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HATE HOMOPHOBIC CASES AND THE EUROPEAN INVESTIGATIVE ADEQUACY PRINCIPLE. SOME BRIEF REFLECTIONS ON ITS IMPACT ON THE ITALIAN LEGAL SYSTEM

1. *Introduction*

On the European regional level – thanks to both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union case law of, as well as to the normative activity of the same EU – we are witnessing the emergence of some legal principles (as well as to the adaptation of pre-existing ones) aimed at strengthening the protection of LGBTIQ (Lesbian, Gay, Bisexual, Transgender, Intersex, Queer) people.

In this brief paper we will try to describe some of them (mostly the investigative adequacy principle and the gender identity principle), with the aim of understanding how they could influence the legislative proposal on the protection of LGBTIQ people under consideration by the Italian Parliament.

Let us start by reminding that the European Court of Human Rights, by a judgment issued on 14th January 2021, clarified the procedural scope of the European Convention's provisions that prohibit inhuman and degrading treatment and discriminatory behaviours, and their impact on the obligations of Member States of completeness of investigations in the context of criminal proceedings on gender hate crimes.

In particular, the Court focused on the relationship between homophobic crimes and minor crimes in the context of *bis in idem* principle.

Indeed, Croatia, the defendant State, used the fundamental right enshrined in the latter principle as a tool to prevent individuals who committed hate crimes on a homophobic basis from being tried twice: as it emerged before the ECtHR, in fact, Croatian prosecutors, without investigating deeper, used to trial and convict those who committed hate crimes

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against the LGBTIQ community for minor crimes, not related to homophobia. This prevented them to be committed in a second trial for more serious homophobic hate crimes.

The ruling of the European Court represents an interesting precedent that actually impacts on individuals' behaviour: through the condemnation of the State for failing to properly lead criminal proceedings against homophobia, the Court reinforces, albeit indirectly, the prohibition of individuals from engaging in such conducts, this resulting in a reinforcement of LGBTIQ protection.

After a brief *résumé* of both the elements of fact and the pertaining domestic law, and of the decision adopted by the Court, we will proceed to frame it in the context of the Court's case-law, also in order to focus on its impact on the Italian legal system.

We'll then conclude with some more general considerations relating to the discipline of homophobic crimes in Italy in a European perspective.

2. *The* Sabalíc v. Croatia *case*

On 13th January 2010, the applicant, a homosexual woman of Croatian nationality, was physically assaulted in a Zagreb disco by a man whose advances she had been refusing because of her sexual orientation. For the same reason he pushed her against a wall, hit her all over the body and, once she fell to the ground, started even to kick her.

The attack stopped only after one of the woman's friends used his gas pistol to scare the attacker. The victim was accompanied to the emergency department of a local hospital, where she underwent a medical examination that found a hematoma on her forehead, abrasions of her face, forehead and the area around the lips, neck fatigue, chest contusion and abrasions of both palms and knees. The wounds were qualified as minor personal injuries.

The Zagreb police was promptly informed of the fact, identified the attacker through camera footage and questioned both him and the victim (as well as other people that were present) and then started, in the competent Court (*Prekršajni sud u Zagrebu*), a proceeding for violation of public peace and public order. These, in Croatian law, are classified as minor offenses of non-criminal nature. Nowhere in the indictment was to be found any reference to homophobic behaviour or to a hate crime. On April 20th 2010 the accused was sentenced to a financial penalty equivalent to 40 euros.

On 29th December 2010 the victim filed a criminal complaint within the Zagreb Municipal State Prosecutor's Office (*Općinsko državno odvjetništvo u Zagrebu*) for the crimes of attempted serious harm (art. 99, parr. 1 and 4 of the Croatian Criminal Code, CCC) and of violent conduct (art. 331, par. 2 CCC), motivated by the element of hate crime (art. 89, par. 36 CCC), and for the crime of discrimination (art. 174, 1 CCC).

The State Prosecutor's Office asked an investigating judge of the Zagreb District Court to conduct a further investigation in which a medical report confirmed as minor the injuries suffered by the victim, and cross-examined again both the victim and the aggressor.

During the interrogation of the latter, his lawyer informed the judge that he had already been sentenced for minor offenses on April 20th, 2010.

On July 19th, 2011 the Public Prosecutor's Office filed the victim's criminal complaint, since the attacker had already been prosecuted in the minor offense proceedings and the prosecution would therefore breach the *ne bis in idem* principle.

The decision was upheld on appeal and then the applicant, on 5 December 2012 filed an instance to the Croatian Constitutional Court (*Ustavni sud Republike Hrvatske*), referring to the case-law relating to the procedural obligation of the State to investigate acts of violence and crimes of hatred, and complaining the ineffectiveness of both domestic law and the authorities' activities in following effectively up her complaints. She further argued that the lower authorities had misinterpreted the *ne bis in idem* principle and therefore erred in their assessment that the matter had become *res judicata*. However, on January 31, 2013 the Constitutional Court declared the application inadmissible.

So the victim filed her application before the ECtHR.

Before proceeding to frame the decision of the ECtHR in the context of its own case-law, and with the clarification that our attention will essentially focus on procedural issues, we deem necessary to recall the relevant rules contained in the Croatian Code of Criminal Procedure (CCCP).[1]

Art. 2

(1) Criminal proceedings shall only be instituted and conducted upon the order of a qualified prosecutor.
(2) In respect of criminal offences subject to public prosecution the qualified prosecutor shall be the State Attorney and in respect of criminal offences that may be prosecuted privately the qualified prosecutor shall be a private prosecutor.
(3) Unless otherwise provided by law, the State Attorney shall undertake a criminal prosecution where there is a reasonable suspicion that an identified person has committed a criminal offence subject to public prosecution and where there are no legal impediments to the prosecution of that person.
(4) Where the State Attorney finds that there are no grounds to institute or conduct criminal proceedings, the injured party may take his place as a subsidiary prosecutor under the conditions prescribed by this Act.

Art. 11

Nobody can be tried twice for an offence for which he or she has been tried and in respect of which a final court decision has been adopted.

Art. 171, par. 1

All State bodies and legal entities are obliged to report any criminal offence subject to official prosecution about which they have been informed or about which they have otherwise learned.

Art. 173

(1) Criminal complaints shall be submitted to the competent State Attorney in writing or orally.
(*omissis*)
(3) If a criminal complaint was submitted before a court, the police or a State Attorney who was not competent in the matter, they shall forward the criminal complaint to the competent State Attorney.

[1] We use the translation of the same ECtHR.

Art. 174

(1) The State Attorney shall reject a criminal complaint by a reasoned decision if the offence in question is not an offence subject to automatic prosecution, if the prosecution is time-barred or an amnesty or pardon has been granted, or other circumstances excluding criminal liability or prosecution exist, or there is no reasonable suspicion that the suspect has committed the offence. The State Attorney shall inform the victim about his decision ... within eight days (art. 55 CCCP) and if the criminal complaint was submitted by the police, he shall also inform the police.

(2) If the State Attorney is not able to ascertain the reliability of the submissions from the criminal complaint, or if he does not have sufficient information to ask for a judicial investigation, or if he has been otherwise informed that an offence has been committed, and particularly if the perpetrator is unknown, the State Attorney shall, if he is not able to do it himself, ask the police to collect all relevant information and to take other measures concerning the offence (art. 177 and 179 CCCP).

Art. 201

(1) The investigation shall be discontinued by a decision of a three-judge panel of the County Court (Article 20, par. 2 CCCP) whenever it decides about an issue:

(*omissis*)

(3) if (...) there are other circumstances excluding the possibility of criminal prosecution. ...".

Art. 437

(1) The judge [conducting criminal proceedings] shall reject the indictment ... if he or she finds that there is one of the reasons for the discontinuation of the proceedings under Article 201, par. 1 (1)-(3) CCCP.

3. *Investigative adequacy principle and a* bis in idem *perspective*

Before the European Court it was ascertained that in December 2011 four non-governmental organizations representing the interests of the LGBTIQ Croatian community published, with the support of the European Union, a "Manual for the suppression of discrimination and violence against LGBT people".

The Manual pointed out that the aforementioned art. 89, par. 36 of the 1997 CCC, as amended, provided an obligation for the criminal justice authorities to clarify the circumstances of a homophobic hate crime, and that national criminal courts had to considered elements of hate as aggravating circumstances, and not as an autonomous crime.

Moreover, the CCC provisions essentially provided for a merely "formal" protection, rather than an effective one, which made it necessary to further specify the element of hate both in the definition of the crime and in the determination of the connected sanctions, which were done with the 2013 Criminal Code.

The same Manual also analysed the impact of the ECtHR case law, especially the judgment in the *Maresti* case[2], on the practice of national authorities regarding the prosecution of hate crimes it excluded any possibility of a double conviction for both minor offenses and criminal proceedings relating to the same facts. On this basis the Croatian police practice was to initiate proceedings for minor offenses and, subsequently, to file a criminal complaint which, just on the basis of the *Maresti* jurisprudence, ordinarily resulted in the dismissal of the subsequent criminal proceeding, due to a previous conviction for minor offenses, of non-criminal nature, in application of the *ne bis in idem* principle[3].

The applicant before the ECtHR argued that the response of the Croatian authorities to the violent homophobic attack she suffered had been wholly inadequate, since the available evidence clearly showed that it integrated the extremes of a homophobic hate crime.

But the police did not investigate at all the reasons of the assault and initiated just a proceeding for minor (that is to say non-criminal) offenses against peace and public order. What's more, the latter proceeding did not even address the discriminatory reasons of the attack, thus preventing the possibility of prosecuting the aggressor for hate and violence crimes linked to the discriminatory motive.

In particular, the prosecution for minor offenses did not address at all the element of hate crime of the attack, and therefore could not be considered a "criminal proceeding" under the *ne bis in idem* principle.

The Court, in view of the injuries suffered by the applicant and the hatred motivation of the violence, held that the application had to be examined under art. 3 of the ECHR[4]. The duty of the authorities to fully investigate the existence of a possible link between a discriminatory reason and an act of violence could also be read as part of the positive responsibilities imposed on States by art. 14.

It must be said that issues such as those in the *Sabalíc* case could be examined only pursuant to art. 3, that is to say without the emergence of a separate issue pursuant to art. 14, or request the application of both these rules, in conjunction[5]. In the case, in consideration of the fact that the homophobic connotations of the attack had not been adequately addressed by the authorities, the Court decided to proceed in the latter sense, and found that Croatia infringed both obligations.

The Court concluded that, in the context of investigations on episodes of violence, national authorities have a duty to take all reasonable measures to identify any discriminatory reasons.

In particular, the obligation to investigate, while certainly of a non-absolute nature, nevertheless requires the Member States to do everything reasonable to collect and assure any evidence.

States, indeed, have to use any means to discover the truth and provide decisions that are fully reasoned, impartial and objective, without omitting any of the facts that may be indicative of racial, religious, or gender or sexual oriented intolerance.

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[2] ECtHR *Maresti v Croatia* App n. 55759/07 [25 June 2009].

[3] On what we have defined "heterogeneous *ne bis in indem*", see A. PROCACCINO, *Metamorfosi del* ne bis in idem*: da "certezza del diritto" a "divieto di doppio processo" a "possibilità di procedimenti integrati*, in *Regole europee e processo penale*, a cura di D. Chinnici, A. Gaito, Milano, 2018, p. 325 ss.

[4] In this sense one may see ECtHR *Abdu v Bulgaria* App n. 26827/08 [11 march 2014], par. 39; ECtHR *Škorjanec v Croatia* App n. 25536/14 [28 march 2017], par. 36.

[5] See ECtHR *BS v Spain* App n. 47159/08 [24 july 2012], par. 59; ECtHR *Škorjanec*, par. 37.

Moreover, when such an investigation should lead to the establishment of a proceeding before a national court, the latter must meet the requirements of art. 3 of the Convention[6]. Although there is no absolute obligation for all criminal actions to result in a conviction, national courts should under no circumstances leave unpunished serious attacks on physical and mental integrity or punish serious crimes with excessively light penalties, as this will lead to depriving the domestic judicial system of its deterrent effect.

With respect to the *ne bis in idem* principle, so, the Court recalled that art. 4, par. 2 of Protocol No. 7 to the ECHR places a limit on the application of the principle of legal certainty in criminal matters, expressly allowing Contracting States to reopen a case in which, among other things, a fundamental flaw in the proceedings has been detected.

In the case, if there is a serious violation of a procedural rule that damages the integrity of the proceeding, the latter can also be reopened to the detriment of the accused, if he has been acquitted of a crime or punished for a less serious crime than the one provided for by the applicable law.

This violation, in the case, was to be found in the fact that national authorities infringed their obligation to combat impunity for hate crimes in accordance with the standards of the Convention[7].

4. *Public prosecutor's duty to investigate adequately, accurately, and completely. An Italian perspective*

Let us now try to frame how the described judgment, together with the case-law of the Court, can impact on the Italian legal system and on its way of fighting, from a criminal procedural point of view, homophobic hate crimes.

The duty of the national authorities (for Italy, of the public prosecutor) to investigate adequately – that is to say accurately and, therefore, completely – is closely linked with the obligation to conform the crime report to the reality as known during the investigative acquisitions.

This obligation, in the Italian legal system, is connected to art. 112 of the Constitution[8] and any deviation from its track represents "a radically subversive manoeuvre" of the aforementioned constitutional canon[9].

The European Court of the Human Rights, beyond the problems of transplanting its *dicta* into various domestic legal systems, has contributed to defining the principles of the obligation to investigate adequately: before the case we have examined, the Court affirmed the existence of a *general right* to an effective investigation (albeit with the clarification that

[6] The Court here refers *to MC and AC v Romania*, App 12060/12 [12 april 2016], par. 112.

[7] ECtHR *Zolotukhin*, App n. 14939/03 [10 february 2009], paras. 114-115.

[8] "The public prosecutor has the obligation to persecute". Our translation of "il pubblico ministero ha l'obbligo di esercitare l'azione penale".

[9] In this sense see G. Di Chiara, *Pubblico ministero e l'esercizio dell'azione penale*, in *Una introduzione al sistema penale. Per una lettura costituzionalmente orientata*, a cura di G. Fiandaca, G. Di Chiara, Napoli, 2003, p. 235. In the same sense see also C. Valentini, *Obbligatorietà dell'azione penale, patologie della prassi e controlli*, in *Riv. dir. proc.*, 2020, p. 1023 ss.

the same imposes on Member States merely an obligation of means and not one of result) to which is essential timeliness in the acquisition of the evidence[10].

This right can be claimed by individuals against the State, especially in relation to investigations involving facts that impact on inalienable rights.

And in many cases where it has been concerned with outlining these principles, the Court expressly spoke of superficial or negligent investigations[11].

Let us also recall that, with regard to art. 3 (and 2, indeed) of the Convention, Italian scholarship clarified how the duties of both investigating and deciding authorities must first of all start with the "carrying out of (...) *thorough*, *transparent* and *impartial* investigations, which, in the event of ascertained guilt, can lead, at the end of the trial, to apply sanctions that are *proportionate* to the gravity of the crime committed"[12].

In the case *Talpis v Italy*, nevertheless, the ECtHR, appointing just on the time factor, noted that "the mere passing of time can work to the detriment of the investigation, and even fatally jeopardise its chances of success", and that this "will inevitably erode the amount and quality of the evidence available and that the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the complainants"[13] .

And in fact, the *Sabalíc* judgment highlights the importance of the time factor, in particular in the case of sensitive situations, and for the protection of particularly qualified legal positions, as happens in hate crimes on a homophobic basis.

Some other scholars pinned their specific attention to the need to rethink both the structure and the discipline of preliminary investigations, mostly in view of quality, completeness and timeliness of investigations, as sides of the same coin[14].

We are well aware, indeed, that when we invoke the canon of investigation accuracy as a corollary of completeness, which the European Court takes into great consideration, we risk meeting the objections of those who fear neo-inquisitor dangers, holistic yearnings and investigative bulimia[15]. These fears are, in fact, justified by the use that Italian case-law makes of the category of discretion, that, in its essence, is often interpreted as an almost unchecked power.

And this is far from the meaning enunciated by the ECtHR that, as we have seen, speaks of a power which, far from determining *ex se* its own conduct, must only choose, among the possible and legitimate paths, the most reasonable one[16].

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[10] ECtHR *Mojsiejew v Poland* App n. 11818/02 [24 february 2009]; ECtHR *Turan Cakir v Belgium* App n. 44256/06 [10 march 2009]; ECtHR Nagmetov v Russia App n. 35589/08 [5 november 2015]; ECtHR *Buzurtanova v Russia* App n. 78633/12 [5 november 2015].

[11] For a thorough reconstruction one may see A. MOWBRAY, *Duties of Investigation under the European Convention on Human Rights*, in *ICLQ*, 1007, p. 437 ss.

[12] M. MONTAGNA, *Necessità della completezza delle indagini*, in *I principi europei del processo Penale*, a cura di A. Gaito, Roma, 2016, p. 345 ss. See also ECtHR *Krsmanovic v Serbia* App n. 19796/14 [19 december 2017]. Emphasis added.

[13] ECtHR *Talpis v Italy* App n. 41237/14 [2 March 2017] par. 128. In literature see S. DE VIDO, *The ECtHR Talpis v. Italy Judgment. Challenging the Osman Test through the Council of Europe Istanbul Convention?*, in *Ricerche giuridiche*, 2017, p. 7 ss.

[14] R. LOPEZ, *Riflessioni in tema di contraddittorio, concentrazione dibattimentale e ragionevole durata del processo*, in *Scritti in onore di Antonio d'Atena*, Milano, 2015, p. 1643 ss.; C. VALENTINI, *Obbligatorietà dell'azione penale, patologie della prassi e mancanza di controlli*, in *Riv. dir. proc.*, 2020, p. 1206 ss.

[15] One may see M. CAIANIELLO, *Archviazione (diritto processuale)*, in *Enc. dir.*, Milano, 2008, p. 59 ss.

[16] In this sense C. VALENTINI, *Obbligatorietà*, cit., p. 1206.

But this interpretation is very frequent in the vast Italian case-law panorama that deals with the discretion of the public prosecutor on the qualification of the fact within the crime report, as well as with the fundamental, connected, issue of the questionability of its choices in order to verify the term of duration of the investigations.

In addition to the European Court case-law, indeed, several scholarly studies have already showed the need to apply more specific and stringent parameters for the public prosecutor in the management of crime reports and their updates.

They demonstrate the need of a full judicial control on these activities, also for the purposes of avoiding investigative duplications, which could well take place both in the form of the registration of a crime report of a fact substantially superimposable to one on which an investigation has already been carried out, and/or when a decision has been issued (thus as we have seen in the case we are dealing with), or, again in the event of concurrence of crimes, for which a contextual procedural path should be prepared *ab initio*[17].

So, the first of the junctions of the procedural dynamics in which the void is very large, therefore, is the one which relates to the registration of the *notitia criminis*, which determines the *res iudicanda* of the pre-trial phase, that is the "pre-investigation res iudicanda" or, as has been very well said, the "virtual charge"[18].

It essentially constitutes the "investigative case" which will gradually become consolidated into the "judicial case". And to both these one has to look to verify procedural duplications.

5. *Investigative adequacy as a basic principle for a European* minimum *and effective criminal proceeding and the reasonable duration principle*

The case-law of the ECtHR, therefore, requires to consider the principle of completeness of investigations as of fundamental importance for the construction of a European criminal trial that has both a *minimum* negative impact on individuals (and which, therefore, also respects the principle of *bis in idem*), and that, at the same time, allows a fully satisfying protection of victims, especially in cases of particular delicacy of the protected situations, as in hate crimes on a homophobic basis which, as we have seen, are recorded with particular frequency against LGBTIQ groups.

Let us recall that the Strasbourg Court condemned the useless and unprofitable lengthening of the investigation by the prosecutor office (which led to filing due to time-banning) for a not complex fact, and qualified it as a violation of art. 6, par.1 ECHR[19].

This violation (as in the *Sabalic* case) influenced negatively the position of victim of the crime, who was deprived of effective tools to assert his/her claims and to solicit the opening

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[17] About the situations of abuse in updates and substitutions of crime reports and on the so called "omnibus" see in-depth analysis of R. APRATI, *La notizia di reato nella dinamica del procedimento penale*, Napoli, 2010, p. 155; A. MARANDOLA, *I registri del pubblico ministero. Tra notizia di reato ed effetti procedimentali*, Padova, 2001, p. 168, 183, which deals both with the updating of the originally registered fact and the registration of a new fact.

[18] L. CARLI, *'La "*notitia criminis*" e la sua iscrizione nel registro di cui all'art. 335 c.p.p.*, in *Diritto penale e processo*, 2005, p. 559.

[19] ECtHR *Petrella v Italy* App n. 24340/07 [18 March 2021], on which see A. MARANDOLA, *Persona offesa e durata irragionevole delle indagini tra Corte costituzionale e Corte edu*, in *Penale. Diritto e procedura*, 2021 www.penaledp.it/persona-offesa-e-durata-irragionevole-delle-indagini-tra-corte-costituzionale-e-corte-edu/

of criminal proceedings on the facts that had affected him, and reverberated on the simultaneous infringement of the right to an effective remedy pursuant to art. 13 ECHR[20].

The Court had already identified margins and parameters to balance burdens and responsibilities for the reasonable duration in the experimentation of the trial activities between procedural apparatuses and individuals, but what mostly interests us here pertains mostly the pre-trial phase, that is in the full and almost exclusive availability of the public prosecutor.

In relation to the management of this phase, indeed, the Court seems to draw up a dry assessment of negligence against the proceeding apparatus.

What is affirmed, in its essence, is the affirmation of a strict connection between completeness of the investigations and reasonable duration of that phase.

6. *Some remarks on the proposed Italian "Zan" Bill as an implementation of international and European principles*

The procedural context we have briefly described should make it clear that in case of individual behaviours which affect weaker (in the sense of less protected) individuals or communities, European States, in all their expressions, must put in place all the reasonably suitable measures to protect them.

These include the obligation for the public prosecution to carry out an accurate investigation, albeit in compliance with the principle of reasonable duration, in order to properly set up a trial that could lead – if necessary – to the application of a proportionate sanction to the individual that was found guilty of crimes of hate.

In a more general sense, and now in a substantive perspective, we may recall that the right to non-discrimination belonging to LGBTIQ community, which the European Court has found violated, finds its title in many rules of international law, not only of a regional scope such as the cited art. 14 of the ECHR, but even of universal application, as both the United Nations Covenants on civil and political and economic and social rights[21]. Even treaty bodies of the United Nations confirmed that sexual orientation and gender identity are included among the grounds of discrimination prohibited by international law[22].

So, even though no international human rights treaty explicitly mentions sexual orientation, gender identity or sex characteristics, or the right of LGBTIQ people to be not discriminated, we can say that any form of discrimination against them is *already* prohibited in *itself*.

But this doesn't mean, as the Croatian case showed, that there's no need for specific domestic protection tools.

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[20] Given the unreasonable length of the investigations and the absence of a domestic court in which to assert legitimate claims by the offended party, the Court decided for the violation of art. 6, par. 1 ECHR, due to the ineffectiveness of remedies pursuant to the so called *Pinto Act* (legge 24 march 2001, n. 89).

[21] See the UN document 'International Human Rights Law and Sexual Orientation & Gender Identity', at www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf.

[22] For an overview see the UN doc. of 19th June 2018 'The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People. A Programmatic Overview' at www.ohchr.org/Documents/Issues/Discrimination/LGBT/UN_LGBTI_Summary.pdf. In literature see F. D'AMICO, *LGBT and (Dis)United Nations. Sexual and gender minorities, international law, and UN politics*, 2015, London, *passim*.

The international law rules we spoke of, indeed, impose on States specific obligations to protect (with both procedural and substantive rules and regulations), particularly against the situations that most frequently occur, among which, as highlighted, there are violent attacks, beatings, torture, rape and even targeted killings.

No coincidence, so, that the European Parliament, on 11th March 2021, has adopted a resolution[23] which clarifies and recognizes the right to enjoy anywhere on the territory of the European Union of the freedom to live and publicly display one's sexual orientation and gender identity without fear of intolerance, elimination or persecution, and which also states that national authorities, at all levels of governance, should protect and promote the rights of all, including LGBTIQ.

The European Parliament resolution was induced by the recent well-known problems that have seen sad protagonists Hungary and Poland (but also Croatia, as we've seen) who adopted highly discriminatory regulatory and administrative systems (the so called "Family Charters", for example, with a very limited – and traditional – definition of "family", indeed[24]).

The EP reminds all Member States that the foundation of the protection of sexual orientation (of *any* sexual orientation) is contained in the rights to equal treatment and not discrimination, which are fundamental principles of the European Union legal order.

The EP also pointed out that many EU member States do not still have specific laws on non-discrimination which meet minimum standards of protecting people from discrimination, fight hatred and violence based on sexual orientation, and protect gender identity.

And in these days the Italian Parliament is discussing a bill ("Legeg Zan", from the name of one of its promoters) that aims to include in the Italian legal system not only criminal rules that punish hate behaviour on homophobic bases, but also, and perhaps above all, the legal concept of gender identity the EP spoke of in its resolution[25].

The first article of the proposed bill, which represents some kind of a "manifesto" norm, contains a series of definitions that are fundamental, about sex, gender, sexual orientation and, indeed, gender identity.

The latter is one of the most disputed passages of the bill, as just the use of the expression "gender identity" has been strongly criticized.

It, in its essence, refers to the identification perceived and manifested by an individual in relation to the gender, though not corresponding to the biological sex, regardless of whether the person concerned has completed a transition path. Gender identity, in short, indicates the perception that everyone has of him/herself as male, female or other, regardless of whether he/she has undergone the surgical reassignment of sex.

We have to underline as this expression, so feared and criticized by some, is indeed actually contained in international treaties and, as we have seen, applied in the ECtHR case law.

In addition to the cases we have already talked about, let us recall that, from a substantial point of view, the Court found that art. 8 of the Convention was violated in a case where the applicant's health insurance company refused to cover the costs of her gender

[23] European Parliament resolution of 11 March 2021 on the declaration of the EU as an LGBTIQ Freedom Zone (2021/2557(RSP), at www.europarl.europa.eu/doceo/document/TA-9-2021-0089_EN.html.

[24] On the 7th July 2021 the Commission started a legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people. ec.europa.eu/commission/presscorner/detail/en/ip_21_3668.

[25] One may find the proposed text at www.senato.it/service/PDF/PDFServer/DF/356433.pdf.

reassignment operation on the grounds that she had not observed a two-year waiting period prior to the surgery conversion, and that this was upheld by domestic courts[26].

Again the Court, even declaring a non-violation of art. 8 in conjunction with art. 14, used the "identity gender" concept while examining the case of an applicant, transsexual from male to female, that, before the gender conversion, had had a child by his wife. The two separated in 2002 and the applicant complained about the limitations imposed by the judge on her access rights, on the grounds that her emotional instability resulting from the gender change would have risked upsetting her son, who was six at the time[27].

In another case the applicant had been registered as a boy at birth; upon reaching adulthood, the aforementioned had undergone some treatments and, subsequently, a gender conversion operation. The same complained about the lack of legal recognition of her new status due to the absence of legislation on the subject[28].

And the same expression is contained in the directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011[29], in which gender identity is considered a specific reason for persecution[30].

In short, the explicit provision of this identity model is not only completely compatible with the Italian domestic legal order, European and international legal framework , but, if seen through the eyes of the ECtHR case law and EU legislation, even appears due, in the perspective of conforming the Italian legal system to its international and European obligations[31].

[26] ECtHR *Schlumpf v Switzerland* App n. 29002/06 [8 january 2009].
[27] ECtHR *PV v Spain* App n. 35159/09 [30 November 2010].
[28] ECtHR *P. v Portugal* App n. 56027/09 [06 September 2011].
[29] On standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.
[30] See whereas 30, and art. 10, lett. d).
[31] In the same sense see G.M. RUOTOLO, *La spinta internazionale per una legge sull'omofobia*, (15 May 2021), in *Domani*, online at www.editorialedomani.it/autore/gianpaolo-maria-ruotolo-r3xwn8zk.