is dismissed on the sole basis of sexual orientation, and not a person that is victim of the same treatment solely because of gender identity. Overall, this last position should be the most welcome one.

Third, and finally, under a different perspective, trans workers may invoke a fundamental-right interpretative approach. In this case, the interpretation by analogy is no more needed since the protection should come from, as primary sources, the absolute rights of human dignity and

[175] Citti and others (n 81) 41–42.
[176] Maria Spanò, 'Discriminazione Delle Persone Transgender Sul Posto Di Lavoro: Una Possibile Inclusione Nel Silenzio Normativo', *Transformare le pratiche nelle organizzazioni di lavoro e di pensiero* (Editoriale Scientifica 2015) 103.
[177] *Inter alia*, Maria Teresa Carinci, 'Il Rapporto Di Lavoro al Tempo Della Crisi', *Il Diritto del Lavoro al tempo della crisi* (Atti del XVII Congresso Nazionale AIDLASS 2012).
[178] *Inter alia*, Citti and others (n 81) 102–103.

equality, which are enshrined under art. 2 and 3 of the Italian Constitution[179]. Indeed, the first provision "*recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed*", including workplace; the latter grants "*equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions*". The same Italian Supreme Court, in a case of employer's retaliation against a worker solely because of his affiliation to a trade union, held that, in any event of discrimination on the workplace, art. 3 of the Italian Constitution should always be the legal parameter to be taken into account and that exclude any need of an exhaustive list of discriminatory grounds[180]. Moreover, with specific regard to art. 3, although gender identity is not expressly mentioned, it should be undoubtedly held that the condition of being trans falls under the "personal … conditions" ground[181]. The application of such interpretative approach is not only the most human-right oriented one, but it makes the protection of trans workers (and trans persons in general) an absolute right, which can be activated *ex se*, thus giving the possibility to overcome the barriers created by lacking anti-discrimination laws and problematic comparative approaches.

Being understood the different legal paths through which it could be theoretically possible to extend current labour laws also to trans workers, it is safe to say that the number of times they have been put into practice is exceptionally low. Indeed, as it will highlighted below, Italian case law regarding gender identity and employment-related matters is, so far, almost inexistent.

2.4.3 Lack of jurisprudence: the problem of under-reporting

In 2007, the Council of State, the Italian administrative court of last instance, confirmed as justified and not disproportionate the dismissal of a policemen, imposed on the grounds that he dressed in female clothes during his off-duty life[182]. Indeed, the court's reasonings were very much based on morality discourses[183] since it was held that the policemen's behaviour was futile and selfish, and likely to hinder the honourability and credibility of the police unit[184]. On

[179] Oreste Pollicino, 'Di Cosa Parliamo Quando Parliamo Di Uguaglianza', *Divieto di discriminazione e giurisprudenza costituzionale* (Giappichelli Editore 2006).
[180] Supreme Court, First Civil section, ruling no 10834, 26 May 2015, par. 3.6.
[181] Lorenzetti (n 74).
[182] Council of State, section IV, ruling no 5461, 19 October 2007.
[183] Lorenzetti (n 74).
[184] Council of State (n 173) para 4a.

a similar note, in 2012, the Council of State endorsed the suspension of a policemen because of his relationship with a transsexual person[185]. Indeed, it was held that a stable relationship with a transsexual person would result in a breach of the duty of decorum and dignity that a policemen should have[186]. What really struck in both these rulings was that the administrative judges did not consider whatsoever the importance of human dignity and self-identity, by automatically labelling trans identities, in these specific cases transsexuals and travesties, as something deplorable[187].

Conversely, in 2009, the Court of Ravenna opposed the dismissal of a transsexual firefighter on the basis that it consisted in a discrimination on the grounds of sexual orientation under the Employment Equal Treatment Law. The judges, indeed, held that the dismissal was solely based on the well-known transsexualism-related sexual orientation of the applicant[188]. Clearly, in the absence of an explicit inclusion of gender identity among the prohibited factors of discrimination, it emerges here the difficulty for the judges to correctly frame trans workers' matters within the fragmented anti-discrimination legislation[189]. Indeed, the judges mistakenly confused gender identity and sexual orientation[190]. In any case, although such decision has been overruled by the Court of Appeal of Bologna[191], which pointed out that the dismissal was not based on the sexual identity of the firefighter but rather on her criminal records, it should be definitely welcomed as a promising spark of hope towards a more inclusive and human-rights oriented approach by the Italian courts.

And, as a matter of fact, thereafter, the higher administrative Court started to abandon reasonings "*consisting of mere prejudice against cross-dressing and trans persons*"[192].

Precisely, in 2014, the Council of State welcomed the claim raised by a policeman against his disciplinary suspension justified by the discovery of several photos on his Facebook account portraying him in female clothes[193]. Indeed, the judges held that sexual identity is something that should be protected both under art. 2 and 3 of the Italian Constitution, as well as under art. 10 ECHR, which provides for freedom of expression. Therefore, transvestitism should not be

[185] Council of State, section III, ruling no 512, 1st February 2012.
[186] ibid. para 2.
[187] Spanò (n 171) 115.
[188] Civil Court of Ravenna, Labour Section, ruling no 110, 20 February 2009.
[189] Citti and others (n 81) 48.
[190] Lorenzetti and Viggiani (n 169) 88.
[191] Court of Appeal of Bologna, Labour Section, ruling no 109, 20 March 2015.
[192] Lorenzetti and Viggiani (n 169) 89.
[193] Council of State, ruling no 848, 21 February 2014.

automatically considered against the decorum, even though it relates to a policeman. Interestingly, the Court also interpreted "decorum" as a dynamic concept that very much depends on time and space and should always evolve. Even though also in this last case the judges have intended gender identity as something related to the sexual identity of an individual, it is positively interesting to see that they have used a fundamental-rights interpretative approach, by grounding their reasoning on the human dignity, the principle of equality, and the freedom of expression.

Despite it is important to welcome the above achievements, it also apparent that the number of cases brought before the Italian courts are drastically low, in particular those related to private employment relationships. Indeed, according to Arcigay, one of the most important Italian association on LGBTQIA+ rights, this trend, defined as under-reporting, is caused by several reasons: the fear to lose the job; the fear of retaliation; misinformation on their rights; fear not to be assisted during the legal proceeding; the lack of competent and professional structures; the fear to be stuck in a long and costly legal proceeding; the stress to bear the burden of proof in relation to the discrimination suffered; the feeling of shame for the treatment suffered; the fear of a forced coming out to family, friends or colleagues[194].

Consequently, the result of all the above factors is the trans workers' decision to either go for paths alternative to legal proceedings, mainly settlement agreements with the employers, or not to raise any claim whatsoever by enduring the mistreatment. For instance, Mr. Masi, a labour lawyer of Rete Lenford[195], reports that, one of his clients, a transsexual man, sexually and verbally harassed by his colleagues and forced to resign by his employer, despite his unquestionable working capacities and skills, decided not to file a claim before a labour judge because of his mistrust in the Italian legal system as well as the fear of adverse consequences on his future professional life[196]. Masi, finally, relates that his client preferred to move abroad to find a new (inclusive) job. Strikingly, the lack of a comprehensive and inclusive anti-discrimination legislative framework and the fear not to receive adequate protection during and

[194] Arcigay (n 96) 119–120.

[195] "Avvocatura per i diritti LGBTI - Rete Lenford" is a well-known Italian association composed by lawyers that offer their legal services to LGBTI persons.

[196] Piergiorgio Masi, 'Idoneità Di Genere? Un Caso Di Mobbing Sul Luogo Di Lavoro Ai Danni Di Una Persona in Transizione', *Transformare le pratiche nelle organizzazioni di lavoro e di pensiero* (Editoriale Scientifica 2015) 155.

after a hypothetical judicial proceeding have forced Masi's client, as well as many other trans workers[197], to the extreme decision to leave Italy. Clearly, this is beyond unacceptable.

2.5 Why an explicit legal protection is absolutely necessary

As highlighted in the above sections, the anti-discrimination legal structure currently in place both at International/European and Italian level is profoundly unsatisfactory for trans workers. Indeed, although relevant soft laws tools and guidelines have been adopted, in particular by UN human rights body, and some achievements have been reached at EU level with the Gender Recast Directive, so far none of the legal instruments above analysed present an express inclusive and comprehensive protection of trans workers. Shortly, gender identity is never mentioned in hard labour laws. It is also true that some – occasionally successful – attempts at jurisprudential level to extend the literal meaning of the anti-discrimination corpse of law, either by analogy or through a fundamental-rights interpretative approach, has been carried out: this shows that it could be hypothetically possible to understand such laws as inclusive of a protection on the basis of gender identity, even if not mentioned. Therefore, why should it be strongly advocated the adoption and implementation of express labour legislation on gender identity? The reasons are mainly three.

First, the lack of legislation can "*perpetuate ambiguities surrounding protection based on gender identity*"[198] and cases on discrimination of trans workers are "*still ruled on a case-by-case basis*"[199]. Indeed, although courts have had, so far, an important role in interpreting in a progressive way existing labour laws as to include also certain aspects of gender identity, the approach is still very much inconsistent. The uncertainty on what kind of interpretative methods should be adopted, as well as the lack of a general understanding of what gender identity is and encompasses make the judicial intervention on the matter rather unpredictable. As seen, the ECJ has extended the protection of the labour directives just to those workers that have already undergone gender reassignment surgery, while the Italian courts struggle to separate the concept of sexual orientation from the one of gender identity. Moreover, it has not been infrequent the

[197] Arcigay (n 96).
[198] Enrica N Ruggs and others, 'Workplace "Trans"-Actions: How Organizations, Coworkers, and Individual Openness Influence Perceived Gender Identity Discrimination' (2015) 2 Psychology of Sexual Orientation and Gender Diversity 404, 404–405.
[199] ibid 404.

use by judges of morality discourses, with assertions regarding the deplorability of certain behaviours or way of life. Fortunately, this trend is being replaced by self-determination and human dignity arguments instead, but it shows how certain retrogressive cultural mind-set may find its space also in a court if a specific law is not in place.

The lack of a piece of legislation protecting trans workers and the jurisprudential piecemeal approach result in a second adverse consequence: the mistrust of trans workers in the legislative structure. Indeed, as highlighted by Arcigay's report, trans workers feel so not protected by the system currently in place, that fear the consequences of claiming their own rights. They are afraid, *inter alia*, that judges may not rule in their favour, that the proceeding could be too intrusive, thus forcing them to coming-out, or regardless the outcoming of the judicial path, to suffer retaliation or to have impediments for the future professional life. Such negative perception forces trans workers not to denounce the mistreatment suffered, thus substantiating the under-reporting trend.

Finally, the adoption of an *ad hoc* piece of legislation may constitute a pivotal step towards the attainment of a more progressive and inclusive society. Indeed, although it is undeniable the importance of grassroots queer movements led by civil society, the educational and shaping role of the law should not be underestimated[200].

Although each of the three arguments above considered would be enough to push the legislator to adopt a specific law on trans workers' rights, an exceptionally arduous obstacle interposes: the lack of political will. A meaningful example of this at Italian level is the ongoing and frustrating debate on the so-called D.D.L. Zan[201], a law that aims to counter forms of homo-transphobic, misogynist, and ableist hate crimes and would introduce for the first time in the Italian legal framework, although not in the context of labour law, the concept and definition of gender identity[202]. Indeed, despite the approval by one of the two chambers of the Italian Parliament, it is now stuck in the second one due to the strong obstructionism by far-right political parties, which opposes, *inter alia*, morality and religious discourses[203].

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[200] Brian Burge-Hendrix, 'The Educative Function of Law', *Law and Philosophy* (Oxford University Press 2007).
[201] Proposta di legge ZAN ed altri, 2 maggio 2018, n. 569, "Modifiche agli articoli 604-bis e 604-ter del codice penale, in materia di violenza o discriminazione per motivi di orientamento sessuale o identità di genere" (Legislative proposal on hate crimes based on sexual orientation, gender identity, misogeny, and ableism)
[202] Luciana Goisis, 'Hate Crimes in a Comparative Perspective. Reflections on the Recent Italian Legislative Proposal on Homotransphobic, Gender and Disability Hate Crimes' [2021] GenIUS 2020-2 1.
[203] Giovanni Casadio, 'Omofobia, Il Ddl Zan Sotto La Scure Di Due Mesi Di Audizioni. Il Pd Protesta: "Subito in Aula"' *La Repubblica* (17 June 2021)

This example clearly shows that the adoption of a legislative intervention should go hand in hand with the implementation of bottom-up approaches aiming at subverting the resistance posed by a retrogressive culture. Indeed, as it will be showed in the next Chapter, the performance of good labour practices by different stakeholders, such as employers and employees' representatives, may well increase, on a practical level, the well-being of trans workers and may also endorse a culture of acceptance that could facilitate the adoption of inclusive labour laws.

To conclude, the need for an *ad hoc* legislative intervention is not only encouraged at international level, but it is also pivotal for the actual implementation and respect of trans workers' rights.

<https://www.repubblica.it/politica/2021/06/17/news/ddl_zan_pd_omofobia-306382516/> accessed 21 June 2021.

3rd CHAPTER: GOOD LABOUR PRACTICES

3.1 Introduction: is a bottom-up approach needed?

Although, as highlighted in the previous Chapter, the adoption of a specific law on trans workers is a pivotal step to obtain full recognition of their dignity and rights, it is also true that this operation should be aided by the implementation of good labour practices, in an effort to intertwin a top-down and bottom-up approach. Good labour practices are in general all those practical and diverse actions that aim at granting a peaceful access and integration of the trans worker within the labour market and the workplace[204]. Indeed, such practices, which may include, *inter alia*, inclusive company polices, alias profiles, and gender-neutral dress-code, may not only fill the gaps of a lacking regulatory scheme, but may as well be the practical result of strong anti-discrimination laws[205]. The main stakeholders that should perform these initiatives, and that will be considered in the following sections, are definitely employers and employees' representatives. Indeed, this Chapter will provide for several recommendations on which are the good labour practices that should be adopted by employers and how they should be implemented. It also addresses the important role of employees' representatives and collective bargaining agreements, that in Italy are frequently as relevant as ordinary laws. The standards that will be taken into account derive from both international and national sources. This Chapter will show that either in the lack of express legislative protection or with a strong anti-discrimination structure, the practical and grassroot implementation of principles of equality, dignity and self-determination is an essential and paramount requirement for trans workers well-being.

[204] A.L.A. Milano Onlus and others, 'Transessualismo: buone prassi nei luoghi di lavoro' <http://www.portalenazionalelgbt.it/bancadeidati/schede/transessualismo-buone-prassi-nei-luoghi-di-lavoro.html> accessed 7 April 2021.
[205] Citti and others (n 81) 59.

3.2 "Diversity Management": good labour practices to be adopted by employers

Regrettably, trans workers do not perceive Italian companies as trans-friendly neither at vertical, with the employer, nor at horizontal, with the colleagues, level[206]. Indeed, despite an always increasing global awareness on trans persons' struggles, "*many employers remain ill-equipped to create the policies and workplace cultures that would support trans employees*"[207]. As a matter of fact, according to a very recent study made by the Italian National Statistics Institute (ISTAT), in 2019, only 5,1% of the companies considered (i.e., equal to over one thousand companies with more than 50 employees) has adopted at least one voluntary inclusive measure in favour of the LGBT+ workers, with a notable increase among bigger organizations[208]. Nonetheless, it is important to highlight that the main measures adopted by these few virtuous companies, as it will describe below, regard trans workers' needs[209]. Moreover, it is also relevant to distinguish among different sectors as well as size of the organization: indeed, the industrial sector and the small and medium enterprises tend not to be as progressive as other sectors, such as services, tourism, textile etc., or multinationals[210].

But, how to manage diversity within a company? An answer to this question is given by the so-called "Diversity Management" strategy. The aim of this approach, which has Anglo-Saxon origins, is to create the conditions to make a working context inclusive, i.e., able to encourage the expression of the different identities, experiences and predispositions of the people who make up an organization, by enhancing them and, contextually, by achieving the company's objectives[211]. It operates, therefore, on two themes: on the one hand, it targets the achievement of social integration; on the other, it has a strong pragmatic connotation, linked to the good

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[206] Manfredi Morello and others, 'Diversi? Noi La Chiamiamo Unicità: I CSRnatives Alla Ricerca Di Teorie e Pratiche Virtuose Di Inclusione' 27 <https://www.csreinnovazionesociale.it/diversita-noi-la-chiamiamo-unicita-di-csrnatives-network/>.

[207] Christian N Thoroughgood, Katina B Sawyer and Jennica R Webster, 'Creating a Trans-Inclusive Workplace' [2020] Harvard Business Review <https://hbr.org/2020/03/creating-a-trans-inclusive-workplace> accessed 18 May 2021.

[208] ISTAT, 'Il Diversity Management Per Le Diversità Lgbt+ e Le Azioni Per Rendere Gli Ambienti Di Lavoro Più Inclusivi' 5 <https://www.istat.it/it/files/2020/11/Diversity-e-inclusion-management-nelle-imprese-in-Italia-2019.pdf> accessed 1 June 2021.

[209] ibid.

[210] Monica J Romano, 'Sindacati, Associazioni LGBT e Discriminazioni Sul Lavoro' <https://purpletude.com/diversity/sindacati-associazioni-lgbt-e-discriminazioni-sul-lavoro/> accessed 25 June 2021.

[211] Morello and others (n 201) 15.

functioning of the company, which remains its primary context of implementation. Indeed, the logic behind the Diversity Management strategy is to deem diversity as a resource for the company to improve productivity, creativity, and efficiency of the organization[212]. By basing success and promotion of workers solely on talent and capacities, rather than personal characteristics, the performances increase, and the company is able to obtain a competitive advantage both at reputational and substantive level[213]. It also acquires a strong attracting and retention power towards key employees. Overall, Diversity Management aims at promoting a long-term professional growth of their workers through valuing and empowering diversity and granting equal dignity and labour conditions rather than solely protecting them as vulnerable group of workers[214]. The following subsections will describe the main measures that should be generally adopted by employers in order to make this strategy successful.

3.2.1 "Alias Profile" and the use of correct pronouns

As showed in the first Chapter, the Italian LGR system not only could take several years and entail intrusive psychological and medical examinations, but it also only includes transsexual persons and does not provide for a neutral gender marker. Consequently, it is very much frequent that trans workers may still not have their documents matching with their gender identity, because they are still transitioning, or they cannot obtain such rectification. Such discrepancy may create an extraordinarily strong presence of distress and anxiety[215], and may also increase the risk of discrimination both in accessing the labour market and during the working life. For instance, in the survey carried out by Prof. A. Lorenzetti and Dr. G. Viggiani emerged, among others, the testimony of a young trans man, who reported that because of the mismatch between his identity and his documents he never had any feedback when applying for a job[216].

In this context, a measure that could partially solve this problem would be the adoption by the employer of the so-called "Alias Profile". An Alias Profile consists in a company profile which

[212] Arcigay (n 96) 188.
[213] Associazione Parks Liberi e Uguali per il Diversity Management, 'I Vantaggi Del Diversity Management LGBT' <https://www.parksdiversity.eu/cos-e-parks/> accessed 1 May 2021.
[214] Massimiliano Monaci, 'Le Organizzazioni', *Sociologia delle differenze e delle disuguaglianze* (Zanichelli 2011).
[215] Healy (n 17) 19.
[216] Lorenzetti and Viggiani (n 169) 101.

provides only for the elected name and gender of the trans worker without never mentioning in any phase of data management, unless strictly necessary, the name and gender registered on their identity documents[217]. Such policy would allow the trans workers to exercise their right to self-determination, thus having on all the company documents, such as badge, emails, phone numbers and so on, their elected names. Although this measure has been amply adopted in many universities and educational institutes, it is definitely rarely implemented by Italian companies. It is therefore desirable that moves in this sense are taken as soon as possible [218].

Along with the Alias Profile, another important step to adopt is that of avoiding the so-called deadnaming, namely "*the act of referring to trans people by the names assigned to them in infancy in cases where they have rejected those names*"[219], as well as the use of wrong pronouns. Indeed, working life encompasses several and diverse occasions of communications: interviews, formal and informal in person conversations, emails, phone calls, face-to-face or virtual meetings, etc.. In all these circumstances it is pivotal no to use disrespectful language and to avoid misgendering, which make it difficult for trans workers to fully participate in and to fill part of the employer's organization[220]. The best way to overcome these practices is by providing guidelines and trainings to both employers and employees on how to address trans workers. For instance, some good practices in this regard could be that of internally circulating, in agreement with the trans worker, a communication that inform the colleagues about the gender identity and the preferred name and pronouns[221], or, simply checking with the trans workers before using gendered language[222].

3.2.2 Trans-inclusive company policies and supporting transitioning process

An important tool through which companies administer most of the aspect related to workers is company policies, which are programmatic and standardized documents, reinstating and/or

[217] PERsone TRANSgenere, 'Identità Alias' <https://personetransgenere.wordpress.com/risultati-ottenuti-realizzazioni/in-costruzione/> accessed 22 May 2021.
[218] ISTAT (n 203) 11.
[219] Stephen Turton, 'Deadnaming as Disformative Utterance: The Redefinition of Trans Womanhood on Urban Dictionary' (2021) 15 Gender and language.
[220] Healy (n 17) 7.
[221] A.L.A. Milano Onlus and others, 'Transessualismo e Lavoro: Le persone transessuali e transgender nel mondo del lavoro' <https://www.alamilano.org/alamilano/wp-content/uploads/2016/04/ALA-Transessualismo-e-lavoro.pdf> accessed 7 April 2021.
[222] Healy (n 17) 7.

amplifying labour laws guarantees, acknowledged, and signed by each worker. Indeed, there are company policies setting out workplace health and safety, code of conduct, leave of absence, disciplinary actions, terms for the use of company goods, and so on. Among the main adopted ones, there is in general an equal opportunity policy prohibiting any company from discriminating against employees or job applicants on the basis of protected grounds of discrimination prescribed by law. According to the most recent 2018 Parks LGBT Index, a study made on 60 Italian companies shows that 64% of them have expressly insert in their equal opportunity policies both sexual orientation and gender identity[223]. However, alongside undoubtedly relevant invocation of equality principles, trans workers would need express reference and protection in relation to many and more specific aspects generally covered by company policies.

First, disciplinary actions policies should enumerate among the punishable acts also mobbing, harassment and any other mistreatment towards trans workers specifically grounded on their gender identity[224]. A clear statement in this sense may be a strong tool to prevent and dissuade any act of violence towards trans workers. Moreover, such documents should also establish whistleblowing channels that make easy to trans workers to denounce mistreatments or discrimination suffered. Secondly, policies should provide for privacy clauses specifically construed for trans workers in order to avoid unagreed disclosure of their past lives[225].

Thirdly, company policies should expressly consider the specific needs of trans workers who are in the process of transitioning, by, for instance, granting specific leaves for any medical treatments and health insurance that covers any related expenses[226]. In this regard, it is pivotal to individuate the more adequate human resources representatives responsible for dealing with the transitioning process as well as any other trans related demand[227]. A company can go as far as establishing a specific figure, the so-called Diversity Manager, or an entire Diversity Management department to support trans workers' (and LGBTIA+ workers in general) needs and produce trans-specific policies. Moreover, an open dialogue with the trans worker that is

[223] Associazione Parks Liberi e Uguali per il Diversity Management, 'LGBT Diversity Index 2018' <https://www.parksdiversity.eu/lgbt-diversity-index/risultati-lgbt-diversity-index-2018/> accessed 1 May 2021.
[224] Citti and others (n 81) 60.
[225] ibid 61.
[226] Thoroughgood, Sawyer and Webster (n 202).
[227] Guglielmo Faldetta, 'Transformare La Relazione Di Impiego Dei Lavoratori Transgender: Tra Reciprocità e Logica Del Dono', *Transformare le pratiche nelle organizzazioni di lavoro e di pensiero* (Editoriale Scientifica 2015).

undergoing any degree of transition is paramount: asking and collaborating with the employee, if he/she/* feels comfortable to do so, on how to handle such a sensitive process, as well as providing information about treatment options or support groups can undoubtedly create empathy with the trans worker. Finally, policies should also cover, as it will be better explained in the next section, inclusive and neutral dress-code as well as respectful access to lockers and toilets.

3.2.3 Dress-code, lockers, and toilets? Self-determination is the key-word

Although often considered secondary problems, logistic issues such as the use of lockers or toilets, and the use of an appropriate dress-code are of particular concern to trans workers. Indeed, forcing trans workers either to use toilets and lockers based on their sex assigned at birth, or to follow a dress-code that do not represent their gender identity may result in feeling exceptionally distressed and not included[228]. And indeed, the Human Rights Campaign Foundation strongly advices that employees should use the restroom that corresponds to their gender identity, without ever being obliged to use the one suitable to their sex at birth[229]. Moreover, because most workers, not only trans ones, really value privacy, another suggested solution would be to create single-use and gender-neutral toilets alongside sex-segregated ones. If such addition is not feasible due to lack of resources, the employers should think to increase privacy of existing restroom by adding features "*such as flaps to cover gaps in stall doors or stall walls and doors that extend from floor to ceiling*"[230]. Similarly, with regards to lockers, trans workers should be free to choose them based on gender identity and the employers should create at least one private changing and showering area by using stalls or curtains. All these solutions shall be adopted in agreement with trans workers, and workers in general, and as a result of an ongoing dialogue.

Finally, in relation to dress-code, "*gender stereotypes in dress are … to be avoided*"[231]. In this regard, the solutions could be the following: on the one hand, in the event of gendered dress-

[228] ibid 142.
[229] Human Rights Campaign Foundation, 'Transgender Inclusion in the Workplace - 10th Edition' 31–33 <https://assets2.hrc.org/files/assets/resources/Transgender_Inclusion_in_the_Workplace_A_Toolkit_for_Employers_Version_10_14_2016.pdf> accessed 1 June 2021.
[230] ibid 31.
[231] Susannah Taylor and others, 'Effectively Facilitating Gender Transition in the Workplace' (2011) 23 Employee Responsibilities and Rights Journal 101, 108.

code or uniforms, trans workers should be left free to choose the one that most fit his/her/* gender identity and expressions; on the other hand, employers may well adopt, as amply advocated by the Human Rights Campaign Foundation[232], gender-neutral dress codes in order to accommodate also non-binary trans identities. Whatever solutions is adopted by the employer, the important result need to be that trans workers feel comfortable in the clothes that they wear on the workplace. Being understood the importance of these interventions, it is regrettable to highlight that nowadays very few Italian companies have moved in this sense: according to the abovementioned ISTAT survey, only 3% of the companies taken into consideration have adopted inclusive restrooms or lockers, while just 2% of them have regulated on an inclusive dress-code[233]. Overall, there is still a long way to go.

3.2.4 Training, promotion, and participation to external initiatives

"*The difference between mere tolerance and true acceptance lies in the cultural competency of any organization and its members*"[234]. Indeed, the successful implementation of all the above measures can take effect only as long as the relevant stakeholders have been duly informed and trained: imposing certain behavioural rules without explaining what trans identities are and what to do to support them may be pointless. Consequently, the developing of a trans-specific diversity training by human resources or, if existent, the Diversity Manager, seem paramount. These trainings may take different forms: educational courses that raise awareness on specific trans issues, such as transition process, LGR, deadnaming, and pronouns; advocacy internal or external events managed by trans activists or non-profit LGBTQIA+ organizations; occasions of direct contact and dialogue with trans workers that are willing to take part to such initiative[235]. While the percentage of trans-specific educational courses is higher, also thanks to numerous external associations, such as Arcigay, Rete Lenford, and Parks – Liberi Uguali, which offer these kinds of services, the engagement of Italian companies with external initiatives, such as, for instance, PRIDE, is still exceptionally low. According to ISTAT, just 1,8% of the Italian companies have engaged with external activities. However, given that "*more*

[232] Human Rights Campaign Foundation (n 224).
[233] ISTAT (n 203) 5.
[234] Human Rights Campaign Foundation (n 224) 60.
[235] Thoroughgood, Sawyer and Webster (n 202).

general training on gender-identity topics is … essential"[236], corporate diversity trainings need to be improved. To conclude, training, informing, and educating are the only way through which prejudice and stigma against trans workers could be deconstructed.

3.3 The role of Employees' Representatives: trans workers' protection in collective bargaining agreements

Another important stakeholder in the promotion of good labour practices should undeniably be that of employees' representatives. The two main form of it are trade unions and work councils, which, made up by employees and other persons (pensioners, job seekers, students, politicians, etc.), have an important role in representing workers and in monitoring the employers' behaviour. Indeed, while trade unions represent all the workers belonging to a specific business sector, such as industries, services, tourisms, etc., work councils act at company level and speak for workers employed by a same employer[237]. Trade unions negotiate, together with employers' associations, the so-called collective bargaining agreements (hereinafter, "CBA"), which are umbrella agreements on the working conditions of a specific business sector. For instance, in Italy, there are different CBAs respectively for the service, industrial, energetic, etc., sectors. On the other hand, the work councils have more "on the ground" role forwarding to the employers the workers' request and arranging the adoption of agreements at company level encompassing specific needs of the workers employed in that specific company.

Given everything above, it is apparent how such bodies have to play a paramount role in the promotion and protection of trans workers' rights. Firstly, they, especially work councils, should be in the front line in pushing and agreeing with employers the above-described trans-inclusive company policies, by also monitoring the actual implementation of them[238]. Secondly, they should provide immediate, competent, and legal assistance to those who need it. For instance, one of the biggest Italian trade union, CGIL (Confederazione Generale Italiana del Lavoro), has created the so called "Sportello Nuovi Diritti", which is a service expressly dedicated to those workers who are discriminated because of their sexual orientation or gender

[236] ibid.
[237] CMS, 'Employee Representation and Information, Consultation and Co-determination Rights in Europe' <https://cms.law/en/content/download/334104> accessed 9 June 2021.
[238] Citti and others (n 81) 65.

identity[239]. These actions are also truly relevant in order to combat the under-reporting trend outlined in the previous Chapter: with guidance and material assistance, trans workers may feel more confident to opt for the judicial paths and claim their rights. Thirdly, trade unions and work councils should also start negotiating trans-specific clauses to be inserted in both CBAs and agreements at company level. Indeed, these two tools have in Italy an exceptional relevant role: by reinstating guarantees already provided by the labour laws, they also introduce further protections or integrate areas of regulatory gaps, which are legally binding over the signatory parties. For instance, the CBAs could be integrated, among others, with the following: specific leaves of absence that a trans worker may benefit from during the transitioning period or the LGR proceeding; express health insurance coverage for trans-specific needs; the mandatory implementation of the "alias profile"; the insertion among the misbehaviours punishable with disciplinary proceeding of those grounded on transphobia[240]. Finally, more representation of trans workers within both work councils and trade unions is paramount: trans workers should be incentivized and empowered to be members of the employees' representatives in order to make their voices and requests louder.

3.4 The importance of good labour practices

Overall, it is crystal-clear that the adoption of good labour practices by both the employers and the employees' representatives is essential to take forward a culture of inclusion within the workplace. All the Diversity Management strategies and the employees' representatives' interventions above described, if adopted all together and correctly implemented, are indeed able, despite any possible legislative gap, to create working environments made up of individuals who are selected and treated solely on the basis of their working skills and performances, disregarding any personal characteristics. Such good labour practices allow employers to value diversity, to retain key employees, to educate their workers on what gender identity is and its implications, to understand and welcome the requests of trans workers, as well as to empower them. Moreover, Diversity Management not only permit to drastically decrease any discriminatory act both at access to the labour market and during the employment

[239] 'Sportello Nuovi Diritti' <https://www.cgil-agb.it/it/servizi/sportello-nuovi-diritti>.
[240] Canadian Labour Congress, 'Workers in Transition: A Practical Guide for Union Representatives and Trans Union Members' <https://canadianlabour.ca/workers-in-transition-guide/> accessed 1 May 2021.

relationship, but it enables the employers to easily detect any misbehaviours against trans workers and to act accordingly. However, it is also true that the adoption and implementation of such good labour practices are not mandatory in nature: it is up to the will of virtuous companies and employers to determine whether or not and to which extent they should be endorsed. Indeed, as it is clear by the numbers and data reported in the previous sections, an extremely low percentage of Italian companies have taken some actions in this sense, and even where some good labour practices have been adopted it would be interested to assess whether they have been implemented efficiently. Indeed, it is not uncommon the so-called "rainbow washing", i.e., the sporadic, superficial, and decontextualized use of some LGBTQIA+ petitions, for instance the use of the rainbow flag on the company's logo during PRIDE or the generic invocation of equality principles, without an actual implementation of diversity and inclusion policies. In this context, therefore, and as outlined above, the intervention of the employees' representatives is paramount. In particular, in Italy, the role of both work councils and trade unions is rather powerful, and the value of the agreements reached, including the CBAs, is legally binding among the signatory parties. However, the actions taken so far have been rather few. Indeed, the debate at trade unions' level has just started and none of the CBAs have trans-specific clauses so far. All these elements clearly point out that leaving at the willingness of such stakeholders the creation of an inclusive systems for trans workers is still not satisfactory, even though it can certainly bring positive grass roots changes. This is why this work has strongly endorsed the adoption of mandatory laws in the area of trans workers' rights as one of the main tools through which equality and inclusion of this category can really be achieved.

CONCLUSION

In conclusion, what are the reasons behind the still strong discrimination of trans workers in Italy? As amply outlined in the previous chapters the answers to such a research question are multiple. Firstly, it is safe to affirm that the guidelines at International and European level are not always the most clear and progressive ones. As a matter of fact, standards in the context of LGR and employment are mainly set out by soft laws with no binding and mandatory nature, while the few hard laws or judicial rulings adopted on the matter are still not fully inclusive. Indeed, albeit YPs and recommendations from international and regional bodies demands an LGR proceeding solely based on self-determination and labour laws that expressly provide for the discrimination grounds of gender identity and special protections for trans workers, none of the hard laws, such as UN bodies treaties, ILO conventions, ECHR, and ESC, either regulates the LGR requirements to be met or mention gender identity in the context of discrimination. Moreover, while ECHR rulings is still anchored to a binary conception of gender and a medicalized approach to LGR, the ECJ, as also implemented in Recital no. 3 of the Gender Recast Directive, extend EU anti-discrimination labour laws only to transsexual persons who have already undergone gender reassignment surgery, thus excluding those who have not undergone or are not willing to undergo such operations, and non-binary trans persons.

The result of these unclear and unsettled guidelines has been a rather strong legislative fragmentation among EU countries: while many of them have adopted LGR procedures based on self-determination and with a third/neutral gender marker, and trans-specific labour laws, many others have not. Regrettably, Italy has to be counted in the latter group. Indeed, while TSA, which is the only Italian law who addressed transsexual persons, has severe shortcomings, especially including the still pervasive medical and psychological requirements and the failure to address non-binary trans persons, none of the Italian labour laws ever mention either gender identity or a specific protection for trans workers. Despite the few attempts by Italian courts to adopt extensive interpretative approaches so to include protection of gender identity either within the sex grounds or constitutional principles, the mistrust in the Italian legislative framework is still so high, as shown by the different reports above analysed, and the judicial rulings are so unpredictable and inconsistent that trans workers prefer not to try the judicial path, thus substantiating a severe problem of under-reporting. Here it clearly comes the need of a specific law to protect trans workers, also in light of the possible educational role that an

advanced and progressive legislative system may have on society. Indeed, it is apparent that the struggle to understand what gender identity is and, consequently, the importance to preserve it derives from a cultural mind-set that in Italy is still, under certain aspects, very much backward-looking. This is shown by the strength that certain far-right political parties, anchored to strong religious positions and concepts of familisms and patriarchy, have today in our government. This is shown by the way in which media wrongly portray stories or events that involve trans persons, through, for instance, the use of wrong pronouns or the deadname. Ultimately, this is shown by the high number of violence dictated by transphobia[241]. That is why also grass roots initiatives, alongside legislative reforms, are paramount. And indeed, in the employment context, the adoption of trans-specific and inclusive good labour practices may well foster the creation of a favourable and valuable working environment. However, still, as long as mandatory, and binding laws are not adopted and implemented, also the endorsement of these virtuous actions are up to the willingness of companies and employees' representative. And, as shown, regrettably Italian companies are not considered properly trans-friendly, while work councils and trade unions have just start to take trans-specific rights into consideration. Moreover, the empowerment of trans persons both at political and work level is still very much inexistent.

To conclude, from this research clearly emerges that Italy still has a long way to go in the context of trans persons' rights. However, starting with a reform of the labour market and the employment conditions is decisive. As a matter of fact, the labour market could be a pivotal vehicle to eliminate discrimination against trans persons, also in other aspects of their life. This is firstly because, for most persons, the working activities are the main source of income and, consequently, personal autonomy[242]. Secondly, due to the central role that work have in our capitalist society, work can give an accepted social status and social prestige[243]. Therefore, an inclusive and diverse working environment may entrust trans persons with the necessary dignity and rights and empower them to have the proper place in the society.

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[241] Elisabetta Tola and Marco Toscolo, 'Trans Day of Remembrance per Non Dimenticare Le Vittime Della Violenza' *Il Bo Live Università di Padova* (20 November 2020) <https://ilbolive.unipd.it/index.php/it/news/trans-day-remembrance-non-dimenticare-vittime> accessed 5 June 2021.
[242] D'Ippoliti and others (n 2) 7.
[243] ibid.

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