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The “Danish Girls” in the Workplace and Labour Market. Barriers and Prejudices towards Gender Identity¹

Nicola Deleonardis, Caterina Mazzanti*

Abstract

The paper considers discrimination against transgender people - which often takes the form of multiple discrimination in employment relationships and the labour market - adopting an historical approach. In this regard, the focus is on the possible measures in favour of transgender people both in the labour market and in the employment relationship.

Keywords: *Discrimination against Transgender People; Intersectional Discrimination; Employment Relationship; Labour Market.*

1. Introduction

The expression “demographic transformations” refers to the “transitions” experienced by men and women in life and time, as a natural process that

¹ This paper was carried out within the framework of the project “WORKING POOR N.E.E.D.S.: NEwEquity, Decent work and Skills”, CUP G24I19002630001, funded by the programme PRIN 2017. The title takes inspiration by the 2015 Tom Hooper’s movie “The Danish Girl” on gender identity-related issues. Par. 1 and 6 have been written together by Nicola Deleonardis and Caterina Mazzanti. Par. 2, 2.1, 5 and 5.1 are to be attributed to Nicola Deleonardis, while Par. 3, 4 and 4.1 are to be attributed to Caterina Mazzanti.

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has become more complex and unpredictably rapid in modern societies due to the cultural and social changes of the past decades².

Today’s challenge is about rethinking these phenomena from a different point of view. That is the ever-increasing range of people with gender dysphoria: even the “transition” experienced by the transgender population is a face of the multi-faceted process of demographic changes. Nevertheless, people involved in those transformations face enormous problems, depending on the social unacceptance of diversity in all their forms. This provokes a condition of vulnerability, which has to be defined as a «*condition of life in which one’s autonomy and self-determination is permanently threatened by an unstable position in the society and an unequal distribution of resources*»³. Thus, vulnerability is not linked to a biological characteristic of transsexual people, since it emerges when they enter society as transgender people.

LGBTIQ + people, and specifically transgender people, are considered vulnerable by several studies⁴, some of which introduce a new idea of vulnerability, linked to the needs, interests, and values of the person⁵. The European Court of Human Rights⁶ included LGBTIQ+ people among the so-called vulnerable subjects as well, breaking the silence of national legislators, not always able to take a strong position on this matter⁷.

As pointed out by recent studies⁸, the situation of vulnerability worsened due to the pandemic of Covid-19, which forced people to a lockdown at

² J. Bongaarts, *Human population growth and the demographic transition*, in *Philosophical transactions of the Royal Society of London. Series B, Biological sciences*, 2009, vol. 364, 1532, 2985–2990. <https://doi.org/10.1098/rstb.2009.0137>.

³ C. Ranci, *Fenomenologia della vulnerabilità sociale*, in *Rass. it. di sociologia*, 2002, 2, p. 546 ss. See also E. Battelli, *I soggetti vulnerabili: prospettive di tutela della persona*, in *Il diritto di Famiglia e delle Persone*, 2020, 1, p. 283; S. Rossi, *Forme della vulnerabilità e attuazione del programma costituzionale*, in *Rivista AIC*, 2017, 2, p.10.

⁴ See Texas State, *Prevalence of Bullying amongst Vulnerable Populations*, 2013, www.txssc.txstate.edu, where a specific attention is paid for young LGBTIQ+.

⁵ M. Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, in *Emory University School of Law Legal Studies*, 2014, 14-292, p. 101 ss; S. Rossi, *Op. cit.*

⁶ See the decision *Alajos Kiss c. Ungheria* (ric. n. 38832/06), 20 May 2010 and *Kiyutin c. Russia* (ric. n. 2700/10), 10 March 2011.

⁷ B. Pastore, *Soggetti vulnerabili, orientamento sessuale, eguaglianza: note sulla logica di sviluppo del diritto*, in *GENIUS. Rivista di studi giuridici sull’orientamento sessuale e l’identità di genere*, 2018, 2, p. 108.

⁸ A. P. Romero, S. K. Goldberg, L. A. Vasquez, *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA School of Law, Williams Institute, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>; United Nations Independent Expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity – IE SOGI, *Report to the*

home. In this scenario, LGBTIQ+ people are more likely than non-LGBTIQ+ people to have precarious work or even to be unemployed and consequently poor, to be renters, or to be homeless. Furthermore, LGBTIQ+ elders are more likely to live alone than non-LGBTIQ+ elders. In addition, their families reject them due to their personal choices and conditions.

Consequently, vulnerability is caused by discrimination, stigmatization, and violence, which strongly limit the exercise of one's rights⁹. Vulnerability acquires a juridical relevance and must be addressed by anti-discrimination measures, especially in employment, where many transgender people feel to be discriminated against.

According to the principle of substantial equality, the anti-discrimination law is the most important tool, since it aims at protecting those fundamental rights that are not yet fully respected by society. Its goal is to allow full development of personal life, guaranteeing the conditions through which enjoying a series of fundamental goods in the framework of real democracy¹⁰.

To realize the needs and expectations of transgender people, each person should have the possibility to "build his own identity" and follow his inclinations¹¹.

Moving from an analysis of the international and European regulations (par. 2), the paper analyses the historical background of discrimination against transgender people (par. 2.1). Then, it focuses on the issues of multiple discrimination faced by transsexual workers (par. 3) in employment relationships (par. 4, 4.1) and in the labour market (par. 5, 5.1) to return to work its fundamental role: work, as a milestone of our Constitution (art.1), plays a crucial function, since it is an instrument of active citizenship. Thanks to it, one can realize itself: it represents a unique tool for fostering a policy of non-discrimination and inclusion¹².

UN General Assembly: *The Impact of the Covid-19 Pandemic on the Human Rights of LGBT Persons*,

<https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/COVID19Report.aspx>.

⁹ See S. Rodotà, *Eguaglianza e dignità delle persone lgbt*, in A. Shuster (a cura di), *Equality and justice, forum*, Udine, 2011, pp. 11-17;

¹⁰ B. Pastore, *Op. cit.*, p. 105 ff. espec, p. 106.

¹¹ S. Piccinini, *Osservazioni sull'identità e sul diritto di acquisire una "personalità individuata" cioè una identità che favorisca condizioni per una "vita realizzata"*, in *Il Diritto di Famiglia e delle Persone*, 2020, 3, p. 1215 ff.

¹² In this perspective, see M. V. Ballestrero, *Eguaglianza e differenze nel diritto del lavoro. Note introduttive*, in *LD*, 2004, 3-4, p. 501 ss. According to the A., *«the equality on which labour law*

2. The Marginality of Transgender People in ILO Conventions and European Law

With Convention No. 111 of 1958, the ILO intervened to prohibit discrimination based on "*race, colour, sex, religion, political opinion, national extraction or social origin*" (art. 1 par. 1) in accessing employment and professions as well as in working conditions. The discriminatory factors considered by Convention no. 111 show some ambiguities that are still current. In this regard, on the one hand, art. 1 par.1 describes the causes of discrimination mentioned above, on the other hand, art. 1 par. 2 refers to consultation with trade unions and opens to the possibility of extending its application¹³.

These ambiguities have not been overcome by the recent Recommendations No. 205 of 2017 (Recommendation on Employment and Decent Work for Peace and Resilience): whether point 2, letter f ("Guiding Principles") guarantees the "*need to combat discrimination, prejudice, and hatred on the basis of [...] sexual orientation or any other reason*", point 5, ("*Rights, Equality and Non-Discrimination*"), tackles discriminations against minorities, migrants and refugees. However, it glosses over the need for protection of the LTBTIQ+ community, based on both sexual orientation and gender identity.

Furthermore, the Convention 190 of 2019 on the "Elimination of Violence and Harassment in the World of Work" and the related "Recommendation No. 206 of 2019 (R206) offer the opportunity for some considerations. According to the provisions enshrined in points 12

has been based, on the one hand, promotes the rebalancing of forces between strong contractors and weak contractors, and on the other hand, removes obstacles to the equality of workers, limiting the power of employers to differentiate the treatment of workers.». See also F. Marinelli, *Il divieto di discriminazione del lavoratore subordinato: ILO versus Unione europea*, in *DRI*, 2018, 1, p. 197 ff., espec. p. 199. Generally, about labour law, that supposes *«the existence of inferiority of one party compared to the other one, which does not allow participation and equality»*, see C. Smuraglia, *La Costituzione e il sistema del diritto al lavoro: lineamenti di una teoria generale*, Feltrinelli, 1958, p.46; M. S. Giannini, *Profili della protezione sociale delle categorie lavoratrici*, in *RGL*, 1953, 1, p. 3 ff.

¹³ On this point, in fact, there is no prevailing orientation on the part of the scholar. On the one hand, there are those who have highlighted the exhaustiveness of the list, especially in relation to art. 26 of the 1966 Civil and Political Rights Convention (CPRC). See H.K Nielsen, *The Concept of Discrimination in ILO Convention no. 111*, in *International and Comparative Law Quarterly*, 1994, v. 43, pp. 831-832; on the other hand, there are those who consider that the Convention has provided for a list that includes discriminatory factors "*basic, [...] subject to expansion (but never to shrinkage)*", F. Marinelli, *Op. cit.* In favour of this perspective already J.M. Servais, *International Labour Law*, Kluwer, 2014, pp. 137-138.

and 13 II Part (“Protection and prevention”) of R206, member states should guarantee measures to prevent harassment and violence in favour of women or vulnerable groups referred to in art. 6 of the Convention; in addition, as clarified by point 13, the reference to vulnerable groups and groups in situations of vulnerability in Article 6 of the Convention should be interpreted following applicable international labour standards and international instruments on human rights, as the *Yogyakarta Principles*¹⁴.

According to the ILO’s recent studies¹⁵, LGBTIQ+ people, and therefore also transgender people, would seem to be included among the vulnerable subjects, as victims of harassment at work and mobbing.

However, the recent recommendations mentioned above, as well as further ILO studies¹⁶, do not refer to discrimination based on sexual orientation or gender identity.

Focusing on the European Union regulation, the role that the European Union plays in implementing anti-discrimination protection in favour of LGBTIQ+ people has been certainly more incisive, despite being

¹⁴ In 2006, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the *Yogyakarta Principles*: a universal guide to human rights which affirms binding international legal standards with which all States must comply. See <https://yogyakartaprinciples.org/>. About the link between Yogyakarta Principles and ILO Convention, see ILO, *Information paper on protection against sexual orientation, gender identity and expression and sexual characteristics (SOGIEESC) discrimination*, International Labour Organization, 2019, pp. 6-7.

¹⁵ C. Pagano, F. Deriu, *Analisi preliminare sulle molestie e la violenza di genere nel mondo del lavoro in Italia*, Ufficio Oil per l’Italia e San Marino, 2018 p. 15; see it on www.ilo.org/rome. The risk of harassment also affecting LGBTIQ+ people had already been highlighted some time ago by the “Code of Conduct on Sexual Harassment in the Workplace” of 1991, which contained guarantees to safeguard the dignity of homosexual men and women, considered subjects particularly exposed to sexual harassment. See *Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work*, in OJ, 1992, L 49, 1, supported by the Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the Code of Conduct to combat sexual harassment, in OJ, 1992, C 27, 1. In this regard, see also M. Bell, *Sexual orientation and anti-discrimination policy: the European Community*, in Carver, Mottier (edited by), *Politics of Sexuality*, Routledge, Londra e New York, 1998, p. 58 ff.

¹⁶ V. Ilo, *Settore privato, non discriminazione e uguaglianza*, 2021, www.ilo.org. Of the same view, F. Marinelli, *Op. cit.*, according to the A., ‘the fact that the ILO protects some of these factors in acts on the side of Convention C111 does not seem to be a ploy capable of making up for that lack, if it is true that, on the one hand, the majority of the acts in question are not conventions but recommendations and that, on the other hand, none of them – contrary to Convention C111, and Convention C98 – falls within the eight fundamental conventions of the ILO’.

characterized by a considerable delay. Just at the end of the last century¹⁷, the EU included the principle of non-discrimination in Art. 2 of the Treaty of European Union (TEU) as a common principle for all the Member States and as a fundamental right of the European Union (Article 21, par.1 Charter of Fundamental Rights of the European Union)¹⁸.

Moving to our area of interest, the Directive 2000/78/EC establishes equal treatment in employment and occupation for homosexual persons¹⁹, while the Directive 2006/54/EC (also known as “The recast Directive”) introduces the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation. Both directives refer to the principles of direct and indirect discrimination as defined in Directive 2000/43/EC (that already exists in our legal system in Article 4 par. 1 and par. 2, law no. 125/1991 and in Article 43, Legislative Decree no. 286/1998²⁰).

It is certainly known that the anti-discrimination measures for transgender people are included in the notion of gender. Therefore, Directive 2006/54/EC binds all EU states to respect the principle of equal

¹⁷ Indeed, it should be pointed out that already with Recommendation no. 924 of 1981, the Council of Europe urged the member states to decriminalize homosexual acts, to apply an equal age of consent and to promote equal treatment in the labour market; positions reiterated in the recommendation of the Parliamentary Assembly of 26 September 2000, when the Assembly asked the Committee of Ministers to add sexual orientation to the causes of discrimination prohibited by the European Convention on Human Rights. On this point see M. Bonini Baraldi, *La discriminazione sulla base dell'orientamento sessuale nell'impiego e nell'occupazione: esempi concreti ed aspetti problematici alla luce delle nuove norme comunitarie*, in *Diritto delle Relazioni Industriali*, 2004, 4, p. 775.

¹⁸ F. Marinelli, *Op. cit.*

¹⁹ The Directive applies to all types of employment contracts and prohibits direct and indirect discrimination, also prohibiting the employer from allowing others to operate forms of discrimination of all kinds against their employees (so-called horizontal discrimination). The Directive also requires member states to ensure that victims of discrimination can be sued, and that the burden of proof is placed on the defendant accused of discrimination. About the Directive, see, *ex multis*, D. Lioi, *Discriminazioni contro le persone LGBTI sui luoghi di lavoro: strategie di contrasto tra diritti, giurisprudenza e advocacy*, in M. D'Onghia, G. A. Recchia (edited by), *Pregiudizi Discriminazioni Diritti. Orientamento sessuale e identità di genere sui luoghi di lavoro*, Cacucci, 2018, p. 13 ff.; M. Bonini Baraldi, *Op. cit.*; L. Palladin, *L'attuazione delle direttive comunitarie contro le discriminazioni di razza, etnia, religione o convinzioni personali, handicap, età e orientamento sessuale*, in *Massimario di Giurisprudenza del Lavoro*, 2004, 1, p. 39 ff.

²⁰ A first draft distinguishing direct from indirect discrimination in the ILO system can already be found. See ILO, *Equality in Employment and Occupation. General Survey, International Labour Conference, 75th Session, 1988* p. 23, where we can read that “discriminatory treatment may consist both of the adoption of general impersonal standards that establish distinctions based on forbidden grounds”.

treatment between men and women in employment and, in addition, it protects transsexuals and transgender people against any form of gender discrimination²¹. Otherwise, the Directive 2000/78/EC does not include the condition of transsexuality, since it mentions cases of discrimination based on sexual orientation²².

This interpretation is confirmed by the case *P. v. S. and Cornwall County Council* of 1996 of the Court of Justice, which considers discrimination on the grounds of transsexuality as a type of discrimination based on sex²³.

To fill the lack of a specific rule, the Directive 2006/54/EC leads to the applications of the Equal Opportunities Code (Legislative Decree no. 198/2006²⁴) against discrimination based on gender identity. Such a Code prohibits discrimination in the workplace (and beyond) based on gender. It is therefore essential to refer to a multi-level system of law that finds an indefectible reference in the jurisprudence of the European courts.

Indeed, the concept of gender identity seems to play a crucial role in the European law with the Directive 2011/95/EU²⁵, which refers to both,

²¹ Recital 3 of the Directive states that *"the scope of the principle of equal treatment between men and women cannot be limited to the prohibition of discrimination based on whether a person belongs to one or the other sex. This principle, given its purpose and given the nature of the rights it is intended to safeguard, also applies to discrimination resulting from a change of sex"*.

²² The perspective adopted by Directive 2000/78/EC has, in fact, a potentially reductive scope, since it is *"limited [...] not to all forms and ways in which gender is expressed"*. See G. A. Recchia, *Gli strumenti giuridici di contrasto alla discriminazione per orientamento sessuale e identità di genere nei luoghi di lavoro*, in M. D'Onghia, B. Recchia (edited by), *Op. cit.*, p. 71. As noted, in fact, in the first part of a study by the European Agency for Fundamental Rights (FRA), Italy ranked among the nine member countries of the European Union that applied Directive 2000/78 within the minimum limits compatible with the Treaty establishing the European Union. See Fra, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States. Synthesis Report*, 2009, p. 17.

²³ According to the Court, article 5 of Directive 76/207/EEC on the *implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, as an expression of the principle of equality, *"it cannot be reduced only to discrimination due to belonging to one or the other sex"*, but *"may also apply to discrimination which originates, as in the present case, in the change of sex of the person concerned"*, because the dismissal caused by the change of sex would imply *"unfavourable treatment compared to persons of the sex to which she was considered to belong before that operation"*. See judgment of the Court of Justice of 30 April 1996, *P v. S and Cornwall County Council*, C-13/94.

²⁴ And subsequent modifications. See in this regard the Legislative Decree 6 November 2007, n. 196, which made substantial changes to the Decree on equal opportunities, introducing the articles 55 bis-decies.

²⁵ *Laying down 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*.

sexual orientation and gender identity, with the purposes of defining “social group” and therefore to enucleate a common concept of persecution against “membership of a particular social group” (see preamble no. 30 and Article 10 par. 1).

However, these are rather marginal aspects that do not fully satisfy the necessity of strong protection of a category that is assuming, certainly today more than in the past, a greater social weight. The judgment of the European Court of Justice of 1996, as well as the “Recast Directive” (2006/54/EC), confirm the marginality of people who have not completed the transition process, caged within the traditionalist dualism MTF²⁶ in the European agenda.

There is a change of course with the *European Union Strategy 2020 for LGBTIQ+ rights* – the first strategy launched to promote equality in the European Union for LGBTIQ+ people – which aims at giving “*particular attention to the diversity of LGBTIQ people's needs*” in terms of tackling discrimination, ensuring security, promoting equality and inclusion policies (including at work). The same Strategy highlights that the LGBTIQ+ minority is a multi-faceted category, which includes different subcategories, such as transsexual, non-binary, or intersex people, certainly more vulnerable, who experience violence, forms of marginalization, and segregation. Such experiences are more negative for LGBTIQ+ people²⁷.

As in the case of the ILO, therefore, the European Community does not combine the concept of vulnerability with gender identity through a specific legal provision.

2.1 The Historical Background of Discrimination Against LGBTIQ+ People

Focusing on the Italian situation, the LGBTIQ+ community was affected by a social stigma, especially until the end of the twentieth century.

The negative effects are still felt today as it emerges from the lack of specific anti-discrimination protections. The strategy of concealment and persecution of homosexuality during the fascist regime has strongly contributed to feeding prejudices towards LGBTIQ+ people, that still exist within Italian society. During the twenty years of Fascism, LGBTIQ+ people were considered a threat to the fascist community,

²⁶ Transgender individuals can be classified as female-to-male (FTM) or male-to-female (MTF) where the first gender listed is the one assigned at birth.

²⁷ See *Union of Equality: LGBTIQ Equality Strategy 2020-2025*, 2020, p. 5.

which was based on the ideal of the fascist "new man", an emblem of virility and health. Considering that, in the twenty years of totalitarianism the persecution of homosexual persons has not implied a specific normative measure; this "legal abstention" ended with a *de facto* persecution both in terms of criminal law and discriminatory practices at work²⁸. The repressive action was addressed not so much in the case of homosexual behaviour, but towards homosexual persons themselves, especially those "victims of the pathological deformation". According to the fascist mentality, such deviation consists, for men, in expressing feminine personality, in contrast with the canon of virility, and for homosexual women, in expressing masculine identity, since they miss that femininity "inherent in the woman" and deceive the stereotype of "men breadwinner" and "women house-keeper", according to a hierarchical and patriarchal distinction of gender roles²⁹. The externalization of their (homo)sexuality was, therefore, to punish, while the expression of sexual orientation within the private sphere did not produce legal effects.

This is briefly the cultural and legal background of the discriminatory policies in our country. The opposition against transgender people was even stronger when sexual orientation gave way to the individual's need to transition from one gender to another ("MTF" or "FTM").

Such segregation lasted even after the fascist period. In this regard, it is emblematic to remind the positions of the jurisprudence during the 80s

²⁸ It was not, of course, an oversight, but the result of very specific choices. Comparing the text of the Penal Code (1930) with one of its first versions produced during the preparatory work (1926), it is noted that from the final text a provision of the draft that explicitly punished homosexuality in the event of constituting a public scandal has disappeared, pursuant to article 528 p.c. In this proposal, the perpetrator of such conduct was liable to a sentence of imprisonment of 1 to 3 years. The reason for the prediction of this crime was identified in the preservation of the species, being the homosexual act not aimed at reproduction. The provision, however, was later eliminated, an act in agreement with previous legal tradition. However, this certainly did not entail the criminal irrelevance of homosexuality traced back by jurisprudence within the conduct contemplated by art. 527 p.c., those against offenses to modesty, that is, to obscene acts. On the labor law level, homosexuality was often a justifying cause for the assignment to a lower job profile of the worker and in some cases even dismissal. See L. Benadusi, *Il nemico dell'uomo nuovo: l'omosessualità nell'esperimento totalitario fascista*, Feltrinelli, 2005, p. 115 ff.; see also D. Borrillo, *Omofofia. Storia e critica di un pregiudizio*, Dedalo, 2009; U. Grassi, V. Lagioia, G. P. Romagnani (edited by), *Tribadi, sodomiti, invertite e invertiti, pederasti, femminelle, ermafroditi... per una storia dell'omosessualità, della bisessualità e delle trasgressioni di genere in Italia*, Edizioni ETS, 2017.

²⁹ P. Guazzo, *Al "confino" della norma. R/esistenze lesbiche e fascismo*, in P. Guazzo, I. Rieder, V. Scuderi (edited by), *File di "R/esistenze lesbiche nell'Europa nazifascista"*, Ombre Corte, Verona, 2010.

which, dealing with recent demographic transformations, crystallized the stigma of our society. Against such positions, however, the Constitutional Court has ruled with the decision n. 161 of 6th May 1985. The judgment of constitutional legitimacy concerned Articles 1 and 5, Law no. 164 14th of April 1982 (*Rules on the rectification of gender attributions*), by which the legislator admitted the possibility of starting a gender transition and rectification of sex not only "*for a natural and objective evolution of a situation originally not well defined or only apparently defined*", but also in cases motivated by a "*psychic alteration of the sexual instinct of an unclear nature*".

The ruling on the constitutional legitimacy of the described measure had an important impact on jurisprudence and leads to some reflections on the Court of Cassation's decision issued on the 15th of April 1983³⁰, arising the issue of the constitutional legitimacy, which follows the previous jurisprudential guidelines³¹.

Among the various reasons, the Court of Cassation considers that gender transition is not objectively "*natural*" but derives from a "*psychic alteration*". It goes beyond the limits of the "*respect for the human person*" (art. 32 Cost.) and has repercussions "*on people who start a relationship with the person in gender transition*" and therefore in the "*relationship and as it takes place in our society*", in which the "*diversity of sex also corresponds to a diversity of duties and behaviours*", thus causing "*serious consequences in the private life of individuals and the disturbance of collective life*".

According to the decision of the Court of Cassation, the denial of the freedom to start a sex reassignment (transition) for reasons related to gender dysphoria was found not only a valid reference in art. 32 Const., but in the disturbance that it would have caused in collective life and social relations, therefore also at work.

Almost forty years later, it is necessary to analyse what are the labour protections in the Italian legal system in favour of transsexual people, which may be considered vulnerable subjects, strongly exposed to the risk of "*unworthiness*", as "*their risk is a 'civil death' and a progressive expropriation of every right*"³².

³⁰ In G.U. n. 60 of 1984, pages 1755-1759.

³¹ See Cass. n. 1817/72, Cass. n. 3948/75; Cass. n. 1236/75; Cass. n. 2161/80; Cass. n. 1315/81.

³² See S. Rodotà, *Il diritto di avere diritti*, Bari, Laterza, 2015, p. 207.

3. Discrimination against Transgender People: An Intersectional Approach

As highlighted by recent studies and reports³³, the fear of discrimination leads many LGBTIQ+ people to hide their sexual orientation and/or gender identity at work or in public³⁴.

Research shows that transsexual and Intersex people face even more difficulties in social life and at work. In this regard, there are differences between European countries, but there is a lack of appropriate measures to protect them due to cultural barriers.

One aspect has to be pointed out. In these cases, discrimination is not only based on the condition of being transgender or intersex. It is often based on other aspects, which interacting with transsexuality exacerbates the difficulties in everyday life.

The expression “intersectional” or “multiple discrimination” refers to the case of discrimination occurring based on more than one characteristic³⁵.

Regarding discrimination on the ground of gender³⁶, the World Conference for Women held in Beijing in 1995 pointed out that age, disability, social and economic status, ethnicity, and race can create barriers for women. Consequently, it developed a framework for recognizing multiple and coexisting forms of discrimination, which became part of the Beijing Platform for Action³⁷.

³³ See, above all, European Union Agency for Fundamental Rights (FRA), A long Way for LGBTI equality, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf; Stonewall research, *LGBT in Britain, Work Report*, https://www.stonewall.org.uk/system/files/lgbt_in_britain_work_report.pdf.

³⁴ According to the over-mentioned FRA Report, one in four (26%) respondents hide being LGBTI at work

³⁵ Cho S., Crenshaw K., McCall L., *Towards a Field of Intersectionality Studies: Theory, Applications, and Praxis*, in *Signs*, vol. 38, no 4, 2013, pp. 785-810; Bello B. G., *Diritto e genere visti dal margine: spunti per un dibattito sull'approccio intersezionale al diritto antidiscriminatorio in Italia*, in *Diritto & questioni pubbliche*, 2015, vol. 2, pp. 32 ff.; Bello B. G., *From "books" to "action": Has protection from discrimination become intersectional in Italy?*, in *Sociologia del diritto*, 2016, vol. 2, pp. 191 ff.; Fredman, s. (2005). Double trouble: Multiple Discrimination and EU Law, *European Anti-discrimination Law Review*, No. 2, pp. 13-18.

³⁶ Crenshaw K., *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour*, *Stanford Law Review*, 1991, Vol. 43, pp. 1241 ff.; Gottardi D., *Le discriminazioni basate sulla razza e l'origine etnica*, in Barbera M. (a cura di), *Il nuovo diritto antidiscriminatorio*, 2007, Milano, Giuffrè, 1 ff.

³⁷ Beijing Declaration, United Nations, 1995,

A similar action lacks for Transgender and Intersex people, who face the same problem even more than women since they commonly live in a condition of social isolation and stigmatization³⁸.

For this category, there is still no specific regulation or measure aiming at combating discrimination and the lack of proper tools leads them to hide the episodes of violence and harassment at work as well as in private or public life.

“Intersectional lenses” can be very effective in dealing with such kind of discrimination, both in understanding the issue and in adopting appropriate measures to combat it.

The main problem of our society is the acceptance of diversity in all its forms. Discrimination is mostly based on various characteristics, which exacerbate the condition of the vulnerability of the person. Consequently, in the case of transgender people, it could also occur that the discrimination is not only based on their condition of being transgender, but also on the way that such characteristic interacts with other aspects of identity and social position, such as ethnicity or class, or disability: sexuality and disability are rarely considered together and there is a wrong presumption of heterosexuality for disabled people. This false idea may hurt disabled LGBTIQ+ people, who feel to be discriminated against and socially not accepted³⁹.

Differences exist between MTF and FTM people: an American study shows that FTM transgender employees enjoy greater organizational acceptance and superior economic outcomes compared to MTF transgender employees⁴⁰: in other words, the “appearance of a woman” after the transition exposes to the risk of being a victim of discrimination and social unacceptance.

³⁸ IGLYO (International Lesbian, Gay, Bisexual, Transgender, Queer Youth and Student Organization) has invited public institutions to tackle the issue of the 'intersectional discrimination' of LGBTIQ+. See Bello, B.G., *Why do we need that the EU anti-discrimination law and policy go intersectional?*, in *IGLYO on intersectionality*, 2014, vol. 2, http://issuu.com/iglyo/docs/4.09_iglyo_on_intersectionality .

³⁹ The International Lesbian, Gay, Bisexual, Transgender, Queer & Intersex Youth & Student Organization (IGLYO), <https://www.asgi.it/wp-content/uploads/2015/03/IGLYO-On-Intersectionality.pdf> .

⁴⁰ J. Rudin, Y. Yang, L.W. Ross, A. Farro, T.K. Billing, *Are FTM and MTF Transgender Employees Equally Transgressive?*, in *Academy of Management Proceedings*, 2015, 1, <https://journals.aom.org/doi/abs/10.5465/ambpp.2015.15725abstract>; Rudin J., Yang, Y., Ruane S.; Ross L.; Farro, A.; Billing T.K., *Transforming Attitudes About Transgender Employee Rights*, in *Journal of Management Education: A Publication of the OBTS Teaching Society for Management Educators*, vol. 40(1), 30-46.

An intersectional approach can provide for a more complete understanding of the phenomenon, by considering multiple forms of oppression and structural violence.

It can better inform strategies for the prevention of discrimination by considering the variety of characteristics that make the transgender category even more vulnerable.

As shown by the report “A long way to go for LGBTIQ+ equality”⁴¹, those select findings from the 2019 survey on LGBTIQ+ people in the EU, North Macedonia, and Serbia, four in ten respondents (40%) who self-identify as members of an ethnic minority or have an immigrant background pointed out, as an additional ground for discrimination, ethnic origin or immigrant background.

More than a third of respondents (36%) who identify themselves as persons with disabilities indicated disability as an additional ground. In addition, of those who belong to a religious minority, 28% indicated religion as a further ground.

Another aspect that provokes multiple discrimination is the age: the situation seems to be more difficult for both, the elderly and young LGBTIQ+, who face the problem of social exclusion more than in other phases of their lives⁴².

4. Discrimination against Transgender People in the Employment Relationship

According to Art. 4, Const., «the Republic recognizes the right of all citizens to work and promotes those conditions which render this right effective. Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society». Work is not only the milestone of the Italian Republic (art. 1, Const.) and the main source of individual economic independence but is also an irreplaceable opportunity for each person to realize and express his or her personality.

The border between integration and social exclusion of an individual – and this seems to be even more true for transgender people – is represented by a safe, socially accepted, rewarded, and satisfactory job, which fosters social integration as well as the person’s identity.

⁴¹ FRA Report,

⁴² Participants aged 15 to 17 experienced more harassment than their older peers. Yet they also say they see more individuals standing up for LGBTI people at school – and hear more talk of LGBTI issues in educational settings.

What happens if the person declares to be transgender in the workplace, at the time of hiring, or in the employment relationship? In the case of transgender people, the right to work risks being compromised by discrimination, both at the time of hiring and during the employment relationship.

In the first case, the employer deliberately decides not to hire the candidate since he or she is transgender.

Since we do not have any jurisprudential decision on this specific issue, considering the lack of Directive 2000/78/EC that do not specifically protect Transgender people in such circumstance, a comparison with discrimination against homosexual may suggest some reflections, by an analysis of the case “NH vs. Associazione Avvocatura per i diritti LGBTI-Rete Lenford”.

The matter regarded the proper application of Dir. 2000/78/EC to a case of discrimination in accessing to work⁴³ and the balance between different constitutional rights, which have nevertheless a different importance within the Constitutional Charter: from one side, the principle of equality (art. 3) and the right to work (art. 4 and 35) defended by the association Rete-Lenford, operating in Italy in defence of LGBTIQ+ rights; from the other side, the right to freely express one’s thoughts in speech, writing, or

⁴³ Bilotta F., *La discriminazione diffusa e i poteri sanzionatori del giudice*, in *Responsabilità civile e previdenza*, 2018, fasc. 1, pp. 69 ff.; Id., *La molestia verbale viola la dignità della persona che lavora*, in *Responsabilità civile e previdenza*, 2019, fasc. 6, pp. 1881; Allieri G., *L’anticipazione della tutela antidiscriminatoria nell’accesso all’occupazione*, in *il Corriere giuridico*, 2020, fasc. 11, pp. 1329 ff.; Barbieri S., *Dichiarazioni pubbliche omofobe come discriminazione diretta nelle condizioni di accesso all’occupazione e al lavoro. Nota a margine della sentenza “NH”*, in *Eurojus*, 2020, 3, pp. 182 ff.; Borrillo D., *L’annuncio pubblico di una discriminazione futura costituisce già una discriminazione*, in *Responsabilità civile e previdenza*, 2020, 4, pp. 1155 ff.; Cassano G., *La discriminazione collettiva basata sull’orientamento sessuale: spunti per una riflessione sulla tutela in caso di vittima non identificabile*, in *Diritto delle relazioni industriali*, 2020, 3, pp. 893 ff.; Ceccaroni F., *Collective discrimination without an identifiable victim in eu law. Discrimination by public speech*, in *federalismi.it*, 2020, 33, pp. 41 ff.; Perrino A.M., *Diritto dell’Unione europea: condizioni di accesso all’occupazione e al lavoro*, in *Il Foro It.*, 2020, 6, pp. 304 ff.; Ranieri M., *L’insostenibile leggerezza delle parole. La Corte di Giustizia continua il suo cammino per l’affermazione della tutela antidiscriminatoria*, in *ADL*, 2020, 5, pt. 2, pp. 1180 ff.; Recchia G.A., *Il peso delle parole: le dichiarazioni pubbliche omofobiche nell’accesso al lavoro al vaglio della Corte di Giustizia*, in *Il Lavoro nella giurisprudenza*, 2020, 7, pp. 729 ff.; Rizzi Francesco, *Il caso N.H. I rimedi del diritto agli atti linguistici di discriminazione e la libertà di fare le cose con le parole*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2020, 4, pp. 575 ff.; Sperti A., *Il diritto della comunità LGBTI ad una tutela non “illusoria”: recenti sviluppi giurisprudenziali sul conflitto tra la libertà di espressione e il divieto di discriminazione in base all’orientamento sessuale*, in *Giurisprudenza costituzionale*, 2020, fasc. 4, pp. 2249-2263

any other form of communication (art. 21), a freedom that the defendant considered compromised in this specific case, but which nevertheless has been exercised to share a homophobic message.

The association Rete-Lenford promoted a lawsuit due to some discriminatory declarations by a famous Italian lawyer during a radio interview. In this regard, the defendant declared that he would never hire nor collaborate with a homosexual person in his law firm. Therefore, the association decided to sue the lawyer, claiming the violation of the legislative decree 9 July 2003, n. 216, adopted in implementation of the directive no. 2000/78/EC. The dispute had a positive outcome for the association and the judges condemned the lawyer to pay 10.000,00 euros for damages and to publish the decision in a national newspaper. The verdict was then confirmed by the Court of Appeal, so he decided to appeal the Court of Cassation, which opted for leaving the decision to the European Court of Justice.

The main issue is the scope of application of the directive since the lawyer's declarations did not occur in the specific context of a real hiring nor a selective procedure, protected by the over-mentioned European directive, but in the different circumstances of a radio interview.

On this point, the European Court of Justice specifies that the expression «conditions of access to employment and work» is referred to by art. 3, par. 1, a) of the European directive need a uniform interpretation throughout the European Union (paragraph 31 of the ruling). In addition, the anti-discrimination legislation aims at achieving the highest level of employment and social protection, a goal that justifies an extensive interpretation of the directive, which has to be applied also in this specific case.

Focusing on the issue of discrimination in access to work for Transgender workers, the aforementioned directive does not include transsexuality among the reasons for discrimination, so it could not be applied in case of discrimination in access to work suffered by a Transgender person.

Nevertheless, the application of the Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (implemented by Legislative Decree n. 5/2010 in emendation of the Code of Equal Opportunities), points out 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. Given 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» (point 3). The problem is, consequently, the

lack of a specific provision in favour of transgender and intersex people within the Italian legal system, which is still based on a “binary paradigm”⁴⁴.

Regarding the protection of transgender people in employment, important interventions have been taken by some Italian regions⁴⁵. Tuscany was the first Region in Italy to promote a law against discrimination against homosexual and transsexual/transgender people. This law aims at adopting policies to recognize each person «the free expression and manifestation of their sexual orientation and their gender identity», guaranteeing both the right to self-determination and access on equal terms to the interventions and services provided by the region. The areas of competence of the law, therefore, concern professional training and labour policies, health and assistance, and the promotion of cultural events. For each of these areas, the regulation ensures effective equal access and treatment of LGBTIQ+ people in accessing regional services. To fill the gap that still exists in the national regulation, it should be necessary to adopt an extensive interpretation of the Equal Opportunity

⁴⁴ See p.7 del FRA Report, 2008: «Furthermore, the report finds that the issue of transgendered persons, who are also victims of discrimination and homophobia, is adequately addressed in only 12 EU Member States that treat discrimination on grounds of transgender as a form of sex discrimination. This is generally a matter of practice of the anti-discrimination bodies or the courts rather than an explicit stipulation of legislation. In two Member States this type of discrimination is treated as sexual orientation discrimination. While in 13 Member States discrimination of transgender people is neither treated as sex discrimination nor as sexual orientation discrimination, resulting in a situation of legal uncertainty».

⁴⁵ Regional Law of Toscana 15.11.2004, n. 63, «Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere». In addition, other Italian regions adopted similar regulations. See, in particular L.R. Liguria 10.11.2009, n. 52, «Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere», L.R. Marche 11.02.2010, n. 8, «Disposizioni contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere», L.R. Piemonte, 23.3.2016, n. 5, «Norme di attuazione del divieto di ogni forma di discriminazione e della parità di trattamento nelle materie di competenza regionale», L.R. Umbria 11.4.2017, n. 3, «Norme contro le discriminazioni e le violenze determinate dall'orientamento sessuale e dall'identità di genere», L.R. Emilia-Romagna 1.8.2019, n.15, «Legge regionale contro le discriminazioni e le violenze determinate dall'orientamento sessuale o dall'identità di genere», L.R. Campania 7.8.2020, 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)». Recently, Delibera della Giunta regionale Toscana n.329 del 29.03.2021, «Accordo tra Regione Toscana e Pubbliche Amministrazioni della Regione Toscana aderenti alla Rete RE.A.DY. per la promozione della rete, per rafforzare la collaborazione tra le Pubbliche Amministrazioni locali e l'integrazione delle relative politiche a livello regionale»

Code in the light of the aforementioned directive, which has a wider scope than the Directive 2000/73/EC, since it finds application in case of discrimination against transgender people as well, even in access to employment. As highlighted by point 6, «Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training, and promotion. They should therefore be prohibited and should be subject to effective, proportionate, and dissuasive penalties».

However, the social marginalization of Transgender people and the fear of being a victim of harassment lead them to renounce legal actions. In most cases, the discrimination is hidden, leading, among other things, to a serious lack of statistical data on the phenomenon, especially in Italy.

The second critical circumstance, in which transgender people risk being a victim of discrimination is the workplace. Some research shows that survey respondents feared that their sexual orientation or gender identity could lead to the loss of their jobs. Most transgender respondents said that they feared that coming out or transitioning at work would mean losing their jobs.

In the interviews, discriminatory hiring and firing were recounted as both a fear and a reality. Being transgender is a visible condition. This appearance has an immediate impact on all aspects of emotional, family, and even working life, immediately placing the person at risk of discrimination.

At work, the coming out of the person can even provoke vertical mobbing, therefore by management and employers, or horizontal, by colleagues.

Mobbing represents a difficult situation to manage, as it is difficult to prove. Thus, the lawsuit exposes the person to the risk of negative consequences at work, worsening his condition because he or she has sued the author for such behaviour. In addition, it is difficult to have witnessed mobbing episodes, and consequently, the person is induced to resign spontaneously.

From this point of view, it should be necessary a legal intervention aiming to introduce a lightened burden of proof, similar to the one regulated by Art. 40, Code of Equal Opportunity. In case of mobbing and discrimination, it is necessary to guarantee the right of defense (art. 24 of the Constitution), a fair trial (art. 111 of the Constitution), and the

substantial equality (art. 3, paragraph 2, of the Constitution) in favour of a person, who finds itself in a weaker condition than the employer's one⁴⁶. This situation is characterized by an imbalance between the parties, to the detriment of the employee.

The asymmetry shows itself through different aspects, first that of collecting proofs, so it is necessary to adopt a solution more appropriate than the one achieved by the ordinary rules (art. 2697 c.c.), which due to their rigidity would discourage the applicant from taking legal actions⁴⁷.

From this point of view, the lightening of the burden of proof can be justified in the light of the principle of substantial equality (Art. 3, par. 2, Const.), since it removes a real obstacle to the full recognition of a right. According to Art. 3, par. 2, Const., the condition of vulnerability (and, therefore, of diversity) has to be protected.

Finally, it should be noted that the situation of discrimination at work worsened during the Pandemic of Covid-19⁴⁸. During the outbreak, many LGBTIQ+ people have been forced to spend more time at home. But being at home does not mean this kind of abuse and discrimination stops. British research⁴⁹ shows that LGBTIQ+ employees have been the target of negative comments or conduct from work colleagues in the last year

⁴⁶ R. Sacco, *Presunzione, natura costitutiva o impeditiva del fatto, onere della prova*, in *Riv. dir. civ.*, 1957, I, 399 ff.; M. Taruffo, *Presunzioni, inversioni, prova del fatto*, in *Riv. trim. dir. proc. civ.*, 1992, 733 ff.; L. De Angelis, *Profili della tutela processuale contro le discriminazioni tra lavoratori e lavoratrici*, in *RIDL*, 1992, 1, p. 457; A. Vallebona, *L'inversione dell'onere della prova nel diritto del lavoro*, in *Riv. trim. dir. proc. civ.*, 1992, 809 ss.; G. Balena, *Gli aspetti processuali della tutela contro le discriminazioni per ragioni di sesso*, in *Giorn. dir. lav. rel. ind.*, 1995, p. 435; A. Guariso, *I provvedimenti del giudice*, in M. Barbera (a cura di), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Milano, 2007, p. 579 ff.; L. Curcio, *Le azioni in giudizio e l'onere della prova*, in *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, op. cit., 529 ss.; G. Ficarella, *La tutela giudiziaria contro le discriminazioni tra passi indietro e novità*, in *Il Giusto proc. civ.*, 2010, 3, 252; R. Santagata de Castro, R. Santucci, *Discriminazioni e onere della prova: una panoramica comparata su effettività e proporzionalità della disciplina*, (parte I), in *ADL*, 2015, 3, 534 ss.

⁴⁷ Taruffo M., *La valutazione delle prove*, in Taruffo M. (a cura di), *La prova nel processo civile*, in P. Schlesinger, *Trattato di diritto civile e commerciale*, Milano, 2012, pag. 207 ss.; Tarzia G., *Manuale del processo del lavoro*, Milano, 1999, 366 ss.

⁴⁸ United Nations Independent Expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity, *Report to the UN General Assembly: The impact of the Covid-19 Pandemic on the Human Rights of LBBT Persons*, in <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/COVID19Report.aspx>; Kneale D., Bécares L., *The mental health and experiences of discrimination of LGBTQ+ people during the COVID-19 pandemic: Initial findings from the Queerantime Study*, in *medRxiv*; doi: <https://doi.org/10.1101/2020.08.03.20167403>.

⁴⁹ <https://www.stonewall.org.uk/resources/lgbt-britain-bi-report-2020>

because they are LGBTIQ+. In fact, with more people communicating through private messaging, it may be harder for managers or HR professionals to control employees and stop such conduct.

In addition, for many people, especially Transgender, home may be a place even more unsafe than the workplace: some ethnic groups are less likely to be open about their sexual orientation or gender identity around family and accepted by familiars. So, it is necessary to adopt urgent measures to ensure that pandemic responses are free from violence and discrimination⁵⁰.

4.1. How to Prevent and Combat Discrimination in the Employment Relationship: Some Proposals

To avoid discrimination in the workplace, it might be suggested to operate on two different levels: prevention and sanction.

Preventing discrimination means, first, spreading an inclusive culture within the work environment, in which diversity is promoted as a value and an irreplaceable resource for all.

There are different tools to achieve this goal. The first profile on which it is required to pay particular attention is that of the language⁵¹, since it is a vehicle of discrimination and violence within the working context, starting from the moment of the hiring.

Thus, the use of a gendered language is a way to avoid discrimination. As it is known, English does not have a grammatical gender as Italian or other languages do. Nevertheless, regardless of this linguistic difference, both in English and in Italian⁵² exist use of gender-specific terms for referring to professions or people, such as “businessman” or “waitress,” or using the masculine pronouns (he, him, his) to refer to people in general, for gender-neutral concepts⁵³. It is the inadequate use of the

⁵⁰ United Nations Human Rights, *Report on the impact of the COVID-19 pandemic on the human rights of LGBT persons*, in <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/COVID19Report.aspx>.

⁵¹ Robustelli C., *Lingua e identità di genere*, in *Studi italiani di linguistica teorica e applicata*, 2000, vol. 29, 507 ss.;

⁵² Lepschy G., *Sexism and the Italian language*, *The Italianist*, 1989, 7, p. 158 ff.; Sabbatini A., *Raccomandazioni per un uso non sessista della lingua italiana*, Presidenza del Consiglio dei Ministri, Roma, 1987

⁵³ Holmes J., *Speaking up: understanding language and gender*, in *Journal of Multilingual and Multicultural Development*, 2020, 41, 7, 652-654.

language since it is based on a binary model and it, therefore, neglects existing differences, as in the case of non-binary persons.

It is not just a matter of grammar. The use of gendered language reflects a specific social prototype, based on a patriarchal model that has existed in our culture and still survives in some realities: even the legal language often shows an improper use of the words. Therefore, it must adapt to the changes and needs of society, precisely because law and language are closely connected, and “language realizes law through its words⁵⁴.” This can lead women and LGBTIQ+ to experience social marginality and invisibility, if not real discrimination or violence, even in the workplace. Concerning transgender people, choosing the proper words in communication might be respecting the principle of identity: if the person we are talking with is in transition from masculine to feminine (MTF), it does not matter at what stage of the transition she is, if she feels that she is a woman, she must be treated as such. The same goes for FTM people⁵⁵. This rule is very important for both cases, that of the hiring and that of the employment relationship. Therefore, it is correct to use proper words, taking into consideration the person’s appearance.

The correct use of the language might reveal a practice and a policy aimed at enhancing diversity within the work environment - be it gender, sexual orientation, ethnic origin, disability, etc. - supporting different lifestyles and responding to their distinct needs. In this sense, one might refer to diversity management as an important tool for the inclusion of diversity in the workplace, according to the Directive 2006/54/EC, point 7: “In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and access to employment, vocational training and promotion, per national law and practice.”

Diversity management is important from an ethical point of view since it promotes integration and a culture of respect for diversity. In addition, it

⁵⁴ Cavagnoli S., *linguaggio giuridico e lingua di genere*, in Bachiddu E., Pasquino M., *L’Università e il Work.life balance. Aspetti culturali, normativi e diversity management*, 67 ff., Università degli Studi di Roma Tor Vergata, Comitato Unico di Garanzia, https://www.scosse.org/wordpress/wp-content/uploads/2016/03/Universita_e_Workflow_balance_O.pdf#page=66.

⁵⁵ <http://www.parlarecivile.it/argomenti/genere-e-orientamento-sessuale/transessuale.aspx>

has also a positive effect on the level of “employer branding”⁵⁶. It improves not only the image of the company but also contributes in terms of performance of the business because, in an open-minded environment, people are subjected to less stress and work better.

The inclusion of diversity contributes to innovation and change because it allows for the exploitation of different points of view.

However, in case there are episodes of discrimination, the existing sanctioning instruments should be enhanced: so, it might be necessary to operate even on a “punitive” level.

According to the European directives, the compensation for damage has also punitive and preventive functions (Art. 15, dir. 43/2000/EC, Art. 17, dir. 78/2000/EC, Art. 8-inquires, dir. 73/2002/EC, Art. 25, dir. 54/2006/EC).

In this regard, the Directive 2006/54/CE, which also applies to discrimination arising from the gender reassignment of a person (point 3), establishes that «[...] These forms of discrimination [...] should therefore be prohibited and should be subject to effective, proportionate, and dissuasive penalties» (point 6).

This dissuasive effect is closely related to the “adequacy” of the measure, which inevitably depends on the extent of the compensation⁵⁷. In fact, in order not to frustrate this vocation, the European legislator has imposed the general prohibition of limiting the compensation within a maximum limit by law. Thus, according to point 33, Directive 54/2006/EC, «It has been established by the Court of Justice⁵⁸ that to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate about the damage sustained. It is, therefore, appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to consider his/her job application».

⁵⁶ See the case of the IKEA campaign “#fateloacasavostra” to fight discrimination and violence against LGBTIQ+ on the occasion of the international day against homophobia on 17th May; See also the activity of “Parks - Liberi e Uguali”, a non-profit association that for the past ten years has been involved in helping companies to create business opportunities related to the enhancement of diversity, with a prevailing focus on sexual orientation and gender identity.

⁵⁷ Amoriello L., *Alla ricerca della dissuasività. Il difficile percorso di affermazione dei principi UE in tema di danno non patrimoniale da discriminazione*, in WP C.S.D.L.E “Massimo D’Antona”, 264/2015, 3

⁵⁸ European Court of Justice, 2.8.1993, C – 271/91, *Marshall c. Southampton Southwest*, in *Riv. it. dir. lav.*, 1994, II, 3.

5. Discrimination against Transgender People in the Labour Market

The protection of transsexual workers in the labour market offers the opportunity to tackle the issue from two points of view: the first one is that of the anti-discrimination law and the second one is that of the labour market law. From an anti-discrimination perspective, it must be highlighted the level of protection afforded to this category as vulnerable persons. From a labour market law point of view, it has to be verified the effective functioning of active labour market policies in Italy.

The goal of extending the employment service for transsexual people had already been expressed by the European Parliament with Resolution no. 1117 of 12 September 1989, which highlighted the high unemployment status of transsexual people (60%-80%) and the need for placement measures to facilitate their entry into the labour market⁵⁹.

After about 30 years, many analyses and research converge on an interpretation of the situation of discrimination at work for transsexual people certainly not comforting, showing marginal attention of the European Union towards the vulnerability of such category. This vulnerability is exacerbated by the Covid-19 pandemic, due to an economic recession that, by swelling the ranks of the unemployed, stirs up stereotypes and prejudices and leads to discriminatory behaviour⁶⁰.

It has already been argued that work plays an important role in social inclusion, both for the availability of income, and therefore of individual economic autonomy, and for the social status connected to it.

In the case of transgender people, however, a third factor points out how labour market policies are essential to achieving the anti-discrimination goal. If we exclude the Basic Income (so-called “Reddito di Cittadinanza”), and the other emergency measures launched by the “pandemic legislators”⁶¹, the Italian Welfare State reveals its insurance nature, linked to social security and, where it exists, to the main role played by families, that build a strong network in supporting their

⁵⁹ See point no. 12 of the Resolution no. 1989/1117

⁶⁰ G. Mattei, T. Russo, T. Addabbo, G. M. Galeazzi, *The COVID-19 recession might increase discriminating attitudes toward LGBT people and mental health problems due to minority stress*, in *International Journal of Social Psychiatry*, 2021, v. 67(4), p. 400–401. The European Union had also expressed itself on this point, see Ilga Europe, *COVID-19 and specific impact on LGBTI people and what authorities should be doing to mitigate impact*, 2020; see it on www.ilga-europe.org.

⁶¹ On this point, reference is made to the volumes of D. Garofalo, M. Tiraboschi, V. Fili, F. Seghezzi (edited by), *Welfare e lavoro nella emergenza epidemiologica. Contributo sulla nuova questione sociale*, Adapt University Press, 2020-2021.

members to fill the lack of government intervention. Nevertheless, the poor support by familiars of transgender people, due to widespread prejudices and preconceptions, even within the family, elevates work as the only solution for transgender people's emancipation since they are constantly experiencing situations of forced social exclusion. In addition, work is the only factor to access a series of public goods and services⁶².

According to some recent studies by the European Commission, in 2019 only 51% of transsexual people are in employment as employed or self-employed persons⁶³; a detail that becomes even more worrying if we consider that the European average of the employed workforce stands at 69.3%. The exclusion from the labour market shown by these data, which does not differ particularly from previous Italian⁶⁴ and EU⁶⁵ studies, demonstrates the difficulty in accessing the labour market.

These difficulties arise because of a gender expression that does not conform to the biological one. Unlike homosexual people, transgender people can hardly evade discrimination by concealing their identity and nature, greatly increasing the chances of suffering discrimination. The position of vulnerability and the impossibility of hiding their gender identity, allow us to hypothesize that in general homosexual or bisexual people are mostly affected by discrimination in the workplace, while transsexual and transgender people are subjected to stronger discrimination in access to work and dismissal⁶⁶.

Several causes hinder access to work for transgender people, such as the non-compliance of gender expression with the personal sex, further delicate in the initial phase of the "Real Life Test", when the personal documentation does not correspond to the gender of the person or

⁶² Unar, *Le buone pratiche antidiscriminatorie a livello internazionale nello specifico ambito dell'orientamento sessuale*, 2012, p. 47.

⁶³ The 8.3% are in a state of not employment or unemployment, 26% are students, while about 11% were in unpaid or voluntary work, incapacity for work or civil or military service. V. European commission, *Legal gender recognition in the EU: the journeys of trans people towards full equality*, Directorate-General for Justice, and Consumers, 2020, p. 67.

⁶⁴ Research from 2011 shows that 45% of employers (out of 40 cases) refused the job offer of transgender people. See Arcigay, *Io sono, io lavoro. Report finale di prima indagine italiana sul lavoro e le persone lesbiche, gay, bisessuali e transgender/transessuali*, Tip. Negri, 2011, p. 47.

⁶⁵ According to some 2017 studies, about 37% of people surveyed felt discriminated against for their gender identity when looking for a job. See Fra, *Being Trans in the EU. Comparative analysis of data from the EU LGBT survey*, 2017, p. 4.

⁶⁶ Unar, *Op. cit.*, p. 42.

problems of (alleged) incompatibility with some professional sectors⁶⁷. A kind of resignation forces transgender people to accept the ordinariness of these obstacles, which, also due to unawareness of their rights, are even more common in the search for a job. Their research is directed towards "trans-friendly"⁶⁸ occupations and, therefore, it frustrates the possibility of choosing a job congenial "to their abilities" and skills.

The data show reduced possibilities to access to work: their position of vulnerability in the labour market obliges transsexual people to accept penalizing contractual conditions or to take refuge in the informal (or irregular) labour market, including prostitution for transsexual "MTF" people⁶⁹. Those aspects often lead to the result of multifactorial discrimination, linked not only to transsexuality but ethnicity too⁷⁰: the difficulty of coming out one's gender identity, especially in the absence of a psychic-biological reconciliation process not yet started in the country of origin, is an obstacle for recognition of international protection by the territorial commissions⁷¹.

The lack of specific regulation in both the European Union and in the Italian legal system (except in the case of Directive 2011/95/EU and the Directive 54/2006/EC) exacerbates discrimination based on gender identity and at the same time, it dissuades discriminated persons from reporting harassments and from claiming equal treatment at work.

If concerning anti-discrimination protections based on sexual orientation, the current legal system has a significant number of pronouncements – more at the supranational level⁷² than at the Italian one⁷³ – there are few

⁶⁷ Healthcare, education, and law enforcement are perceived as particularly difficult areas to work; see European Commission, *Legal gender recognition in the EU*, cit. p. 82.

⁶⁸ European Commission, *Legal gender recognition in the EU*, cit., p. 76.

⁶⁹ See E. Abbatecola, *Trans-migrazioni. Lavoro, sfruttamento e violenza di genere nei mercati globali del sesso*, Rosenberg & Sellier, 2018, p. 90 ff., where it emerges that, due to their economic and social vulnerability, the sex market seems to be the most available outcome in front of a society still closed to the changing and which is discriminating against those who violate the taboo of a gender identity that doesn't conform to the biological body.

⁷⁰ European commission, *Legal gender recognition in the EU*, cit., p.77.

⁷¹ See P. Palermo, *Orientamento sessuale e identità di genere nel sistema dell'asilo in Italia anche alla luce della riforma Minniti*, in *GenIUS, Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 2018, 2, pp.43-59. In this regard, the ETUC calls for the inclusion of the cross-sectional category of LGBTIQ+ asylum seekers among vulnerable persons, in order to facilitate the recognition of international protection and offer them decent and safe jobs. ETUC, *Op. cit.*, p. 3.

⁷² See here just the first application of Directive 2000/78/EC, Court of Justice. EU, 25 April 2013, C-81/12, *Asociația Accept c. Consiliul Național pentru Combaterea*

pronouncements concerning discrimination in terms of access to work for transgender people, testifying to the ineffectiveness of the inclusion of discrimination based on gender identity among those generically gendered, therefore based on the sex of the discriminated subject.

This is what emerges from some rulings of various national courts. In 2018, in Hungary, an employer's discriminatory behaviour against a transgender "MTF" person who had applied for a job as a sales assistant was found. The woman had not yet changed her name, but she had started the transition path by dressing and behaving like a woman. According to the Court's decision, the discrepancy between the applicant's sex and her behaviour was the cause of discrimination based on gender. The Dutch Equal Treatment Court reached the same conclusion, according to which the refusal of a taxi company to hire a transsexual woman, considering her "*inadequate*" for the job position, is discriminatory had to be considered discriminatory⁷⁴.

Going beyond the European Union borders, in the case *Schorer v. Billington* of 2008⁷⁵, in the United States, the Columbian Supreme State Court

Discriminării. On this point, see L. Calafă, *Homophobic statements in football: the FC Steaua Bucharest case and discrimination on grounds of sexual orientation at the Court of Justice*, in RIDL, 2014, 4, p. 133 ff.

⁷³ The trial is the first case of application in Italy of the prohibition of discrimination on the basis of sexual orientation with reference to employment and working conditions, according to the provisions of Legislative Decree no. 216/2003 implementing Directive 2000/78. The ruling of the Court of Justice, *NH v. Associazione Avvocatura per i diritti LGBTIQ+*, case C-507/18, dealt with the story of a well-known Italian lawyer, who, interviewed in 2013 during the telephone broadcast "La zanzara", made statements offensive and detrimental to the dignity of LGBTIQ+ people, emphasizing that in his professional office he would never have hired or accepted the collaboration of gays or lesbians, which could have "*disturbed the environment*", creating "*a situation of great difficulty*". After being unsuccessful in the first (Court of Bergamo, 6 August 2014) and in the second instance of judgment (Court of Appeal of Brescia, 11 December 2014), the lawyer appealed to the Court of Cassation (Cass. civile, 20 July 2018, n. 19443). Although there was no specific complainant or identifiable victim, the substantive courts concluded that "*conduct which, only on an abstract level alone, prevents or makes it more difficult to access employment is also liable to constitute discrimination.*" On this point, *ex multis*, A. Sperti, *Il diritto della comunità LGBT ad una tutela non illusoria*, in *Giur. Cost.*, 2020, 4, p. 2249 ff. About the Cassation judgment see D. Lioi, *Op. cit.*, in M. D'Onghia, G. A. Recchia (edited by), *Op. cit.*, pp. 35-39.

⁷⁴ For both cases recalled (and others), see European Commission, *Trans, and intersex equality rights in Europe. A comparative analysis*, Directorate-General for Justice and Consumers, 2018, p. 99 ff.

⁷⁵ See *Schorer v. Billington*, *Civil Action n. 05-1090*, on website <https://www.courtlistener.com/opinion/1497100/schroer-v-billington/>.

declared that the behaviour against Shorer based on sexual stereotypes was discriminatory, since it violated the *Title VII of the Civil Rights Act of 1964*, which establishes the general principle of non-discrimination in the workplace based on race, colour, religion, sex or national origin. The applicant had applied for a job position as a specialist in terrorism and international crime at the Congressional Research Service (CRS) and the Librarian Congress of the United States, obtaining the job position. As a response to the communication to the CRS on her choice to start a transition, the recruitment process was interrupted, forcing Schroer to activate the appeal procedure for violation of the Civil Rights Act based on discrimination by gender stereotype. What is interesting to underline about this case, which will pave the way for the recent ruling of the Supreme Court of the United States on gender discrimination against transsexual people⁷⁶, are two aspects. The first one concerns the Supreme Court's progressive approach to the European positions. The decision is based on an idea of gender equality that was already expressed in 1996 in the case *P. v S. and Cornwall County Council*; the second one concerns one of the defendant's reasons to avoid recruitment, according to which the discrepancy between the biological gender and the declared one would lead to delays in granting security: since the involved job position was of crucial importance, timeliness was essential. Therefore, the lack of specific anti-discrimination protection based on gender identity represents a limit for transgender people, because it allows the author of discrimination to detect the “*aporia*” between biological gender and the one that has been expressed by the person. This lack of protection certainly shows a further disadvantage for those who are already in vulnerable conditions.

From this point of view, however, returning within national borders, we should recognize a change of course of the Constitutional Court, which has scratched a wall and overcomes cultural barriers such as dualism and distinctions based on gender functions.

The Constitutional Court, with the judgment no. 221 of 5 November 2015, held that the obligatory nature of the surgery, to change sex, under Law no. 164/1982, is against Articles 2, 3, and 32 Cost., as well as art. 8

⁷⁶ The recent ruling concerns the dismissal of a transsexual person. See T. E. Lagrand, *Protection of Transgender Employees from Discrimination: Is There Convergence Between the Approaches of the US Supreme Court and the Court of Justice of the European Union?*, in *GenIUS. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 2020, 1, pp. 1-18. See too G. A. Recchia, *La discriminazione per orientamento sessuale e identità di genere come “fondata sul sesso”*: la Corte Suprema degli Stati Uniti rilegge il diritto del lavoro federale, in *Labor*, 2021, 1, pp. 69 ff.

ECHR. Constitutional jurisprudence has recognized the right to gender identity as an essential element of the right to personal identity, including it in the rank of the person's fundamental rights. Thus, it is considered inviolable "*the right to express one's sexual identity, as a crucial factor in the development of one's personality*", that people are required to recognize "*on behalf of social solidarity*," and the right to sexual freedom, since "*sexuality is one of the most important ways of expressing the human personality*." As an absolute subjective right, the person can freely exercise it⁷⁷.

Therefore, whether the ruling of the Supreme Court finds a solution concerning the issue concerning the introduction of gender identity into our system, the problems regarding anti-discrimination protection in the labour market are still unsolved. The Court's ruling renews the perspective according to which looking at gender identity, while still the condition of the vulnerability of transgender people, and potential social exclusion, requires a serious reflection on the policies to be implemented. This implementation should regard "active" protection and not only a repressive-sanctioning one.

In addition to Articles 23, 27, 31, 42-49, Legislative Decree 198/2006 (*Code of equal opportunities between men and women*), the measures aimed at implementing an effective form of anti-discrimination protections based on gender identity in the market are still limited. In this regard, Article 8 of the Workers' Statute (Law no. 300/70) prohibits investigating workers' opinions during the recruitment phase, and Article 15 prohibits discriminatory behaviour. Moving the analysis to the field of work in the Public Administrations, Law no. 183/2010 (the so-called "Collegato Lavoro") has replaced the Committee for equal opportunities and mobbing with the Equal Opportunities Committee (CUG, Comitato Unico di Garanzia). At the same time, the legislative decree n. 276/2003 provided for a Protective Statute of the worker on the labour market, within which Art. 10 extended the prohibition also to public and private subjects to make personal investigations. Such measure has had only partially positive feedback⁷⁸.

⁷⁷ See B. Pastore, *Soggetti vulnerabili*, cit.; G. A. Recchia, *Gli strumenti giuridici di contrasto*, cit. The judgment of the Constitutional Court, 13 July 2017, n. 180, reiterated the concept, arguing that the aspiration of the individual to the correspondence of the sex attributed to him in the population registers with that subjectively perceived and lived undoubtedly constitutes an expression of the right to recognition of gender identity.

⁷⁸ According to some surveys, a residual percentage of intermediaries in the search for work have refused the applications of LGBTIQ+ people: in 11.9% of cases, they are administration agencies, while in 7.5% they are other public subjects of guidance and support in the search for a job, such as Cpl. See Arcigay, *Op. cit.*, p. 48.

Those solutions seem to be not sufficient. It is necessary to balance contractual freedom (during the recruitment phase) and equality in access to the labour market, according to a solidaristic principle⁷⁹. The relevance of the contractual party's personal qualities influences private autonomy, and its power impedes, or limits, the vulnerable groups from accessing work. The labour market becomes a space of preconceptions on personal qualities and provokes unbalancing in contractual relationships, directly affecting the work performance and the potential benefits that the worker could bring in terms of collaboration in the company (or to the company), *ex* 2094 c.c.

The idea is certainly not to promote a mechanism of mandatory recruitment like the job placement for disabled people (Law no. 68/1999)⁸⁰; however, as in the case of disabled people, transgender people are in a condition of vulnerability and, therefore, they find difficulties in tackling such vulnerability and achieving a job placement, just using their professional skills.

According to recent statements of the European Trade Union Confederation (ETUC)⁸¹, a greater effort with the nature of an active anti-discrimination measure is required to effectively face the condition of the vulnerability of transgender people and to satisfy their social needs⁸². The economic effort seems to be looming with the PNRR, which finances active employment policies for an amount of 6.6 billion Euros through the GOL Plan (*Garanzia di Occupabilità per i Lavoratori*, Guarantee of Employability of Workers).

⁷⁹ G. Carapezza Figlia, *Il divieto di discriminazione quale limite all'autonomia contrattuale*, in RDC, 2015, 6, p. 1388 ff.; see too M. Ciancimino, *La discriminazione contrattuale: profili rilevanti per la tutela della persona. Note a margine di un recente dibattito dottrinale*, in *Il diritto di famiglia e delle Persone*, 2018, 2, p. 667 ff.

⁸⁰ On the other hand, it is not detectable, except in exceptional cases, a *deminutio* of working capacity, nor are there any reward mechanisms deriving from a sort of "social recognition" by the State. On the placement for disabled people, see A. Riccardi, *Disabili e lavoro*, Cacucci, 2018, p. 23 ff.

⁸¹ ETUC calls on additional financial resources for the Member States and for Social Partners to enhance their capacity building activities and for campaigns that could contribute to the sensibilisation and also effectively target concrete issues and respond to attacks on LGBTIQ people on the national and local level. Cfr. ETUC, *Op. cit*

⁸² In general, about the need to protect differences and reassess different social needs regardless of budgetary needs, see S. Giubboni, A. Pioggia, *Lo stato del benessere: dalla redistribuzione al riconoscimento*, in RDS, 2015, 2, p. 297 ff.

As highlighted by the Plan⁸³, it seems that the protection of LGBTIQ+ people, and therefore of transgender people (who find themselves in a *limbo* between sexual orientation and gender), has captured the attention of the legislator as vulnerable subjects, albeit concerning the specific objective of "*defining, in close coordination with the Regions, the essential levels of training activities*". However, this hope is shattered in front of the GOL Program, elaborated by ANPAL (National Agency for Active Policies at Work) and the Ministry of Work⁸⁴, where transsexual persons are not intended among the vulnerable subjects considered. This category could be included among the beneficiaries of active policies as unemployed without income support (and specifically "*workers with less than one occupational role*"), referred to in the next point of the Plan, but this suggests in any case a partial reading of the effects that discriminatory conduct has for transgender people.

This interpretation, which implies exclusion from the Essential levels of the Performances ("LEP," Livelli Essenziali Delle Prestazioni)⁸⁵, therefore entails a discretion of intervention of the Regional Agency for Active Policies (ARPAL) (on a regional level) spread throughout the territory.

According to the idea that transsexual people are vulnerable, it would be possible to promote active anti-discrimination policies in the labour market: the condition of vulnerability justifies a difference by the principle of substantial equality (Art. 3, par. 2 Cost.)⁸⁶.

It seems more feasible the hypothesis that ANPAL attributes itself, to art. 9 par. 2, Legislative Decree no. 150/2015, further tasks, and functions, through the stipulation of agreements with the regions and autonomous provinces, on the direct management of employment services and active

⁸³ See above all the *transversal priorities*, declined on p. 35, and mission 5 C. 1, p. 206 ff. of the PNRR.

⁸⁴ See *Garanzia di occupabilità dei lavoratori* (GOL), Raffaele Tangorra, CNEL, 7 October 2021, on www.bollettinoadapt.it.

⁸⁵ Referred to the point M of Min. Decree 28 March 2018 n.4. About the LEP see, already, P. Pascucci, *I livelli essenziali delle prestazioni*, in E. Ghera, D. Garofalo (edited by), *Organizzazione e disciplina del mercato del lavoro nel Jobs Act 2*, Cacucci, 2016, p. 137 ff.

⁸⁶ On this point, see Constitutional Court 21 June 2006, n. 253, which declares unfounded the question of constitutional illegality of articles. 2 and 3, law of the Tuscany Region of 15 November 2004, n. 63 (Rules against discrimination determined by sexual orientation or gender identity), since "*it limits itself to affirming, in favor of these* (of transgender people, Ed.), *the objective of expressing specific regional employment policies, as subjects exposed to the risk of social exclusion*". About the "*reparatory and promotional function*" of affirmative actions, see already M. V. Ballestrero, *Op. cit.*, p. 505.

labour policies⁸⁷. Such measures are directed in favour of the "*subjects who mostly need*"⁸⁸ public intervention in the field of employment services. In this perspective, therefore, through the European funds referred to in Art. 9, par. 1, let. f) and i), employment services could be implemented for transgender people, taking into consideration their "*state of need*"⁸⁹; those services could be activated by the State and the regions.

These policies are directed to avoid intervention by the State aiming at giving mere assistance to such a category. Such drift of the State is a risk already widely predicted⁹⁰: if it is true that Art. 4 of the Constitution does not refer to the right to work as a right to obtain a job ("*according to his possibilities and choice*"), at the same time it is a duty of the Republic to make this right effective⁹¹, with particular attention to vulnerable subjects⁹², that

⁸⁷ About this argument see L. Valente, *Le competenze regionali*, in E. Ghera, D. Garofalo (edited by), *Op. cit.*, p. 37 ff., espec. p. 51.

⁸⁸ See the circ. of the Job Ministry 23 December 2015, no. 34. About this argument see R. Santucci, *Lo stato di disoccupazione*, in E. Ghera, D. Garofalo (edited by), *Op. cit.*, p. 159 ff.

⁸⁹ Deducible from art. 5 par. 2, Legislative Decree n. 147/2017 (Inclusion income, REI), and subsequently borrowed from art. 4, par. 11, d.l. n. 4/2019, conv. with mod. from law 28 March 2019, n. 26 (Citizenship income). For the purposes of access to the REI, in fact, the identification of the state of need took place according to the following factors of vulnerability and environmental / social factors: a) personal and social conditions and functions; b) economic situation; c) work situation and employability profile; d) education, instruction and training; e) housing status; f) family, proximity and social networks.

⁹⁰ D. Garofalo, *La dottrina giuslavorista alla prova del Covid-19: la nuova questione sociale*, in *LG*, 2020, 5, p. 429 ff., which, in reference to the emergency legislation, reads a "*mass welfarism*", "*which, if prima facie, may appear justified to counter the spread of the epidemic, at the same time is suitable to feed in the population, especially in the uno occupied part, the conviction that there is a State ready and able to provide for the needs of life without working*". In a perspective *de iure condendo* see Id, *La disoccupazione da pandemia: come passare dall'assistenzialismo di Stato ad una nuova politica per l'occupazione*, in D. Garofalo (edited by), *Covid-19 e sostegno al reddito*, Adapt University Press, 2020, p. 1 ff. The same opinion has R. Del Punta, *Nota sugli ammortizzatori sociali ai tempi del Covid-19*, in *RIDL*, 2, 2020, p. 251 ff.

⁹¹ See L. Carlassare, *Solidarietà: un progetto politico*, in *Costituzionalismo.it*, 1, 2016, p. 62. See too F. Mancini, *Il diritto al lavoro rivisitato*, in *Politica del diritto*, 1973, 6, p. 687 ff., for which, it is a social right, "*such that the interest in which protection is conferred can be satisfied only through public intervention*". Indeed, the debate is far from resolved in this almost peremptory expression, finding different nuances about the programmatic or perceptivity of the same. On the point we referred to D. Garofalo, *Formazione e lavoro tra diritto e contratto. L'occupabilità*, Bari, Cacucci, 2004, p. 28 ff., who considers the norm as a valuable programmatic, that is understood as "*a program to be carried out, a goal to be achieved*".

⁹² See, in this regard, the repealed article 15, law no. 264/1949, which, regardless of its juridical-temporal location, attributed to the state of need a proactive function: to define the subjects to be started primarily at work.

means particular attention to those subjects for whom the obstacles to achieving full realization in society are determined by prejudices related to their characteristics.

The enhancement of the right to work through training, employment services, and awareness policies, is reinforced by the limits on free private initiatives, under art. 41 par. 2 Constitution⁹³, does not represent an external limit to an efficient production for enterprises but could solve the problem of discrimination. It could also fill the lack of work⁹⁴ and, therefore, prevent the exclusion of transsexual people from the world of work.

5.1 Good Practices in the Labour Market

Until today, the active employment policies (including employment services, training, and the activities aimed at developing employability) have been entrusted exclusively to regional legislators, due to the principles of subsidiarity and legislative powers of the State and the regions in the matter of "safety and work" (Art. 117 par. 2 Cost.). The results are not entirely satisfying.

However, excluding best practices at the supranational level, which include experiences of particular interest⁹⁵, this research intends to focus on some programs implemented on the Italian territory.

In this regard, Piedmont has launched a project using the "POR-FSE 2007/2013" funds, for the strengthening of employability and socio-occupational integration of particularly disadvantaged people victims (or people at risk) of discrimination. According to the regional plan, during 2014, 4 months of job placements and paid internships were launched in favour of 126 people, 36 of whom were LGBTIQ+, mainly transsexual. It is interesting to underline that during the period of training for the internship workers were assisted by two tutors, one responsible for the work performed and the other (called "life friend") for the aspects related to individual professional enhancement. The project has involved the

⁹³ C. Smuraglia, *La Costituzione*, cit., pp. 58-59.

⁹⁴ In general, on the removal of the state of need through active policies, see most recently the interim report by S. Renga, *La tutela del reddito: chiave di volta per un mercato del lavoro sostenibile*, at the Aidlass Congress of Taranto, 2021, p. 20.

⁹⁵ Among the international good practices collected, it is worth mentioning, for example, the pilot experience of the municipality of Brighton (United Kingdom), which provided local private sector managers with guidance for the recruitment of transgender personnel. For a review of best practices see. UNAR, *Op. cit.*, pp. 68 -71.

LGBTIQ+ territorial associations, which have strengthened its effectiveness through numerous seminars addressed to Job offices and company representatives⁹⁶; the implementation of a “gender literacy”⁹⁷ and a culture of gender is necessary to prevent the (sub)culture of prejudice.

The intervention in the labour market in favour of transgender people also includes the activation of some job orientation desks scattered throughout the Italian territories, aimed at responding to the specific needs of transgender users in the cities of Turin, Verona, Bologna, Milan, Rome, Naples (in collaboration with the CGIL)⁹⁸.

A program of particular interest has been “Diversity on Job” which started, with the financing of EU funds, by the Ministry of Work, ANPAL (since 2015), and Unar (National Anti-Racial Discrimination Office) in 2014-2015, to implement the possibilities of employment of vulnerable subjects. The Italian project, called “Obiettivo Convergenza,” provided for the financing of Campania, Puglia, Calabria, and Sicily that have launched 6 months of internships in enterprises in favour of 16 LGBTIQ+ people, except for heterosexual subjects. The selection of subjects started in the internship, certainly could appear paradoxically discriminatory, because it excludes heterosexual people, however, it is justifiable according to the principles of reasonableness⁹⁹ and substantial equality enshrined in art. 3 Cost.

⁹⁶ B. Gusmano, *La transessualità nei contesti lavorativi: ambito di intervento e buone prassi*, 2021, see it on <http://www.portalenazionalelgbt.it/>; A. Lorenzetti, *Buone pratiche per il contrasto alle discriminazioni e l'inclusione delle persone transgeneri*, in Consiglio Regionale del Friuli Venezia Giulia, Rete Lenford, *La condizione transessuale: profili giuridici, tutela antidiscriminatoria e buone pratiche*, Quaderni dei diritti. Garante regionale dei diritti della persona, 2017, p. 50 ff.

⁹⁷ See F. Corbisiero, I. Marotta, *Diversity on the Job: buona prassi di inclusione lavorativa nella città di Napoli*, in F. Galgano, M. S. Papillo (edited by), *Diversity Management. Nuove frontiere dell'inclusione e sfide per i C.U.G. universitari. Atti del Convegno Università degli Studi di Napoli Federico II, Napoli, 5-6 dicembre 2019*, FedOAPress, 2020, p. 165 ff., espec. p. 169.

⁹⁸ B. Gusmano, *Op. cit.* On this point, there is a well-established interest of the CGIL towards the protection of LGBTIQ+ people. Already in the mid-90s the first desks dedicated to the “new rights” were born in the cities of Turin and Bologna, aimed at protecting people discriminated against for sexual orientation and gender identity and at the study of employment situations in the labour market of transsexual people. See I. Franco, *Portare più avanti il confine dei diritti*, in *Rassegna sindacale*, 1998, 2, p. 11-12; E. Degli Esposti, G. Lucca, *Si parte dallo sportello «Trans»*, in Id.

⁹⁹ F. Corbisiero, *L'inserimento lavorativo delle persone LGBT tra politiche di diversity management e buone prassi aziendali*, in M. D'Onghia, G. A. Recchia (edited by), *Op. cit.*, p. 95 ff., espec. p. 114.

To find the recipients of such measures, the project provided that people potentially interested to work would prove their sexual orientation or gender identity, as well as the discriminatory harassment they suffered. If the proof of their sexual orientation or gender identity is justified by the objective of identifying the beneficiaries of the project, the request to document the suffered discrimination is more problematic, since it emphasizes the idea of work as a tool to compensate the victims for the harassment suffered¹⁰⁰ and so it in contrast with Art. 1 Constitution, according to which Italy is "*democratic republic founded on work*". The risk is that work, the aim of which is to make possible people's self-realization, becomes a tool of compensation against discrimination already suffered by the worker, according to a paternalistic logic¹⁰¹.

6. Final Remarks

In conclusion, although this study is not intended to take any political position, the topic leaves the space for some reflections on the bill against homo-lesbo-bi-trans-phobia (the so-called "DDL Zan," n. 2005/2020), currently rejected by parliament. It is particularly difficult to refrain from a brief consideration since the political debate affects the lives of transgender workers.

As if the problem of the protection of LGBTIQ+ people against discrimination were only an issue for a few and not for all, once again their needs must rely on the sensitivity of a part of the Parliament, not finding a unanimous response in all political parties.

However, to achieve the goal of equality, according to Art. 3, par. 2, Const., the anti-discrimination protection cannot become an object of a political exchange, nor become extortion since it interests those citizens who are often deprived of that dignity that should be guaranteed to every person.

This consideration is also confirmed by the ruling of the Constitutional Court n. 221/2015, which recognizes the right to gender identity as a milestone of the fundamental rights of the person. Therefore, although the Constitutional Court recognized the right to gender identity as an essential and inalienable right, the legislator did not intervene to guarantee

¹⁰⁰ The same opinion, but in a general welfarist perspective and not linked to anti-discrimination protection, has S. Renga, *Op. cit.*, p. 76.

¹⁰¹ Corbisiero's opinion has different nuances because he believes that the central paradox is in the certification of one's sexual orientation or gender identity. V. F. Corbisiero, *Op. cit.*, p. 115.

its protection. According to the ruling mentioned above and to Art. 1, let. d, “DDL ZAN,” gender identity is «the perceived and manifested identification of oneself in relation to gender, even if it does not correspond to sex, regardless of having completed a transition process».

The “DDL ZAN” presents various provisions which confirm the point of view of this research, especially the promotion of a culture of inclusion. The need to introduce “proactive” measures emerges from the same title of the bill, “Measures to prevent and combat discrimination and violence for reasons based on sex, gender, sexual orientation, gender identity and disability”, where the goal of “preventing” discrimination is placed before that one of “fighting” it.

This idea emerges above all from art. 8, which enhances the powers of the Office for the promotion of equal treatment and the elimination of discrimination based on race or ethnic origin (under art. 7, legislative decree 9 July 2003, n. 215), also including the prevention and contrast of discrimination on grounds related to sexual orientation and gender identity. According to art. 8, the (three-year) strategy developed by the Office provides for measures aimed at preventing discrimination at work. This is an aspect of particular importance since repressive-compensatory measures of the anti-discrimination law interact with promotional and preventive ones.

Although the extension of the powers of the aforementioned Office is an agreeable solution, even on this front, however, a legislative limit must be registered, concerning the financial support, which has not been implemented (Article 8, paragraph 2). However, if the Constitution entrusts the Republic with the task of eliminating the obstacles that hinder the achievement of substantial democracy (Article 3, par. 2, Const.), the Republic must itself make use of all the necessary means (especially economic) to ensure that this objective - certainly not secondary - is pursued and achieved.

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at www.adapt.it.

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