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**CONTRAST TO HOMO-  
TRANSPHOBIA IN ITALY**

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## EQUAL FOOTAGE

- ▶ Certi Diritti considers discrimination and violence based on sexual orientation, gender identity and expression as unacceptable as the ones based on any other ascribed characteristic of the person such as gender, disability, age, race, nationality or religion.

## NATIONAL STRATEGY AGAINST DISCRIMINATIONS

- ▶ We then consider urgent and necessary the adoption of a national strategy against discriminations and the assistance to the victims of hate crimes. Such a strategy obviously needs to be backed by adequate funding in order to be implemented effectively. The strategy must have an horizontal approach and be linked to other strategies against discrimination based on different grounds already in place.

## FOR AN OPEN UNPROTECTED DEMOCRACY

- ▶ On the other hand, we believe that prohibitions that censor controversial standpoints are often counterproductive to the ultimate goal of promoting equality for LGBTI people and cannot really eradicate the social biases homo-transphobia is based upon. A censorial attitude would risk turning homophobes, xenophobes and racists into martyrs of freedom of thought. Freedom of expression is the milestone of an open unprotected democracy which is the main condition for strategies against prejudice to succeed. Freedom of expression must be cherished because the transformation of the democratic system into an ideologically closed regime is a gradual process and one realizes it only when it is too late, as Gaetano Salvemini put it.

# POSITIVE MEASURES

- ▶ Equality is better promoted by positive measures, such as information and training, which increase reciprocal comprehension and tolerance rather than by censoring standpoints perceived as insulting by the LGBTI community or any other community, for that matter.
- ▶ Such measures are also the best antidote to the abuse of civil, administrative or, even worse, penal sanctions in this field.
- ▶ Among these positive measures there are some particularly important:
  - ▶ training of public officers - prioritizing employees in the departments of Justice, home security, labour, health and education - journalists and athletes;
  - ▶ anti-bullying programs in all schools;
  - ▶ the creation and empowerment of an equality body truly independent from the government
  - ▶ the creation of adequate monitoring and data collection mechanisms on hate crimes, discrimination and incitement to discrimination, hostility or violence involving NGOs.

# INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE

- ▶ In limited circumstances the State, according to international treaties, has to prohibit hate speech against LGBTI people which constitute incitement to discrimination, hostility or violence. This is the case of the International Covenant on Civil and Political Rights, signed by Italy and other 167 parties, that, even if it doesn't mention sexual orientation, gender identity and expression, can be considered to cover these grounds according to the general principle for which lists included in human rights treaties must be interpreted in an extensive manner.

# INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

- ▶ Article 19 (which after stating the right to freedom of expression establishes its limits):
  - ▶ 1. Everyone shall have the right to hold opinions without interference.
  - ▶ 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
  - ▶ 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    - ▶ (a) For respect of the rights or reputations of others;
    - ▶ (b) For the protection of national security or of public order (ordre public), or of public health or morals.

# INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

- ▶ Article 20(2):
  - ▶ Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

## CONTRAST WITH CONSTITUTIONAL PROVISIONS

- ▶ Sometimes, though, the provision of the Covenant may contrast with Constitutional provisions as it is the case of article 19(3) of the Covenant and two Constitutional Court rulings in Italy (nn. 348 e 349/2007) which protect freedom of expression for its individualistic nature.
- ▶ We think that our Constitutional Court rulings should prevail because we share our Constitutional Court idea that the right to freely express one's thoughts should be granted to the individual as such despite the advantages or disadvantages for the State.

## PROHIBITION VS CRIMINALISATION

- ▶ art. 20(2) of the International Covenant on Civil and Political Rights reads “prohibited by law”, not “criminalized”, therefore it doesn’t necessarily require penal sanctions: other kind of sanctions suffice.
- ▶ We believe that penal sanctions are counterproductive and that it would be better to resort only to:
  - ▶ Civil or administrative sanctions and provisions
  - ▶ Accessory sanctions such as public utility labour
  - ▶ Truth and Reconciliation mechanisms which played such a relevant role in South Africa
- ▶ Not only should this be valid for incitement to discrimination, hostility or violence based on sexual orientation, gender identity or expression, but also for all other grounds: gender, disability, age, race and religion.

## PENAL SANCTIONS ARE COUNTERPRODUCTIVE

- ▶ Using the penal lever risks:
- ▶ turning perpetrators into martyrs for freedom of expression
- ▶ causing jurisprudential application of the law to be hardly uniform which would translate into a threat to legal certainty, the rule of law, the principle of equal treatment before the law and, indeed, freedom of expression.

## NO SYMBOLIC USE OF PENAL LAW

- ▶ We believe that penal law should not be used symbolically by passing manifesto-laws which serve merely abstract and ideological functions:
- ▶ “the relation between penal law and cultural norme should be the exact opposite of what enthusiastic supporters of a pedagogical penal code believe”, because “the penal law shouldn't lie dormant values with the threat of the sword [by threatening penal sanctions], but should protect values already lay dormant through dialog and consent” (Fornasari, 2008).

## AGGRAVATING CIRCUMSTANCES

- ▶ We don't want to protect an abstract idea of human dignity, but the concrete dignity of the victim which, in Italy, is already protected by the crimes of slander, libel and vilification which could well provide a specific aggravating circumstances.

# INCITEMENT

- ▶ In any case, when the State prohibits incitement to discrimination, hostility or violence, it's important that it clearly defines the key concept of "hatred", "discrimination", "hostility" and "violence".
- ▶ Special attention should also be given to the concept of "incitement" that should clearly refer to the intent of the alleged perpetrator to make others commit acts of discrimination, hostility or violence.
- ▶ This way it is possible to tell incitement from other expressions which may offend or shock, but which are protected by art 19 of the International Covenant on Civil and Political Rights.
- ▶ To be guilty of incitement the alleged perpetrator should not only mean to share his or her opinion, but he or she should also intend to persuade others to act upon those opinions.

# INTENT

- ▶ A definition of intent should include:
  - ▶ the will to disseminate hatred;
  - ▶ the will to target a group of people with regard to their religion, race, gender, age, disability, sexual orientation, gender identity or expression;
  - ▶ the awareness of the possible consequences of his or her actions.

## ARTICLE 19 TEST

- ▶ We recommend the use of the test devised by Article 19 in their Policy Brief, Prohibiting incitement to discrimination, hostility or violence (<http://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>).

## CIVIL SANCTIONS

- ▶ Among the civil sanctions we suggest:
  - ▶ the right to rectify and answer
  - ▶ some economic or other form of compensations, provided they are proportional and adequately justified and motivated
  - ▶ the obligation to formal and public apologies could be yet another meaning to take into consideration.

## BURDEN OF THE PROOF

- ▶ The burden of the proof should always be shared between the victim and the alleged perpetrator.



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**THANK YOU  
FOR YOUR ATTENTION**