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International Human Rights Law violations in so-called “conversion therapy” practices

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“Timendi causa est nescire”
L'ignoranza è la causa della paura.

Lucius Annaeus Seneca, *Naturales Quaestiones*

INTRODUCTION

For many decades, if not centuries, LGBT individuals have been told they need to be corrected, that they must be somehow rectified, because of their “evilness” or “sickness”. Perpetuated discrimination over time has led to the development of more or less “scientific” methods, that have been promoted aggressively under the belief that homosexuality or gender diversity are diseases and are treatable as such. While many families used these treatments to obtain the result of the “normalization” of their loved ones, the existence of these practices has been kept secret to the general public – or acquiesced by States – for a long time. With the development of a society more open to diversity and the protection of minorities, Pandora’s box has been opened. In fact, only recently has it come to define practices aimed at converting or altering the sexuality or gender identity of a person with the term “conversion therapy”.¹

According to scientific evidence, such practice can lead to detrimental effects on its subjects.² It has also proven that homosexuality is merely a variation of human sexuality, dispelling the misconception that it is a disease.³ This raises the question of whether so-called “conversion therapy” may amount to Human Rights violations.

Hence this work will examine whether such practices are compatible with International Human Rights Law.

The first chapter of this work is intended to define conversion therapy. This term includes a number of activities, distinguished by the intensity of the use of physical coercion, modality, intrusiveness, and related physical and psychological consequences. In addition, this part of the work focuses on identifying the promoters and perpetrators of these practices, the victims and what is the role of the State in this scheme. The second part of the first chapter preliminarily assesses the possible International Human Rights Law violations that so-called “conversion therapy” practices are putting in place.

¹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, Par. 17.

² American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009). Available at: <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

³ World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (World Health Organization 1992) 11.

The second chapter analyzes the legal framework of International Organizations and International Conventions of Human Rights. As far as the European Union is concerned, an attempt has been made to retrace the path which, over the years, is leading to a European ban on conversion therapy. In the absence of a Europe-wide ban, this work tries to identify – by means of a *de iure condendo* analysis – the most appropriate areas in which to regulate this phenomenon, the competences of the European Union and, finally, the most appropriate legislative measure for the case in question. In the section on the ECHR, it is examined whether conversion therapy practices constitute a violation of the various rights guaranteed by the Convention, taking into account the guidelines of ECtHR and the possible States' obligations. The positions of the UN, IACHR and ACHPR are also analyzed. However, such International Organizations' declarations, while politically advantageous, do not address critical considerations, such as whether International Human Rights Law requires the prohibition of conversion therapy, and if so, why. Finally, this chapter seeks to identify the position of the Yogyakarta Principles in International Human Rights Law, recognizing their farsightedness in recognizing, defining, and trying to lay the foundations for the discipline of conversion therapy.

The third and last chapter shifts focus to domestic caselaw. The first section examines some American cases that appear to be lumped together by the attempt to knock down conversion therapy local bans by appealing to some human rights guaranteed by the American Constitution. The second section, instead, assesses what is the situation of conversion therapy in China and what are the causes of its particular diffusion. In particular, this section examines domestic cases in which the victims have been deemed entitled to compensation and tries to establish what are the obligations of the State with regard to conversion therapy.

Chapter 1

Conversion Therapy and Sexual Orientation Change Efforts

1.1 Overview: Practices and Diffusion

Since 1973, homosexuality is no longer considered a pathology. That year the American Psychiatric Association (APA) removed the diagnosis of “homosexuality” from the second edition of its Diagnostic and Statistical Manual (DSM II).⁴ Afterwards, in 1990, it was also removed from the International Classification of Diseases (ICD-10)⁵ and, later in 2001, from the Chinese Classification of Mental Disorders.⁶

Nevertheless, many individuals, such as leaders, health professionals, State authorities and family members, continue believing that homosexuality is an evil that must be eradicated. To this day, in at least 68 countries/regions in the world are observed practices of conversion therapy.⁷ This term, as explained in the next paragraph, is used to cover a broad number of practices, all aimed at effecting a change or alteration on sexual orientation and gender identity.⁸

For many years media hardly addressed this delicate issue, until conversion therapy attracted international attention. In 2015, a 17-year-old American transgender girl, Leelah Alcorn (born Joshua Ryan Alcorn) committed suicide after being forced to undergo conversion therapy by her parents. When she came out as a transgender to her parents, they refused to accept her gender identity and, later, they denied Leelah’s request to undergo transition treatment. Instead, Alcorn’s parents decided to send her to a

⁴ Drescher J., *Out of DSM: Depathologizing Homosexuality* (Basel, Switzerland 2015), 5(4), 565–575. <https://doi.org/10.3390/bs5040565>.

⁵ World Health Organization, ‘The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines’ (World Health Organization 1992) 11.

⁶ Jing Wu, ‘From ‘Long Yang’ and ‘Dui Shi’ to ‘Tongzhi’: Homosexuality in China’ in Vittorio Lingiardi and Jack Drescher (eds), *The Mental Health Professions and Homosexuality: International Perspectives* (CRC Press 2003) 136- 137.

⁷ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 p. 24.

⁸ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 p. 17.

Christian-based conversion therapy to make her accept male gender identity as her assigned-at-birth-gender.⁹ Indeed, in many faith-based settings, the premises to treatments are “sexual brokenness” or “gender confusion”.¹⁰ The therapy is based on the belief that there is something intrinsically evil in diverse sexual orientations and gender identities.¹¹ Moreover, Leelah’s parents decided to remove her from her public school and made her attend Ohio Virtual Academy, an online school. From that moment, a five-months period of isolation started for Leelah: her parents denied her access to social media and many forms of communication, including meeting her friends. Few months later, on Reddit.com, while asking other users whether her parents’ behavior could be classified as child abuse, Leelah confessed that her parents used to refer to her in a “derogatory tone”, with faith-based threatening sentences (such as “God's going to send you straight to hell”).¹² She also admitted that she has been prescribed Prozac, an antidepressant, for one year, and her dosages increased about every couple of months. At that moment she was taking 60 mg of Prozac per day.¹³ According to U.S. Food and Drugs Administration, antidepressants, including Prozac, may increase the risk of suicide in children and adolescents. In most cases, the maximum dosage suggested for 18-year-old and younger people is 20 mg per day.¹⁴

⁹ Fox F., “Leelah Alcorn's Suicide: Conversion Therapy Is Child Abuse” (*Time* January 8, 2015). Available at <https://time.com/3655718/leelah-alcorn-suicide-transgender-therapy>.

¹⁰ E.g., JONAH (Jews Offering New Alternatives for Healing); Orthodox Christians institutions in Russian Federation; Cristian institutions in USA etc.

¹¹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 p. 50

¹² Margolin E., “Leelah Alcorn's suicide note pointed out societal problems” (*MSNBC* January 3, 2015). Available at <https://www.msnbc.com/msnbc/leelah-alcorns-suicide-note-pointed-out-societal-problems-msna496831>.

¹³ Badash D., “New And Disturbing Details Emerge About Leelah Alcorn's Life From Posts She Made To Reddit” (*The New Civil Rights Movement*, January 2, 2015). Available at https://www.thenewcivilrightsmovement.com/2015/01/leelah_alcorn_posted_disturbing_details_on_reddit_that_now_refute_mother_s_claims/.

¹⁴ Center for Drug Evaluation and Research, “Suicidality in Children and Adolescents Being Treated With Antidepressant Medications” (*U.S. Food and Drug Administration*). Available at <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/suicidality-children-and-adolescents-being-treated-antidepressant-medications>.

After reviewing Leelah’s dramatic situation, it is evident that “conversion” attempts that her parents carried out include the most spread and common practices: ¹⁵

- Verbal abuse and humiliation.
- Isolation: which may include solitary confinement or being kept from interacting with friends and family.
- Medication.
- Talk therapy or psychotherapy.

In addition, when the promoters/providers of conversion therapy are parents or legal guardians of minors, the latter are especially prone to undue influence or coercion. The reason is clearly children’s and adolescents’ lack of legal authority to make medical or mental health decisions.¹⁶

In her suicidal note posted on Tumblr.com, Leelah cited loneliness and alienation caused by her parents as primary reasons for her decision to end her life. “*I felt hopeless*”, wrote Alcorn, “*that I was just going to look like a man in drag for the rest of my life.*”¹⁷

Right after her suicide, the 44th president of the United States, Barack Obama stated that as part of his dedication to protecting America’s youth, his “*administration supports efforts to ban the use of conversion therapy for minors*”, since he recognized his “*concern about its potentially devastating effects on the lives of transgender as well as gay, lesbian, bisexual and queer youth*”. ¹⁸ In response to the petition posted to “We the People” section of White House official website, in April 2015 President Barack Obama called for the banning of conversion therapy for minors.¹⁹

¹⁵ International Rehabilitation Council for Torture Victims, “*Conversion Therapy Is Torture*” *Statement on Conversion Therapy (International Rehabilitation Council for Torture Victims July 13, 2021)*. Available at <https://irct.org>.

¹⁶ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 p. 26.

¹⁷ Margolin E., “Leelah Alcorn's suicide note pointed out societal problems” (*MSNBC* January 3, 2015). Available at <https://www.msnbc.com/msnbc/leelah-alcorns-suicide-note-pointed-out-societal-problems-msna496831>.

¹⁸ Jarrett V., “Petition Response: On Conversion Therapy” (*National Archives and Records Administration* April 8, 2015). Available at <https://obamawhitehouse.archives.gov/blog/2015/04/08/petition-response-conversion-therapy>.

¹⁹ Shear D. M., “Obama Calls for End to ‘Conversion’ Therapies for Gay and Transgender Youth” (*The New York Times* April 9, 2015). Available at <https://www.nytimes.com/2015/04/09/us/politics/obama-to-call-for-end-to-conversion-therapies-for-gay-and-transgender-youth.html>.

Today, more than the 40 percent of the United States population lives in jurisdictions where these “therapies” are banned. Even though there is not a federal law banning conversion therapy at the federal level, a total of 20 states and the District of Columbia had local laws proscribing these practices on minors.²⁰ Several counties and cities have also enacted local bans.²¹

In Europe, only 2 out of 50 United Nations Member States banned conversion therapy: Malta and Germany.²² In March 2018, the European Parliament of the European Union approved Resolution n. 56 that welcomes initiatives prohibiting practices that imply “conversion therapies” and appointed Member States to ban such practices.²³ Unfortunately, conversion therapy is a reality that still happens today and violates several human rights.

The term “conversion therapy” is an umbrella term which is used for a multitude of practices and methods, depending on the context.²⁴ The term indicates a set of practices that aim at effecting a change from non-heterosexual to heterosexual and from trans or gender diverse to cisgender. Most of the practices are clandestine and, consequently, poorly documented.²⁵ There are other terms used to describe these phenomena: sexual orientation change efforts (shortened as SOCE), reparative therapy, reintegrative or reorientation therapy, ex-gay therapy or gay cure.²⁶ The pathologization or medicalization

²⁰ To mention a few: Assembly Bill No. 2943/2018 (California); House Paper 755, Legislative Document 1025/2019 (Maine); Assembly Bill A576/2019 (New York); Senate Bill No. 5722/2018 (Washington); Act 20-530/2014 and Act 22-573/2019 (District Of Columbia).

²¹ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (*ILGA* December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

²² International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (*ILGA* December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

²³ European Parliament Resolution on the situation of fundamental rights in the EU in 2016, 1 March 2018, P8_TA(2018)0056, p. 65 available at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0056_EN.html?redirect.

²⁴ International Rehabilitation Council for Torture Victims, “Conversion Therapy Is Torture” Statement on Conversion Therapy (*International Rehabilitation Council for Torture Victims* July 13, 2021). Available at <https://irct.org>.

²⁵ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 p. 17.

²⁶ International Rehabilitation Council for Torture Victims, “Conversion Therapy Is Torture” Statement on Conversion Therapy (*International Rehabilitation Council for Torture Victims* July 13, 2021). Available at <https://irct.org>.

of variations in sexual orientation and gender identity has no empirical evidence. The World Medical Association (WMA) has pointed out on several occasions that “*homosexuality does not represent a disease, but a normal variation within the realm of human sexuality*”.²⁷ Therefore, those kinds of practices lack any foundation in science and medicine and do not have the potential to be effective. Generally, all those practices are premised on a belief that an individual’s sexual orientation or gender identity can be changed: the conviction is frequently based on the assumption that the change’s “outcome” is beneficial to the individual, family, or community.²⁸

Conversion therapy is diffused and practiced all over the world. Different sources confirm that conversion therapy is performed in 68 countries.²⁹ Despite the huge spread, it is possible to identify common elements.

Victims of conversion therapy are, of course, homosexual and gender-diverse people. Research, at least initially, focused on the impact of this phenomenon on gay men. The American Psychological Association examined 55 research in 2009, 43 of which were primarily on homosexual or bisexual men and only one on lesbians, a bias that overlooks the impact on lesbian, bisexual women, trans people and gender-diverse persons.³⁰ However, data about the age of victims are clear: conversion therapy is used on a disproportionately large number of young people. According to a recent global survey, four out of five people who were subjected to conversion therapy were 24 years old or younger at the time, and almost half of them were under the age of 18.³¹

Practitioners and promoters of conversion therapy are categorized into several groups.

²⁷ World Health Organization (WHO), “The ICD-10 classification of mental and behavioral disorders: clinical descriptions and diagnostic guidelines” (*World Health Organization*, 1992). Available at <https://apps.who.int/iris/handle/10665/37958>.

²⁸ International Rehabilitation Council for Torture Victims, “Conversion Therapy Is Torture” Statement on Conversion Therapy (*International Rehabilitation Council for Torture Victims* July 13, 2021). Available at <https://irct.org>.

²⁹ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

³⁰ American Psychological Association (APA), “Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation” (*Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, APA, 2009).

³¹ Bishop A., “Harmful Treatment The Global Reach of So-called Conversion Therapy” (Outright Action International, 2019) Available at <https://outrightinternational.org/reports/global-reach-so-called-conversion-therapy>.

A large proportion of practitioners and promoters, in over forty countries, is made by health professionals, such as doctors, therapists, counselors. Sometimes those qualifying terms are used in a colloquial way and not in a technical way since some self-proclaimed health professionals are not educated, trained, or licensed. In addition, patients themselves may not be aware of or deceived by a health professional's lack of qualifications. According to reports, conversion therapy is being practiced also by educated, qualified, and duly licensed health practitioners all around the world, spreading unscientific beliefs and discriminating against their clients, in violation of their primary ethical commitments.³² Indeed, it is unethical for health-care providers to claim to cure anything that isn't a disorder, and they are obligated by the "do no harm principle" not to prescribe therapies that are known to be ineffective or promise impossible outcomes.³³ For these and other reasons, offering "conversion therapy" is legally considered as a form of deception, false advertising, and fraud.³⁴ Mental health and medical providers that promote conversion therapy are particularly diffused in Asia, and they often operate in specialized clinics.³⁵ Instead, in Africa, conversion therapy is perpetrated by religious leader in combination with public and private mental health providers.³⁶

This leads to the second category, represented by religious practitioners such as religious or spiritual leaders, religious community members or groups.³⁷ Faith-based groups and religious leaders, in particular, operate in a grey area, advising families and victims, often pushing or delivering practices on their own or in collaboration with others. They actively

³² International Rehabilitation Council for Torture Victims, "Conversion Therapy Is Torture" Statement on Conversion Therapy (International Rehabilitation Council for Torture Victims July 13, 2021). Available at <https://irct.org>.

³³ World Medical Association, "World Medical Association Declaration of Helsinki. Ethical principles for medical research involving human subjects" (*Bulletin of the World Health Organization*, 2001). Available at <https://apps.who.int/iris/handle/10665/268312>.

³⁴ Alempijevic D, Beriashvili R, Beynon J, et al., "Statement of the Independent Forensic Expert Group on Conversion Therapy." (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

³⁵ International Lesbian and Gay Association (ILGA), "State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update" (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

³⁶ International Rehabilitation Council for Torture Victims, "Conversion Therapy Is Torture" Statement on Conversion Therapy (International Rehabilitation Council for Torture Victims July 13, 2021). Available at <https://irct.org>.

³⁷ International Rehabilitation Council for Torture Victims, "Conversion Therapy Is Torture" Statement on Conversion Therapy (International Rehabilitation Council for Torture Victims July 13, 2021). Available at <https://irct.org>.

promote, and frequently practice, “reparative therapy”, relying on the underlying belief that different sexual orientations and gender identities are inherently evil.³⁸ These methods and intentions of religious organizations may be disguised as philanthropic endeavors to help persons who have “same-sex desire” or other apparently abnormal displays of sexual orientation, gender identity, and gender expression. These heinous ideas of conservative religious interpretation continue to endanger young people all across the world.³⁹ Both faith-based perpetrators and health professionals find gains in operating or promoting these practices. According to research investigating the economics behind practices of “conversion therapy”, there is compelling evidence that they are, in many circumstances, a lucrative business for providers all around the world.⁴⁰ The cost of a single session of “conversion therapy” in the United States can range from free to \$26,000.00. The price ranges from less than 30,000 won (\$25.88) to more than 30,000,000 won (\$25,875.68) in the Republic of Korea.⁴¹ The business model is supported by marketing mechanisms and the underlying message is always similar: gender-diverse or homosexual people are bad for society and conversion therapy is the solution that leads to the desirable outcome.⁴² Even when there is no apparent charge or monetary remuneration, the economic dimension is present, as with informal arrangements between family members and religious leaders that make some kind of contribution to the group, church, or institution without a direct or explicit link to the “conversion therapy” delivered.⁴³

³⁸ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 50.

³⁹ Bishop A., “Harmful Treatment The Global Reach of So-called Conversion Therapy” (Outright Action International, 2019) Available at <https://outrightinternational.org/reports/global-reach-so-called-conversion-therapy>.

⁴⁰ Alempijevic D, Beriashvili R, Beynon J, et al., “Statement of the Independent Forensic Expert Group on Conversion Therapy.” (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

⁴¹ Alempijevic D, Beriashvili R, Beynon J, et al., “Statement of the Independent Forensic Expert Group on Conversion Therapy.” (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

⁴² Alempijevic D, Beriashvili R, Beynon J, et al., “Statement of the Independent Forensic Expert Group on Conversion Therapy.” (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

⁴³ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 31.

Parents, legal guardians, and other family members represent the third category of conversion therapy promoters and providers. Child and adult victims are forced by their family, or even community members, to undergo those harmful practices in order to conform to their family or community expectations regarding sexual orientation and gender identity. Children and teenagers frequently lack the power and authority to make medical or mental health decisions, and even when they do, they are particularly vulnerable to undue influence or pressure, mostly from family members or others in positions of authority.⁴⁴

Some States could be considered perpetrators and promoters of conversion therapy, although it happens in different ways. In certain States, public authorities or institutions are directly involved in conversion therapy or in financial assistance for practitioners. In Tunisia, for example, it is said to be employed by psychiatrists in juvenile detention centers where minors accused of homosexual behavior may be committed on a judge's order.⁴⁵ The legal instrument that regulates legal gender recognition in Ukraine states that "*intensive psychotherapeutic work aimed at the patient's refusal of change (correction) of sex should be conducted with them*".⁴⁶ This norm allows any psychiatric facility to conduct this type of conversion therapy, since it is part of State policy.

In some circumstances, States are liable for funding conversion therapy directly or indirectly. According to sources, health practitioners in Switzerland and Germany have been reimbursed for these activities by both public and private insurance companies, which they may bill as "tiefenpsychologische Therapie" (deep psychological therapy) or "Erörterung einer lebensverändernden Erkrankung" (discussion of life-changing disease)⁴⁷. Furthermore, despite their apparent responsibility to regulate those services and, in particular, to prevent torture and ill-treatment, child abuse, and fraud, States have generally failed to prevent conversion therapy or punish practitioners when it occurs in

⁴⁴ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called "conversion therapy", Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 26.

⁴⁵ Ghoshal N., *Tunisia's Assault on Gay Men's—and Everyone's—Right to Privacy*. Available at <https://www.hrw.org/news/2018/12/03/tunisia-assault-gay-mens-and-everyones-right-privacy>. Published 2018.

⁴⁶ Decree No. 60 of 3 February 2011, issued by the Ministry of Health, para 3.

⁴⁷ 20 Minuten - Krankenkasse zahlt für «Heilung» Homosexueller. Available at <https://www.20min.ch/schweiz/news/story/Kranken-kasse-zahlt-fuer--Heilung--von-Homosexualitaet-10765609>.

the private health and education sectors. State officials are also involved in the marketing of conversion therapy, giving legitimacy to an illegal activity. Additionally, when cases of corrective violence involving physical or sexual assault are recorded, police in numerous jurisdictions have frequently refused or failed to intervene, decreeing a refusal to act.⁴⁸

Queste ultime considerazioni su responsabilità e implicazioni degli Stati devono essere argomentati meglio, perché si tratta di un punto molto rilevante anche per il proseguo del suo elaborato.

The practices of conversion therapy are another distinguishing feature that helps to classify this phenomenon. They may differ depending on their nature or origin. Human Rights Council's Independent Expert, Victor Madrigal-Borloz, classified three main approaches that seems to guide practices of "conversion therapy": faith-based, medical, and psychotherapeutic. It is indeed important to highlight that these classifications do not stand separate to each other: frequently the approaches are mixed together.⁴⁹ Conversion therapy is common in religious settings. According to sources, this usually entails a lot of prayer and reading of holy passages. This has been combined with religious practices such as "oiling the head or body" or "dousing the person with water". More aggressive procedures are occasionally used during ritual cleansing or exorcism. To exorcise the unwanted "evil spirit" or "demon", practitioners may use beatings, burning the head, back, or palm, isolation, or rigorous fasting in addition to prayers. To hit the "patients", brooms, rods, and bamboo could also be used.⁵⁰ In 2015, the New Jersey Superior Court⁵¹ found a Jewish "conversion" organization guilty of violating the New Jersey Consumer Fraud Act.⁵² Defendants testified about being blindfolded and pummeled with basketballs, restrained with duct tape, bundled up in blankets, and subjected to

⁴⁸ International Rehabilitation Council for Torture Victims, "Conversion Therapy Is Torture" Statement on Conversion Therapy (International Rehabilitation Council for Torture Victims July 13, 2021). Available at <https://irct.org>.

⁴⁹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called "conversion therapy", Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 25.

⁵⁰ Alempijevic D, Beriashvili R, Beynon J, et al., "Statement of the Independent Forensic Expert Group on Conversion Therapy." (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020). Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

⁵¹ Ferguson et al. v JONAH et al. [2015] No. L-5473-12 (New Jersey Superior Court).

⁵² Consumer Fraud Act, N.J.S.A, Approved 5/1998.

homophobic slurs.⁵³ Many faith-based approaches treat sexual orientation and gender identity as an addiction that can be overcome by following the tenets of a spiritual advisor, but they can also include practices modeled after 12-step programs that support the underlying premise of “sexual brokenness” or “gender confusion”.⁵⁴ These premises are similar to the psychological approach, so that the dividing boundaries between religion and psychotherapy are blurred.

The use of psychotherapy as a form of "conversion therapy" appears to be based on the assumption that sexual or gender diversity is the result of an abnormal upbringing or experience.⁵⁵ By having patients go through past experiences, such as absent paternal or officious maternal figures, providers claim to correct aberrations and foster the development of desire for members of the opposite sex, which is regarded the desirable norm.⁵⁶ According to research, it takes place in at least 25 countries, including Italy, Austria, United Kingdom and United States of America.⁵⁷ Eye Movement Desensitization and Reprocessing (EMDR) is also a common method used by some practitioners. In EMDR, a person concentrates on a painful memory while receiving bilateral stimulation. In this case, EMDR has been used to address an individual’s “negative sentiments toward heterosexual sex” as well as an apparent underlying trauma.⁵⁸ According to sources, individuals are frequently isolated and urged or pushed to break up with existing friendships and relationships. Practitioners have repurposed clinical evaluation methods such as the Rorschach test or the Minnesota Multiphasic Personality Inventory, which assess personality traits and psychopathology into tests “to clarify gay

⁵³ Ferguson et al. v JONAH et al. [2015] No. L-5473-12 (New Jersey Superior Court).

⁵⁴ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 51.

⁵⁵ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

⁵⁶ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 42.

⁵⁷ International Rehabilitation Council for Torture Victims, “Conversion Therapy Is Torture” Statement on Conversion Therapy (International Rehabilitation Council for Torture Victims July 13, 2021). Available at <https://irct.org>.

⁵⁸ EMDR Institute, 2021. “What Is Emdr? - Emdr Institute - Eye Movement Desensitization And Reprocessing Therapy”. Available at <https://www.emdr.com/what-is-emdr> [Accessed 10 September 2021].

tendencies” or find “root causes”.⁵⁹ There is also mention of hypnotherapy, with one claim of past-life regression, which allegedly allows you to recall memories from previous lifetimes. The failure of psychotherapy can be harmful. Failure can have even more serious consequences in some situations. Individuals who “fail” therapy in Iran, for example, are routinely pressured to undergo gender reassignment surgery.⁶⁰ The recommendation of gender reassignment surgery is based on the belief that homosexuality is deviant, but that it is possible for an individual to be “trapped in the body of the wrong”. According to sources, hundreds of people are subjected to these operations each year, with 45 percent of them being lesbian or gay rather than transexual. Furthermore, these procedures “*fall far short of international clinical standards and frequently result in long-term health complications such as chronic chest pain, severe back pain, loss of sexual sensation, debilitating infections, recto-vaginal and recto-urethral fistula, and incontinence.*”⁶¹

Medical procedures are based on the “*theory that sexual orientation and gender identity are consequences of an inherent biological disorder that can be addressed exogenously*”. Pharmaceutical techniques, such as medication or hormone or steroid therapy, dominate current medical procedures.⁶² Worryingly, there are claims that medication is administered using coercion or threat in China, Russia, and Vietnam, whilst in other nations, consent is most likely obtained through coercion or is not duly informed.⁶³ According to sources, health experts in at least 13 nations use aversive therapies that combine electric shocks to the hands, head, stomach, and/or genitals with the presentation of homoerotic stimuli. Another typical method is to give “patients” nausea-inducing drugs

⁵⁹ Day H., “Gay Conversion Therapy: I Thought Being Straight Would Make Me Happy” (BBC Three, 2019, April 4) Available at <https://www.bbc.co.uk/bbcthree/article/59cf7968-437d-4475-8c85-3146fc018e0c>.

⁶⁰ Justice for Iran (JFI) & Iranian Lesbian and Transgender Network (6Rang), “Diagnosing Identities, Wounding Bodies - Medical Abuses and Other Human Rights Violations Against Lesbian, Gay and Trans-Gender People in Iran” (JFI, 6Rang, 2014).

⁶¹ Justice for Iran (JFI) & Iranian Lesbian and Transgender Network (6Rang), “Diagnosing Identities, Wounding Bodies - Medical Abuses and Other Human Rights Violations Against Lesbian, Gay and Trans-Gender People in Iran” (JFI, 6Rang, 2014).

⁶² UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 46.

⁶³ Alempijevic D, Beriashvili R, Beynon J, et al., “Statement of the Independent Forensic Expert Group on Conversion Therapy.” (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

or have them snap an elastic band around their wrist to cause discomfort, while stimulated by same-sex video or images. When electric shocks are employed, it's unclear how strong the electric shock current is; nonetheless, sources say that people often feel a lot of agony and that they may be tied or strapped down during the session.⁶⁴ Health professionals, in a few countries, employ electroshock or electroconvulsive therapy (ECT) to try to modify a person's sexual orientation or gender identity. To produce a seizure, ECT entails connecting electrodes to the head and transmitting an electric current between them. It is a harsh method of treatment used as a last resort for disorders including treatment-resistant, life-threatening depression, and it almost always results in major disorientation, cognitive impairments, and retrograde amnesia.

For all the above aspects, including beatings, rape, forced nudity, force-feeding or food deprivation, isolation, and confinement, forced medication, verbal abuse, humiliation, and electrocution, resource indicate that the methods and means commonly used to implement “conversion therapy” practices are conducive to psychological and physical pain and suffering.⁶⁵ Conversion procedures are essentially humiliating, insulting, and discriminatory in nature. The combined impacts of powerlessness and humiliation produce deep feelings of shame, guilt, self-disgust, and worthlessness, which can lead to a damaged self-concept and long-term personality changes. The harm produced by “conversion therapy” begins with the belief that a person is sick, diseased, or abnormal because of their sexual orientation or gender identity, and that they must be treated as a result. This begins the victimization process.⁶⁶ Children and teenagers are particularly vulnerable to the effects of “conversion therapy” procedures. Recent research of transgender adults revealed that early exposure “*was strongly associated with increased risks of severe psychological distress and lifetime suicide attempts*” before the age of ten. Children endure a significant loss of self-esteem and a sharp increase in

⁶⁴ Alempijevic D, Beriashvili R, Beynon J, et al., “Statement of the Independent Forensic Expert Group on Conversion Therapy.” (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

⁶⁵ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 55.

⁶⁶ Alempijevic D, Beriashvili R, Beynon J, et al., “Statement of the Independent Forensic Expert Group on Conversion Therapy.” (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

depressed tendencies, which can lead to school dropout and the adoption of high-risk behaviors and substance abuse.⁶⁷

From a scientific point of view, claiming that conversion therapy methods represent medical therapy is incorrect. The word “therapy” comes from ancient Greek and means “curing” and “healing”. A therapy is only intended to treat and cure physical or mental disease, and homosexuality has been scientifically proven not to be a disease.⁶⁸ In fact, homosexuality is not even classified as a mental disorder in the psychology field.⁶⁹ Consequently, any “therapy” that claim to be able to “cure homosexuality” appear to be pointless. Conversion therapy is based on the medically incorrect pathologization of sexual orientation and gender identity, exhibited through therapies that cause considerable “pain and suffering, as well as psychological and physical harm”.⁷⁰ This is particularly true when it comes to demonstrate the effects of therapy: conversion therapy perpetrators and supporters have failed to demonstrate the effectiveness of therapy.⁷¹ And even when “effects” are detected, studies have demonstrated that there is no possibility of a lasting change of sexual orientation. LGBTQ+ people subjected to conversion therapy still feel same-sex attractions, according to studies, and reports of change could not be empirically substantiated.⁷² When reports of change are filed because of the healing of the “patient”, they are always “counterbalanced” by claims of psychological injury.⁷³ Finally, conversion therapy does not have medical justification and poses “a

⁶⁷ Jack L. Turban and others, “Association between recalled exposure to gender identity conversion efforts and psychological distress and suicide attempts among transgender adults”, *JAMA Psychiatry*, vol. 77, No. 1; Ryan C and others, “Parent-initiated sexual orientation change efforts with LGBT adolescents: implications for young adult mental health and adjustment”, *Journal of Homosexuality*, vol. 67, No. 2; and Fjelstrom J., “Sexual orientation change efforts and the search for authenticity”, *Journal of Homosexuality*, vol. 60, No. 6. Available at www.sciencedirect.com/science/article/pii/S1752928X20300366.

⁶⁸ Nugraha IY, “The Compatibility of Sexual Orientation Change Efforts with International Human Rights Law” (2020) 38 *Netherlands Quarterly of Human Rights*. Available at <https://doi.org/10.1177/0924051917724654>.

⁶⁹ Drescher J., *Out of DSM: Depathologizing Homosexuality (Basel, Switzerland 2015)*, 5(4), 565–575. Available at <https://doi.org/10.3390/bs5040565>.

⁷⁰ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 20.

⁷¹ APA 2009 (n 8) 2-3.

⁷² APA 2009 (n 8) 2-3.

⁷³ APA and Others (n 1) 6.

serious threat to the health and human rights” of those who were subjected to them.⁷⁴

The potential change of the innate sexual orientation promoted by conversion therapy supporters does not have scientific evidence.⁷⁵

In conclusion, conversion therapy is a form of societal rejection, stigmatization, and discrimination. Conversion therapy is not supported by medical or scientific evidence. The technique is ineffective and intrinsically repressive, and it is likely to cause individuals serious bodily and emotional pain and suffering, as well as long-term negative consequences.⁷⁶

1.2 Corrective rape

The term “corrective rape” was coined after the events of 28th April 2008 in Johannesburg, South Africa. On that day the bloody, lifeless body of Eudy Simelane was found naked and face down in a drainage ditch. She was a well-known member of South Africa's national soccer team, an equal rights activist, and one of the region's first openly lesbian women.⁷⁷ Eudy Simelane's brutal rape and murder drew attention to corrective rape in other parts of the world: even though the rates of gender violence in South Africa are among the highest in the world, there are many other countries where cases are being increasingly reported (Thailand, Zimbabwe, Ecuador, Uganda, Jamaica, and India).⁷⁸ The failure of the legal system to provide an adequate remedy to the survivors is even more

⁷⁴ Pan American Health Organization, “*Cures’ For An Illness That Does Not Exist - Purported Therapies Aimed at Changing Sexual Orientation Lack Medical Justification and Are Ethically Unacceptable*” (2009).

⁷⁵ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020) Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

⁷⁶ International Rehabilitation Council for Torture Victims, “Conversion Therapy Is Torture” Statement on Conversion Therapy (International Rehabilitation Council for Torture Victims July 13, 2021). Available at <https://irct.org>.

⁷⁷ Mieses A., “Gender Inequality and Corrective Rape of Women Who Have Sex with Women” (GMHC Treatment Issues, December 2009). Available at https://www.poz.com/pdfs/gmhc_treatmentissues_2009_12.pdf.

⁷⁸ Doan-Minh S., “Corrective Rape: An Extreme Manifestation of Discrimination and the State’s Complicity in Sexual Violence” (Hastings Women's Legal Journal, 167, 2019). Available at <https://repository.uchastings.edu/hwlj/vol30/iss1/8>.

worrisome than the spread of these acts of violence.⁷⁹ There was no mention of a hate crime when Simelane’s killers were brought to trial.⁸⁰ Instead of using the word “lesbian”, the court questioned the prosecutor, “*Is there another word you could use instead of that one?*”⁸¹ Despite the fact that two of the five men charged with Simelane’s murder were found guilty, the judge stated that Simelane’s sexual orientation had “no role” in the rape or murder.⁸²

It is reasonable to hypothesize that corrective rape occurs exclusively in countries labeled as third world, “less civilized”, or where homosexuality is banned or discrimination against the LGBTQ+ population is tolerated.⁸³ This assumption, however, ignores the sexual violence that has occurred and continues to occur in presumably civilized countries around the world. South Africa, for example, provides some of the most progressive constitutional protections for LGBTQ+ persons in the world.⁸⁴ Despite this, South Africa has one of the highest rates of gender violence in the world.⁸⁵ In many countries, such as United States, corrective rape is ignored or de-emphasized⁸⁶ and it is

⁷⁹ Doan-Minh S., “Corrective Rape: An Extreme Manifestation of Discrimination and the State’s Complicity in Sexual Violence” (Hastings Women's Legal Journal, 167, 2019). Available at <https://repository.uchastings.edu/hwlj/vol30/iss1/8>.

⁸⁰ Brownworth V. A., “Op-ed: The Other Ex-Gay ‘Therapy’”, (ADVOCATE, 10 July 2013, 6:15 AM), Available at <https://www.advocate.com/commentary/2013/07/10/op-ed-other-ex-gay-therapy?page=full> [<https://perma.cc/3C2Y-MTH6>].

⁸¹ Brownworth V. A., “Op-ed: The Other Ex-Gay ‘Therapy’”, (ADVOCATE, 10 July 2013, 6:15 AM), Available at <https://www.advocate.com/commentary/2013/07/10/op-ed-other-ex-gay-therapy?page=full> [<https://perma.cc/3C2Y-MTH6>].

⁸² Martin A. et al., “Hate Crimes: The Rise of ‘Corrective’ Rape in South Africa” (ACTIONAID, March 2009). Available at <https://shukumisa.org.za/wp-content/uploads/2017/09/hate-crimes-the-rise-of-corrective-rape-report.pdf>.

⁸³ Doan-Minh S., “Corrective Rape: An Extreme Manifestation of Discrimination and the State’s Complicity in Sexual Violence” (Hastings Women's Legal Journal, 167, 2019). Available at <https://repository.uchastings.edu/hwlj/vol30/iss1/8>.

⁸⁴ Outright Action International, “South Africa: New Constitution Protects Gays and Lesbians” (OutRight Action International, May 1, 1998). Available at <https://outrightinternational.org/content/south-africa-new-constitution-protects-gays-and-lesbians>.

⁸⁵ Goldscheid J., “*Gender Violence and Work in the United States and South Africa: Parallel Processes of Legal and Cultural Change*”, (American University Journal of Gender, Social Policy & Law, 19, 2011). Available at <https://digitalcommons.wcl.american.edu/jgspl/vol19/iss3/7/>.

⁸⁶ Goldscheid J., “*Gender Violence and Work in the United States and South Africa: Parallel Processes of Legal and Cultural Change*”, (American University Journal of Gender, Social Policy & Law, 19, 2011). Available at <https://digitalcommons.wcl.american.edu/jgspl/vol19/iss3/7/>.

not recognized as a distinct hate crime.⁸⁷ For this and other reasons, many, if not most, corrective rapes cases go unreported, and it's unclear how many of the recorded rapes are done with the aim of correcting the victim's sexuality.⁸⁸

Originally, "corrective rape" referred to rape committed by straight men against lesbians in order to "correct or cure their homosexuality".⁸⁹ It is a punishment for being gay and for not conforming to traditional gender roles. The reason behind corrective rape is typically revealed through verbal abuse during the rape, which focuses on "*teaching the victim a lesson and doing her a favor by showing how to be a real woman*".⁹⁰ Now, the term is more widely used to refer to the rape of any member of a group who does not conform to gender or sexual orientation norms, with the perpetrator's motive being to correct the individual.⁹¹

Victims of corrective rape are most commonly lesbians, asexual women, and transgender men.

Lesbians are the most commonly targeted group for corrective rape. In an institutionally heterosexual society, corrective rape is a punishment for a gay woman's perceived infringement of both heteronormative masculinity and femininity. In this approach, the heteronormative gender structure might identify anyone who "*resists heterosexuality's structuring of masculinity and femininity, perhaps by failing to participate (or correctly participate) in the social economy of (hetero) sexual desire*". In fact, perpetrators of homophobic violence state that their actions were motivated by their victim's breach of

⁸⁷ Doan-Minh S., "Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence" (Hastings Women's Legal Journal, 167, 2019). Available at <https://repository.uchastings.edu/hwlj/vol30/iss1/8>.

⁸⁸ Brown R., "Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response," (Annual Survey of International & Comparative Law 2012: Vol. 18: Iss. 1, Article 5). Available at: <https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/5>.

⁸⁹ Brown R., "Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response," (Annual Survey of International & Comparative Law 2012: Vol. 18: Iss. 1, Article 5). Available at: <https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/5>.

⁹⁰ Mieses A., "Gender Inequality and Corrective Rape of Women Who Have Sex with Women" (GMHC Treatment Issues, December 2009). Available at https://www.poz.com/pdfs/gmhc_treatmentissues_2009_12.pdf.

⁹¹ Brown R., "*Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response*," (Annual Survey of International & Comparative Law 2012: Vol. 18: Iss. 1, Article 5) Available at: <https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/5>.

gender rather than their phobia or hatred of homosexuality or gay or bisexual persons.⁹² Butch lesbians, in particular, are regularly the victims of rape: their sexual orientation is the most evident, and thus the most likely to be viewed as undermining masculinity and claims to male bodies.⁹³ They become the most vulnerable due to “the tripartite threat” they pose to heterosexuality (because of their relationships with women); to gender norms (because of their expressions of masculinities and disregard for femininities); and to sex (through challenging expectations surrounding somatically female bodies).⁹⁴

Asexual women form the second group that is exposed to corrective rape. Asexuality is a new notion in contemporary society, and it is defined as an identity for someone who does not experience sexual desire.⁹⁵ Researchers discovered a shockingly significant bias against asexual persons.⁹⁶ As expected, attitudes toward homosexuals, bisexuals, and asexuals were more negative than attitudes toward heterosexuals.⁹⁷ But surprisingly, asexual people were regarded to be the least “human” of all the sexual minority groups tested: they were ascribed with much less human nature qualities and were perceived to have “fewer human emotions”.⁹⁸ Sexual harassment and violence, including corrective rape, are all too common in the asexual community.⁹⁹ People who commit corrective

⁹² Hawthorne S., “*Ancient Hatred and Its Contemporary Manifestation: The Torture of Lesbians*” (The Journal of Hate Studies, 2006). Available at <https://genderandsecurity.org/projects-resources/research/ancient-hatred-and-its-contemporary-manifestation-torture-lesbians>.

⁹³ Lock Swarr A., “*Paradoxes of Butchness: Lesbian Masculinities and Sexual Violence in Contemporary South Africa*”, (Signs: Journal Of Women In Culture And Society, 2012). Available at <https://doi.org/10.1086/664476>.

⁹⁴ Lock Swarr A., “*Paradoxes of Butchness: Lesbian Masculinities and Sexual Violence in Contemporary South Africa*”, (Signs: Journal Of Women In Culture And Society, 2012). Available at <https://doi.org/10.1086/664476>.

⁹⁵ “Overview” (Overview | The Asexual Visibility and Education Network). Available at <https://www.asexuality.org/?q=overview.html>; accessed September 27, 2021.

⁹⁶ MacInnis C.C. and Hodson G., “Intergroup Bias toward ‘Group x’: Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination against Asexuals” (2012) 15 *Group Processes & Intergroup Relations* 725. Available at <https://doi.org/10.1177/1368430212442419>.

⁹⁷ MacInnis C.C. and Hodson G., “Intergroup Bias toward ‘Group x’: Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination against Asexuals” (2012) 15 *Group Processes & Intergroup Relations* 725. Available at <https://doi.org/10.1177/1368430212442419>.

⁹⁸ MacInnis C.C. and Hodson G., “Intergroup Bias toward ‘Group x’: Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination against Asexuals” (2012) 15 *Group Processes & Intergroup Relations* 725. Available at <https://doi.org/10.1177/1368430212442419>.

⁹⁹ Mosbergen D., “Battling Asexual Discrimination, Sexual Violence and ‘Corrective’ Rape”, (HUFFINGTON POST, 20 June 2013, 8:57 AM, updated Dec. 6, 2017), Available at https://www.huffingtonpost.com/2013/06/20/asexual-discrimination_n_3380551.html [<https://perma.cc/XE5D-CUJ7>].

rape do so because they think they are waking up someone's sexuality and "fix" the victim.¹⁰⁰

Transgender men are a third category that is subjected to corrective rape. They are, in general, some of the most discriminated against members of society.¹⁰¹ Moreover, they are victims of sexualized violence at a higher incidence than the general population.¹⁰² The perpetrator's desire to reaffirm their own heterosexuality and masculinity to others drives violence against transgender women.¹⁰³ As a result, transgender women are primarily assaulted in public places in order for the attacker to have an audience.¹⁰⁴ Though trans women endure higher rates of sexual assault than trans men in general, other forms of demeaning sexual violence, such as forced genital exposure, are more common.¹⁰⁵ Violence against transgender men, on the other hand, can be linked to the perpetrator's desire to punish trans men for "*failing to define himself as sexually receptive and for adopting availability-associated characteristics and behaviors*".¹⁰⁶ As a result, transgender men are frequently abused in secluded locations with no witnesses. The rape serves as a reminder from the rapist that trans men "*are women after all, and they will be*

¹⁰⁰ Mosbergen D., "Battling Asexual Discrimination, Sexual Violence and 'Corrective' Rape", (*HUFFINGTON POST*, 20 June 2013, 8:57 AM, updated Dec. 6, 2017), Available at https://www.huffingtonpost.com/2013/06/20/asexual-discrimination_n_3380551.html [https://perma.cc/XE5D-CUJ7].

¹⁰¹ Doan-Minh S., "*Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence*" (*Hastings Women's Legal Journal*, 167, 2019). Available at <https://repository.uchastings.edu/hwlj/vol30/iss1/8>.

¹⁰² Brenner A., "*Resisting Simple Dichotomies: Critiquing Narratives Of Victims, Perpetrators, And Harm In Feminist Theories Of Rape*" (*Harvard Journal of Law and Gender*, 2013). Available at <https://harvardjlg.com/wp-content/uploads/sites/19/2012/01/2013-summer.6.pdf>.

¹⁰³ Ashley F., "*Don't Be so Hateful: The Insufficiency of Anti-Discrimination and Hate Crime Laws in Improving Trans Well-Being*" (2018) 68 *University of Toronto Law Journal* 1. Available at <https://doi.org/10.3138/utlj.2017-0057>.

¹⁰⁴ Ashley F., "*Don't Be so Hateful: The Insufficiency of Anti-Discrimination and Hate Crime Laws in Improving Trans Well-Being*" (2018) 68 *University of Toronto Law Journal*. Available at <https://doi.org/10.3138/utlj.2017-0057>.

¹⁰⁵ Goldscheid J., "*Gender Violence and Work in the United States and South Africa: Parallel Processes of Legal and Cultural Change*", (*American University Journal of Gender, Social Policy & Law*, 19, 2011). Available at <https://digitalcommons.wcl.american.edu/jgspl/vol19/iss3/7/>.

¹⁰⁶ Goldscheid J., "*Gender Violence and Work in the United States and South Africa: Parallel Processes of Legal and Cultural Change*", (*American University Journal of Gender, Social Policy & Law*, 19, 2011). Available at <https://digitalcommons.wcl.american.edu/jgspl/vol19/iss3/7/>.

treated as such”. In other words, the rapist is giving the message that these people “*have no right to act as if they are men*”.¹⁰⁷

Beyond this classification, corrective rape might potentially apply to anyone who does not conform to typical gender expressions or heterosexuality: non-binary, gender fluid people, bisexual people, may be raped because of their perceived gender identity or sexual orientation.¹⁰⁸

Legal theorists generally consider corrective rape as a hate crime.¹⁰⁹ Hate crimes have specific traits that serve as proof of the perpetrator’s discriminatory motivation.¹¹⁰ First, victims of hate crimes are selected because of an immutable characteristic: in the case of corrective rape, they are chosen not at random or on the basis of who they are as individuals, but rather on the basis of their sexual orientation or gender identity. Second, victims of corrective rape are interchangeable in the perpetrator’s mind. Any member of the target group is a possible victim. The victim could be any lesbian, asexual woman, or transgender male who the attacker perceives to be acting in a way that violates sexual orientation or gender norms. The third characteristic is the fear among the target group: because of this victim interchangeability, when one member of a particular group is targeted because of their sexual orientation, the entire community suffers. Consequently, corrective rape has a greater impact on the community. When hateful sentiments toward asexual people and the LGBTQ+ community are manifested through sexual violence, society experiences negative effects.¹¹¹ The fourth trait is the victims’ psychological trauma. Victims of corrective rape are subjected to a form of compound trauma. They are traumatized not only by rape, but also by being the victim of a hate crime. Bias crime victims experience more trauma, both physiologically and psychologically, than non-bias

¹⁰⁷ Namaste K, “Genderbashing: Sexuality, Gender, and the Regulation of Public Space” (1996) 14 *Environment and Planning D: Society and Space* 221. Available at <https://doi.org/10.1068/d140221>.

¹⁰⁸ Doan-Minh S., “Corrective Rape: An Extreme Manifestation of Discrimination and the State’s Complicity in Sexual Violence” (*Hastings Women's Legal Journal*, 167, 2019). Available at <https://repository.uchastings.edu/hwlj/vol30/iss1/8>.

¹⁰⁹ Doan-Minh S., “Corrective Rape: An Extreme Manifestation of Discrimination and the State’s Complicity in Sexual Violence” (*Hastings Women's Legal Journal*, 167, 2019). Available at <https://repository.uchastings.edu/hwlj/vol30/iss1/8>.

¹¹⁰ Carney K.M., “Rape: The Paradigmatic Hate Crime” (2001) 75 *St. John's Law Review*. Available at <https://scholarship.law.stjohns.edu/lawreviews>.

¹¹¹ Massaro M. T., “*Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*”, (1985) 69 *Minnesota Law Review* 395, 429. Available at <https://heinonline.org/HOL/P?h=hein.journals/mnlr69&i=411>.

crime victims.¹¹² Another aspect that proves how corrective rape fits into the hate crime paradigm is the severe underreporting by victims. Many rape victims opt not to report their assault because of the “*ill-equipped, unsympathetic criminal justice system's response*”¹¹³. A further characteristic is the serial nature of the attacks on victims: bias crimes frequently involve multiple attacks on the same victim or the same group with which the victim identifies. When race is involved, the risk of being raped more than once increase much more: women of color and indigenous women have the highest rates of sexual assault, as result of “*colonization and slavery's categorical devaluing of black and brown bodies*”.¹¹⁴ The last characteristic is the increased level of violence of the offense. Rape, like all hate crimes, is “excessively violent in nature”, and many victims require hospitalization. Because each of these features is present in the crime of corrective rape, it fits perfectly within the hate crime paradigm.¹¹⁵

This result does not imply that non-corrective rapes are less heinous. It simply means that different sorts of rape should be prosecuted and punished differently.¹¹⁶ For example, prison rape is not a hate crime, but is classified under international law as torture. To qualify as torture, an act must meet four criteria: It must cause serious mental or physical suffering; it must be done intentionally; it must be perpetrated by or with the consent or acquiescence of a public authority; and it does not include pain and suffering caused by legitimate conduct.¹¹⁷ Each of these prerequisites is met by prison rape. As a result, while corrective rape is a hate crime, prison rape is a kind of torture, and both should be tried as such.

¹¹² Carney K.M., “*Rape: The Paradigmatic Hate Crime*” (2001) 75 St. John's Law Review. Available at <https://scholarship.law.stjohns.edu/lawreviews>.

¹¹³ Carney K.M., “*Rape: The Paradigmatic Hate Crime*” (2001) 75 St. John's Law Review. Available at <https://scholarship.law.stjohns.edu/lawreviews>.

¹¹⁴ Paulk L, “*Sexual Assault in the Lgbtq Community*” (National Center for Lesbian Rights April 30, 2014). Available at <https://www.nclrights.org/sexual-assault-in-the-lgbt-community/>> accessed September 28, 2021.

¹¹⁵ Carney K.M., “*Rape: The Paradigmatic Hate Crime*” (2001) 75 St. John's Law Review. Available at <https://scholarship.law.stjohns.edu/lawreviews>.

¹¹⁶ Doan-Minh S., “*Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence*” (Hastings Women's Legal Journal, 167, 2019). Available at <https://repository.uchastings.edu/hwlj/vol30/iss1/8>.

¹¹⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS.

The legal framework that protects against corrective rape is fairly developed: there are few interesting International Human Rights instruments.

The International Covenant on Civil and Political Rights (ICCPR) contains various rights incumbent upon State parties to take action to protect LGBTQ+ people from corrective rape. Article 2 paragraph 1 provide freedom of expression without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.¹¹⁸ Also, Article 26 provides for equality of individuals before the law, without discrimination of any kind: “*the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground*”.¹¹⁹ Even though sexual orientation is not specifically listed as a class for anti-discrimination protection, the Human Rights Committee, the body that oversees ICCPR implementation, held in *Nicholas Toonen v. Australia* that sexual orientation was a protected status under the Covenant because “*the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation*”.¹²⁰ The ICCPR's Article 7 protects people from “torture, cruel, inhuman, or degrading treatment or punishment”.¹²¹ This article should be interpreted in the sense that it prohibits not only activities of state agencies but also activities that come from private individuals.¹²² In addition to make torture, cruel, inhuman, and degrading treatment a crime, States shall also actively monitor state and private actors to guarantee that this right is not violated. As a result, the States’ omissions to prohibit corrective rape and other forms of sexual violence against LGBTQ+ people are a breach of this right.¹²³

Article 13, paragraph 1 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) guarantees the right to education: the State parties recognize the right

¹¹⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹¹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹²⁰ *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

¹²¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹²² Brown R., “*Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response*,” (Annual Survey of International & Comparative Law 2012: Vol. 18: Iss. 1, Article 5) Available at <https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/5>.

¹²³ Brown R., “*Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response*,” (Annual Survey of International & Comparative Law 2012: Vol. 18: Iss. 1, Article 5) Available at <https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/5>.

of everyone to education. Education is seen as a tool “*to participate effectively in a free society*” and to “*promote friendship among all nations and all racial, ethnic or religious groups*”.¹²⁴ The State is failing to fulfill its obligations under this article by failing to provide education on homosexuality, bisexuality, transgenderism, and gender identity.

¹²⁵According to research about state-sponsored homophobia, most people have preconceptions about LGBTQ+ individuals as a result of a lack of education about sex and sexual diversity, which leads to animosity.¹²⁶

Third, article 29, paragraph 1 of the Convention on the Rights of the Child (CRC) expands the right to education to affirm that education is the preparation of the child to live responsibly in a free society, “*in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national, and religious groups, and persons of indigenous origin*”.¹²⁷ As a result, when schools and other educational institutions become centers for the spread of prejudice and hatred toward lesbians and other sexual minorities, they are directly violating fundamental rights.¹²⁸

The relevance of women's rights is critical for the fulfilment of all human rights. In order to fully express the human rights foundation, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) includes many rights specific to women.¹²⁹ Articles 5 and 10 of the Convention on the Elimination of All Forms of Discrimination Against Women emphasize women's rights to social equality with the goal of eliminating cultural and educational patterns of behavior that are based on or promote the inferiority of women or stereotypical roles of women.¹³⁰ Lesbian,

¹²⁴ International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS (ICESCR).

¹²⁵ Brown R., “*Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response*,” (Annual Survey of International & Comparative Law 2012: Vol. 18: Iss. 1, Article 5) Available at <https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/5>.

¹²⁶ Long S. et al., “*More Than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa*” (The International Gay And Lesbian Human Rights Commission, 2003).

¹²⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS (CRC).

¹²⁸ Brown R., “*Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response*,” (Annual Survey of International & Comparative Law 2012: Vol. 18: Iss. 1, Article 5) Available at <https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/5>.

¹²⁹ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS.

¹³⁰ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS.

asexual, transgender women who are subjected to corrective rape are victims of educational and cultural gender inequities. These two articles impose an affirmative obligation on the State Parties: as a result, the state violates the convention because of its failure, or incapacity to address these social inequities.

Analyzing the situation from a regional perspective, is clear that regional instruments resemble international legal instruments. Both European Union Law and Council of Europe Law provide protection against discrimination in Europe: the two systems operate independently, yet their case law can influence one another.

1.3 Violations: applicable International Human Rights Law.

The fundamental principles of universality, equality, and non-discrimination guide the application of International Human Rights Law.¹³¹ Conversion therapy is in contrast with non-discrimination paradigm. Indeed, non-discrimination principle has the aim to provide all individuals with an equal and fair chance to participate in society's opportunities. This means that individuals or groups of individuals in similar situations should not be treated differently based on a single trait, such as gender, race or ethnicity, religion or belief, handicap, age, or sexual orientation. In the context of the right to sexual and reproductive health, non-discrimination also includes the right of all people, including lesbian, gay, bisexual, transgender, and intersex people, to be fully recognized for their sexual orientation, gender identity, and intersex status.¹³² Non-discrimination principle is recognized in many international and regional treaties, such as International Covenant on Civil and Political Rights (Article 26)¹³³, Charter of Fundamental Rights of European Union (Article 20 and 21 non-discrimination)¹³⁴, European Convention of

¹³¹ International Commission of Jurists, *Chapter two: Universality, Equality and Non-Discrimination*, available at: <https://www.icj.org/sogi-casebook-introduction/chapter-two-universality-equality-and-non-discrimination/>.

¹³² Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health.

¹³³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹³⁴ Charter of Fundamental Rights of the European Union (adopted 14 December 2007) 2007/C 303/01.

Human Rights (Article 14 and Protocol No. 12, Article 1) ¹³⁵. Conversion therapy practices specifically target a certain group characterized on sexual orientation and gender identity, with the “*aim of interfering with their personal integrity and autonomy*”¹³⁶. In other words, conversion therapy practices violate non-discrimination principle.

The International Covenant on Economic, Social, and Cultural Rights, as well as many other international law sources, also entails the right to health.¹³⁷ Every individual, without exception, should be able to enjoy the best possible physical and mental health. This is frequently associated with access to health care, but the right to health extends further. It includes a wide range of aspects that can help us in living a healthy life. These aspects are called “underlying determinants of health”. Analyzing from the point of view of conversion therapy, the most important “underlying determinant” is the freedom from non-consensual medical treatment.¹³⁸ Subjecting patients to medical treatment without their complete, free, and informed consent is degrading and harmful.¹³⁹ Unfortunately, non-consensual medical treatment concerning sexual orientation change efforts is really common due to the fact that majority of the individuals subjected to “therapies” are minors.¹⁴⁰ Young people often lack the power and authority to give their consent to medical treatments, and even when they do give their consent, they are particularly vulnerable to undue influence or pressure from family members. Furthermore, regulations mandating lesbian, gay, bisexual, transgender, and intersex people to be treated as mental or psychiatric patients, or to be “cured” through so-called “therapy”, are a clear infringement of their right to sexual and reproductive health.¹⁴¹ State parties of the

¹³⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

¹³⁶ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 59.

¹³⁷ International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS (ICESCR).

¹³⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the right to the highest attainable standard of health.

¹³⁹ World Medical Association, Declaration of Helsinki: Ethical principles for medical research involving human subjects (Helsinki: WMA, 1964); Universal Declaration on Bioethics and Human Rights (2005) Article 7.

¹⁴⁰ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (May 2020) A/HRC/44/53, p. 59.

¹⁴¹ Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health.

International Covenant on Economic, Social, and Cultural Rights are also required to suppress homophobia and transphobia, which lead to discrimination, including violations of the right to sexual and reproductive health.¹⁴² Finally, pathologization of sexual or gender diversity reduces LGBTQ+ people identities to diseases, compounding stigma and prejudice, as well as creating additional barriers to accessing services that address their genuine health needs.¹⁴³ The impact of pathologization is not just involving right to health, but it also has consequences on public policy, legislation and jurisprudence: it penetrates in collective conscience.¹⁴⁴ The eradication of the idea of homosexuality or gender diversity as a pathology from everyday life is considered essential to allow LGBTQ+ individuals to access better health care.¹⁴⁵ According to experts, States should reconsider their medical classifications in order to eliminate the perception of some kinds of sexual orientation or gender identities as diseases and to ensure that LGBTQ+ individuals “have better access to quality health care”.¹⁴⁶

International and regional human rights instruments unequivocally prohibit torture and other forms of cruel, inhuman, or degrading treatment, without any exception. This prohibition has the status of *jus cogens*¹⁴⁷, giving rise to the *erga omnes* obligation to take action against those who torture¹⁴⁸. The core elements that characterize torture

¹⁴² Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health.

¹⁴³ Report of the Special Rapporteur on the highest attainable standard of physical and mental health, A/HRC/35/21.

¹⁴⁴ Asia Pacific Forum of National Human Rights Institutions, UNDP, *Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions*, 2016. Available at: https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orie.html.

¹⁴⁵ Report of the Independent expert on protection against violence and discrimination based on sexual orientation and gender identity, A/73/152.

¹⁴⁶ Asia Pacific Forum of National Human Rights Institutions, UNDP, *Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions*, 2016. Available at: https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orie.html.

¹⁴⁷ “A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Also, the existence of this norms s memorialized in Article 53 of the Vienna Convention on the Law of Treaties.

¹⁴⁸ Case no. IT-95-17/1-T10, Trial Chamber, Judgement, 18 December 1998, paragraphs 155-157.

paradigm are the intensity of the pain or suffering, the aim of the act and the official status of the perpetrator.¹⁴⁹

On the basis of these premises, a question may arise whether conversion therapy covers the core elements of torture, so that it can be considered as such. Considering the first element, the intensity of the pain or suffering, some practices that entail electric shock or other physical or psychological harm might fall within the scope of torture.¹⁵⁰ However, not all conversion therapy practices are that clear and unequivocal. There are some methods that rely on psychoanalysis or prayers, and, consequently, they can be easily confused with actual medicine and faith.¹⁵¹ Conversion therapy practices try to change LGBTQ+ people from being non-heterosexual to being heterosexual, and from being trans or gender diverse to being cisgender.¹⁵² Therefore, to satisfy the second element – the aim of the act – it could be argued that since conversion therapy is practiced exclusively on LGBTQ+ people, it could be regarded as a discrimination based on sexual orientation or gender diversity, which is recognised as a ground of torture.¹⁵³

The official status of the perpetrator, which is the third element, could seem more problematic. Not all practices of conversion therapy would automatically meet this condition, because in the majority of cases, conversion therapy is enacted by private actors (such as family or religious leaders) which are excluded by the requirement official status of the perpetrator. Recent research has updated this issue: even when conversion therapy remains “private”, the State is responsible because of its acquiescence, direct or

¹⁴⁹ Nigel S Rodley, *The Definition(s) of Torture in International Law* (2002) 55 *Current Legal Problems* 467. Available at <https://doi.org/10.1093/clp/55.1.467>.

¹⁵⁰ Human Rights Council, ‘Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity Report of the Office of the United Nations High Commissioner for Human Rights’ (4 May 2015) A/HRC/29/23, para 52.

¹⁵¹ Nugraha IY, ‘The Compatibility of Sexual Orientation Change Efforts with International Human Rights Law’ (2020) 38 *Netherlands Quarterly of Human Rights*. Available at <https://doi.org/10.1177/0924051917724654>.

¹⁵² UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 17.

¹⁵³ Committee Against Torture, ‘General Comment No 2: Implementation of Article 2 by States Parties’ (24 January 2008) CAT/C/GC/2, para 21.

indirect financing, failure to regulate health and education or refusal to act.^{154 155} The asymmetrical power relationship between the practitioner and the victim “*evokes the dehumanization, moral exclusion and delegitimizing rationale*”.¹⁵⁶ These are characteristics that conversion therapy shares with the vast majority of gross human rights violations throughout history.

As a result, since conversion therapy fulfills all the three core elements of torture, since the lack of both a medical justification and free and informed consent, and the fact that the practices are based on discrimination, “*conversion therapy practices can amount to torture or, in the absence of one or more of those constitutive elements, other cruel, inhuman, or degrading treatment*”.¹⁵⁷ Furthermore, States have an obligation to protect all people, including LGBTQ+ people, from torture and other cruel, inhuman, or degrading treatment or punishment. Conversion therapy practices are deemed to be in violation of this duty.¹⁵⁸ Conversion therapy practices should be investigated by the State and, if applicable, prosecuted and punished in accordance with international human rights obligations regarding the prohibition of torture and cruel, inhuman, or degrading treatment or punishment. Under the parameters outlined therein, as a result, certain cases may involve international responsibility of the State.¹⁵⁹ The States should take the “*necessary legislative measures to guarantee respect for the autonomy and physical and*

¹⁵⁴ International Rehabilitation Council for Torture Victims, “Conversion Therapy Is Torture” Statement on Conversion Therapy (International Rehabilitation Council for Torture Victims July 13, 2021). Available at <https://irct.org>.

¹⁵⁵ UN Human Rights Council, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. 11 May 2018. A/HRC/38/43.

¹⁵⁶ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 64.

¹⁵⁷ UN General Assembly. Interim Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, relevance of the prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Context of Domestic Violence. 12 July 2019. A/74/148; UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 17.

¹⁵⁸ UN Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination, and violence against individuals based on their sexual orientation and gender identity. 4 May 2015. A/HRC/29/23.

¹⁵⁹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 85.

personal integrity” of LGBTQ+ persons and “*prohibit the practice of so-called ‘conversion therapy’*”.¹⁶⁰

Recently, potential State bans on conversion therapy have been widely criticized. The reason is that, according to some faith-based perpetrators of conversion therapy, the ban will violate their right to freedom of conscience and religion and their freedom of expression.¹⁶¹ Freedom of expression is a core fundamental right, recognized in both international and regional human rights instruments. It entails the right of an individual or group of individuals to express their beliefs, thoughts, ideas, and emotions, without interference.¹⁶² Even though freedom of expression is fundamental, it is not absolute, it may encounter “external limits”.¹⁶³ This occurs when it is essential to preserve others’ rights or reputations, national security, public order, public health, or public morals. Those limitations must be legally mandated and proportionate.¹⁶⁴ In other words, anyone has freedom of expression, as well as freedom of conscience and religion, but only as long as it does no harm to others. Conversion therapy is clearly damaging, according to the research and this is especially true in religious settings.¹⁶⁵ The medical community has mostly condemned conversion therapy: there is no evidence that it is effective, and it can be harmful to mental health.¹⁶⁶ By mistakenly linking LGBTQ+ identities to a disease that can be healed or cured, such methods legitimize homophobic, biphobic, and

¹⁶⁰ UN Committee Against Torture. Concluding observations on the fifth periodic report of China. 3 February 2016. CAT/C/CHN/CO/5.

¹⁶¹ “Christian Institute's Legal Case against Conversion Therapy BAN 'Fundamentally Flawed'” (Humanists UK, 2021) Available at <https://humanists.uk/2021/06/03/christian-institutes-legal-case-against-conversion-therapy-ban-fundamentally-flawed/>> accessed September 27, 2021.

¹⁶² International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS (ICESCR), Art. 19.

¹⁶³ Pustorino P, “Lezioni Di Tutela Internazionale Dei Diritti Umani” (Cacucci 2020).

¹⁶⁴ International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS (ICESCR), Art. 19.

¹⁶⁵ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

¹⁶⁶ Alempijevic D, Beriashvili R, Beynon J, et al., “Statement of the Independent Forensic Expert Group on Conversion Therapy.” (Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

transphobic beliefs.¹⁶⁷ As a consequence, it is lawful to restrict conversion therapy.¹⁶⁸ The Independent Expert also specified that there is no link between religion and discrimination based on sexual orientation or gender identity: there are many churches and religious communities that interpret religion in an inclusive way and support the idea that diversity should be valued and embraced (some of those have also condemned conversion therapy).¹⁶⁹ At the same time, any argument that religious beliefs can be used to justify violence or discrimination against persons because of their sexual orientation or gender identity has been rejected. States should also combat all types of violence and coercion directed against LGBTQ+ people that are justified by religious belief or practice.¹⁷⁰

Research show that the majority of people subjected to conversion therapy are minors.¹⁷¹ This is extraordinarily harmful to their health and development.¹⁷² The principle of the best interests of the child is one of the core principles of the Convention on the Rights of the Child.¹⁷³ In the vast majority of cases, parents or guardians make the decision to subject their children to such practices. The reason for this is that they believe conversion therapy is in the best interests of the child.¹⁷⁴ According to research, parents or guardians are “*motivated by religious beliefs that consider sexual and gender diversity*

¹⁶⁷ Alempijevic D, Beriashvili R, Beynon J, et al., “Statement of the Independent Forensic Expert Group on Conversion Therapy.” (*Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 2020) Available at <https://pubmed.ncbi.nlm.nih.gov/32657772/>.

¹⁶⁸ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 57.

¹⁶⁹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 68.

¹⁷⁰ UNHRC, Forty-third session 24 February–20 March 2020, Gender-based violence and discrimination in the name of religion or belief (24 August 2020) A/HRC/43/48, p. 50 – 54.

¹⁷¹ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

¹⁷² UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 50 – 54.

¹⁷³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

¹⁷⁴ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

to be ‘immoral’ and incompatible with their religious tenets”. They are also misinformed about both the nature of sexual and gender diversity and the ineffectiveness of those practices.¹⁷⁵ Considering all these factors, subjecting children to “*conversion therapy methods not only constitute ill-treatment and, potentially, torture, but it is also a violation of domestic and international laws that prohibit child abuse and neglect*”.¹⁷⁶ According to Convention on the Rights of the Child, in all acts involving children, whether conducted “*by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies*”, the best interests of the child must be considered as a primary consideration.¹⁷⁷ This concept is flexible and adaptable and takes in consideration many assessments: individual decisions necessitate a thorough assessment of the circumstances of a particular child; collective decisions, instead, necessitate a thorough assessment of the circumstances of a particular group. Also, the identity of the child is among the elements to be considered in the assessment. This includes sex, national origin, religion, cultural identity, and sexual orientation.¹⁷⁸ The child’s right to health are crucial in assessing the child’s best interest. Whenever there is uncertainty about potential medical treatments, the advantages of all the treatments have to be weighed “against all possible risks and side effects”.¹⁷⁹ The assessment of the child's best interests must also consider the child's safety and the right to be protected from all types of physical or mental violence, injury, or abuse.¹⁸⁰ If a conflict between these different elements occurs, they

¹⁷⁵ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 87.

¹⁷⁶ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 71.

¹⁷⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS (CRC).

¹⁷⁸ Nugraha IY, “The Compatibility of Sexual Orientation Change Efforts with International Human Rights Law” (2020) 38 Netherlands Quarterly of Human Rights. Available at <https://doi.org/10.1177/0924051917724654>.

¹⁷⁹ Convention on the Rights of the Child Committee, General Comment GC 14 (n 66) on the right of the child to have his or her best interests taken as a primary consideration, paras. 55 and 73.

¹⁸⁰ Convention on the Rights of the Child Committee, General Comment GC 14 (n 66) on the right of the child to have his or her best interests taken as a primary consideration, paras. 55 and 73.

must be “*weighed against each other in order to find out the optimal answer for the child or children*”.¹⁸¹

While the Convention on the Rights of the Child Committee has established the definition and the legal nature of best interest, the meaning of “best interests of the child” in general is complex and must be assessed on a case-by-case basis.¹⁸² As for practices of so-called “conversion therapy”, research prove that it is against best interest of the child.¹⁸³

Conversion therapy practices are also in contrast with the right of a child to have his or her identity respected, provided under Article 8 of the Convention on the Rights of the Child.¹⁸⁴ Moreover, many LGBTQ+ children are forced to undergo conversion therapy practices as a result of the insistence of their parents or legal guardians.¹⁸⁵ This violates the child's right to be heard under Article 12 of the Convention on the Rights of the Child.¹⁸⁶ In fact, all the decisions that does not take in consideration “*the child's views or does not give their views due weight because of their age or maturity*” disregards the child ability to influence the judgment of their best interests.¹⁸⁷

States have the obligations to protect children from violence, harmful practices and cruel, inhuman, or degrading treatment and torture, as well as to respect the right of the child to identity, physical and psychological integrity, health, and freedom of expression. States have also to uphold the principle of the best interests of the child at all times.¹⁸⁸ Imposing “conversion therapy” practices on children violates the obligations of the States to protect

¹⁸¹ Convention on the Rights of the Child Committee, General Comment GC 14 (n 66) on the right of the child to have his or her best interests taken as a primary consideration, paras. 55 and 73.

¹⁸² Convention on the Rights of the Child Committee, General Comment GC 14 (n 66) on the right of the child to have his or her best interests taken as a primary consideration, paras. 55 and 73.

¹⁸³ Nugraha IY, “The Compatibility of Sexual Orientation Change Efforts with International Human Rights Law” (2020) 38 Netherlands Quarterly of Human Rights. Available at <https://doi.org/10.1177/0924051917724654>.

¹⁸⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS (CRC).

¹⁸⁵ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview_.

¹⁸⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS (CRC).

¹⁸⁷ Convention on the Rights of the Child Committee, General Comment GC 14 (n 66) on the right of the child to have his or her best interests taken as a primary consideration, paras. 55 and 73.

¹⁸⁸ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 71.

children from violence, harmful practices, and cruel, inhuman, or degrading treatment, to respect the child's right to identity, physical and psychological integrity, health, and freedom of expression, and to uphold the core principle of putting the child's best interests first.¹⁸⁹ Subjecting children to practices of so-called “conversion therapy” is contrary to international human rights law.

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, encourages States to take immediate action to prohibit conversion therapy practices.¹⁹⁰

¹⁸⁹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 71.

¹⁹⁰ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 83 – 87.

Chapter 2

Analysis of the legal framework of International Organizations and International Conventions of Human Rights

2.1 European Union: path to Europe-wide ban

The first time that a European Union body referred to “conversion therapy” was in 2018. Indeed, Parliament of European Union passed a resolution, in March 2018, that welcomes actions forbidding LGBTIQ+ “conversion therapies” and urged Member States to “outlaw such practices”.¹⁹¹ Although European Parliament resolutions are not binding for Member States¹⁹², it is nevertheless a good method to raise awareness through national lawmakers.¹⁹³

With the “LGBTIQ Equality Strategy 2020-2025”, The European Commission stressed that the Commission itself, the Parliament, and the Council, together with Member States, “*all share a responsibility to protect fundamental rights and ensure equal treatment and equality for all*”. One of the main goals of the Strategy is the protection and promotion of LGBTIQ people’s bodily and mental health¹⁹⁴, which clearly also concerns conversion therapy: the Commission will “encourage Member States to share best practices for ceasing harmful treatments targeting LGBTIQ people that can have serious physical and mental health consequences”, such as conversion therapies practices.¹⁹⁵ The strategy will be executed using intersectionality as a cross-cutting principle, and it will include targeted initiatives to combat prejudice and hate speech experienced by LGBTIQ children and youth.¹⁹⁶

¹⁹¹ European Parliament Resolution on the situation of fundamental rights in the EU in 2016, 1 March 2018, P8_TA(2018)0056, p. 65. Available at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0056_EN.html?redirect.

¹⁹² Consolidated version of the Treaty on the Functioning of the European Union; *OJ C 326, 26.10.2012, p. 47–390*; Articles 223, 234 and 314.

¹⁹³ ILGA World, *Toolbox To Combat So-Called “Conversion Therapies”* (2020).

¹⁹⁴ Regulation (EU) 2020/698 Of The European Parliament And Of The Council Of 25 May 2020, COM(2020)698 par. 2.4.

¹⁹⁵ Regulation (EU) 2020/698 Of The European Parliament And Of The Council Of 25 May 2020, COM(2020)698 par. 2.4.

¹⁹⁶ P-003214/2021.

Recently, in August 2021, the European Commission found itself having to answer some questions about the sobering situation regarding LGBTQ+ people, since there have been strong anti-LGBTQ+ trends in some Member States, especially during the coronavirus outbreak.¹⁹⁷ The question was about what particular actions the Commission has made since the “EU LGBTIQ Equality Strategy 2020-2025” was launched in November 2020 to encourage national bans on “conversion therapy”.¹⁹⁸ Ms. Helena Dalli, Commissioner for Equality, on behalf of the Commission, stressed that the regulation of health policies and the organisation of health services fall within the competences of the Member States.¹⁹⁹ When exercising their competence, EU Member States must, however, ensure that human rights are effectively respected and protected in conformity with both national legislation and international human rights responsibilities.²⁰⁰ Moreover, the Commission, as part of the “LGBTIQ Equality Strategy 2020-2025”, will encourage Member States to share best practices for stopping harmful practices, such as conversion practices.

In March 2021, the European Parliament declared the European Union as an “LGBTIQ Freedom Zone”.²⁰¹ Alongside with the condemnation of all forms of violence or discrimination against people based on their gender or sexual orientation, the European Parliament encouraged once again the Member States to criminalise “so-called conversion therapy practices”.²⁰² The Parliament took in consideration the May 2020 report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.²⁰³ In this report, which is the most significant research on conversion therapy to this day, many Member States of the European Union appear as perpetrators and promoters of such actions.²⁰⁴ Medication,

¹⁹⁷ P-003214/2021.

¹⁹⁸ P-003214/2021.

¹⁹⁹ P-003214/2021.

²⁰⁰ P-003214/2021.

²⁰¹ T9-0089/2021.

²⁰² T9-0089/2021.

²⁰³ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53.

²⁰⁴ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53.

psychotherapy, and ceremonial purification have all been documented to be used to change sexual orientation or gender identity in EU Member States.²⁰⁵

Thus far, only three out of twenty-seven EU Member States have banned conversion therapy.²⁰⁶

European Union declarations concerning conversion therapy, although politically and socially useful, do not provide answers to critical concerns, such as whether and why such actions shall be prohibited under human rights law. The LGBTI Intergroup of the European Parliament emphasized the importance of a Europe-wide ban.²⁰⁷ Bans are considered “the most comprehensive approach” to prohibit all practices of “conversion therapy” and are highly suggested by UNHRC Independent Expert.²⁰⁸ Understanding how to enact conversion therapy ban will be one of the European Union’s next challenges. The problem could be analysed from various perspectives. Firstly, the Directive could be considered the most appropriate legislative instrument for a Europe-wide ban. Secondly, conversion therapy could be thought of as a treatment to be banned in the context of health regulation. Thirdly, the question can be analysed from the point of view of criminal law, trying to understand whether these practices can become crimes in the European legal system.

A directive could be the appropriate legislative act to seal a uniform “conversion therapy” ban throughout the territory of the European Union.²⁰⁹ This is due to the fact that a “directive” is a legislative act that establishes a goal that all EU members must reach, and

²⁰⁵ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 50 – 54.

²⁰⁶ Malta (LV of 2016 Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 Government Gazette of Malta No. 19,693 – 09.12.2016), Germany (G. v. 12.06.2020 BGBl. I S. 1285, Nr. 28), and France (JORF n°0026 du 1 février 2022).

²⁰⁷ “MEPs Inquire the European Commission Regarding so-Called ‘Conversion Therapy’ Practices and the Need for an EU-Wide Ban” (The European Parliament’s LGBTI Intergroup October 9, 2020) Available at <https://lgbti-ep.eu/2020/10/09/meps-inquire-the-european-commission-regarding-so-called-conversion-therapy-practices-and-the-need-for-an-eu-wide-ban/>.

²⁰⁸ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 p. 76 (a).

²⁰⁹ Bans are quite common in the legal landscape of European Union. One of the most famous and recent bans is “Single-use plastics” ban and it was established with a Directive. It contains market bans, national consumption reduction measures, and other provisions regarding technical aspects, such as separate collection targets and design requirements for plastic bottles. The European Commission has also published guidelines and examples, of what is to be considered a single-use plastic product. The Directive on Single-Use Plastics implements the “European Strategy for Plastics in a Circular Economy”.

it is up to each country to develop their own legislation to achieve these objectives. And, although the LGBTIQ human rights protection is not the same in all EU Member States,²¹⁰ an EU Directive could give these States the opportunity to update their legal system. Also, a potential Directive that bans “conversion therapy” could implement “LGBTIQ Equality Strategy 2020-2025”²¹¹ and “LGBTIQ Freedom Zone”²¹².

As a second hypothesis, we could look at the matter from health regulation perspective. According to research, these “treatments” are harmful and unrecognized practices, that conduct to “psychological and physical pain and suffering”.²¹³ As mentioned above, the EU Commission, while answering about the possibility of a Europe-wide ban, has recalled that the regulation of health policies and the organisation of health services fall within the competences of the EU Member States.²¹⁴ Therefore, the “primary responsibility” for organizing and delivering health services and medical treatment rests with EU Member States. Recommendations of the EU Commission could be a solution.²¹⁵ The European Commissions’ role in health matters is fulfilled by the Directorate-General for Health and Food Safety. The DG aim is to support EU Member States’ efforts to “protect and improve the health of their citizens”, as well as to maintain the “accessibility, effectiveness, and resilience of their health systems”, through legislation proposals, coordination, and facilitation of best practices exchange between EU Member States and health experts.²¹⁶ However, the latter two are solutions to reach Member States’ ban of conversion therapy that the EU Commission has already covered²¹⁷ (unsuccessfully, since only two out of 27 Member States have banned such practices). The question arises, what effective and binding legislative instrument could be used in order to reach the goal of Europe-wide ban? The answer could be found in the Treaty on the Functioning of the

²¹⁰ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (*ILGA* December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

²¹¹ P-003214/2021.

²¹² T9-0089/2021.

²¹³ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 p. 55.

²¹⁴ P-003214/2021.

²¹⁵ European Union Commission, “EU Health Policy - Overview” (Public Health - European Commission, October 19, 2021). Available at https://ec.europa.eu/health/policies/overview_en.

²¹⁶ European Union Commission, “EU Health Policy - Overview” (Public Health - European Commission, October 19, 2021). Available at https://ec.europa.eu/health/policies/overview_en.

²¹⁷ COM(2020)698.

European Union (TFEU), since the EU can adopt health legislation under Article 168 (protection of public health), Article 114 (single market), and Article 153 (social policy).²¹⁸ This already happened in many areas concerning health (e.g., health security, digital health, pharmaceuticals, and medical devices). In particular, the current Article 168 of the TFEU states that public health, has become a genuine legislative competence, with the introduction of the power to adopt binding measures to set high standards of quality and safety.²¹⁹ The EU health policy focuses on safeguarding and improving people's health, providing all Europeans with equal access to modern and efficient healthcare, and coordinating any significant health concerns involving multiple EU Member States. And it is precisely for the protection of the health of European citizens that "conversion therapy" practices should be banned.

Moving on to a third hypothesis, Europe-wide ban issue could be analysed from criminal law perspective. Is the criminalization of conversion therapy possible within European Union framework? European Union Law has, over the time, both imposed the disapplication of criminal law that conflicted with EU Law and demanded the extension of national incriminating facts or the introduction of new types of offence.²²⁰ In the latter approach, the European Union has evolved toward a more incisive selection of legal assets deserving of legal protection, even though the implementation of concrete legislative choices has been reserved for the Member States.²²¹ According to Article 4, paragraph 2 TEU, the European Union has shared competence with that of the Member States within the area of justice and fundamental rights.²²² This involves also the competences of the European Union in substantive criminal law, such as the provision of "*minimum rules concerning the definition of criminal offences and sanctions*" in specific areas of protection (Article 83 TFEU).²²³ This seems to introduce a sort of "indirect criminal competence" of the European Union, in the sense that the Criminal Directives create obligation of adaptation for the Member States, but do not establish *ex se* directly

²¹⁸ 2008/C 115/01.

²¹⁹ Curti Gialdino G, "*Codice dell'Unione Europea Operativo – TUE e TFUE commentati articolo per articolo*" (Edizioni Simone, 2012).

²²⁰ Sotis C, "Diritto comunitario e giudice penale" (Il corriere del merito. Le rassegne, 2008).

²²¹ Manacorda S, 2021. Diritto penale europeo in "Diritto on line". [online] Treccani.it. Available at: https://www.treccani.it/enciclopedia/diritto-penale-europeo_%28Diritto-on-line%29/.

²²² 2007/C 306/01.

²²³ 2008/C 115/01.

applicable types of offence.²²⁴ This competence can only be exercised in the areas defined by TFEU (e.g., terrorism, human trafficking and sexual exploitation of women and children, illicit drug trafficking), and it can only be extended by unanimous decision of the European Council with the European Parliament's approval.²²⁵ Some exegetical doubts arise from the formula "*particularly serious crime with a cross-border dimension*" of Article 83. For some, it seems to presuppose an existent criminal regulation at national level. Instead, for others, the formula does not have defining effects, but refers to an empirical dimension that can be manifested for any kind of illicit.²²⁶ In the light of all these elements, returning to the hypothesis of criminalization of "conversion therapy" practices in the European Union, this appears to not be possible for various reasons. First, the TFEU does not provide, among the areas of crime of Article 83, for jurisdiction over crimes that concern the sphere of sexual orientation. Secondly, the European Union does not have direct competence in the field of criminal law, which, as we have seen, is a shared competence with the Member States. It would be easier to predict the criminalization of "conversion therapy" practices if there was direct competence in the justice area, with European regulations providing criminal rules or incriminating facts. However, such a revision to the TFEU would contradict the subsidiarity principle, since it aims to ensure that decisions are taken as closely as possible to the citizen.²²⁷

2.1.1 National Bans of European Union's Member States

Even before the above-mentioned European Parliament resolution in 2018, Malta has become the first EU Member State to ban conversion therapy. Maltese Government, in 2016, has enacted an act prohibiting "conversion therapy" as a misleading and harmful practice against an individual's sexual orientation, gender identity, or gender expression.²²⁸ Anyone who attempts to "*alter, repress, or eradicate a person's sexual*

²²⁴ Manacorda S, 2021. Diritto penale europeo in "Diritto on line". [online] Treccani.it. Available at: https://www.treccani.it/enciclopedia/diritto-penale-europeo_%28Diritto-on-line%29/.

²²⁵ 2008/C 115/01 Article 83 Paragraph 1.

²²⁶ Manacorda S, 2021. Diritto penale europeo in "Diritto on line". [online] Treccani.it. Available at: https://www.treccani.it/enciclopedia/diritto-penale-europeo_%28Diritto-on-line%29/.

²²⁷ Manacorda S, 2021. Diritto penale europeo in "Diritto on line". [online] Treccani.it. Available at: https://www.treccani.it/enciclopedia/diritto-penale-europeo_%28Diritto-on-line%29/.

²²⁸ LV of 2016 Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 Government Gazette of Malta No. 19,693 – 09.12.2016.

orientation, gender identity, and/or gender expression” will be fined or possibly imprisoned.²²⁹ The particular feature of this provision is that it prohibits the execution of conversion therapy, both for professionals and non-professionals.²³⁰ Of course, the act provides for non-professionals a less strict penalty or fine than the ones established for professionals.²³¹ However, the act provides an aggravating factor: the punishment prescribed for non-professionals “*shall be increased by one to two degrees*” in cases where someone performs “conversion therapy” practices on a vulnerable individuals.²³²

The German act that outlaws conversion therapy was promulgated in 2020, called “Law on Protection against Conversion Treatments”.²³³ This law applies to all treatments carried out on humans aimed at “modifying or suppressing sexual orientation or perceived gender identity”. This Law does not apply to the treatment of medically recognized disorders of sexual preference. Moreover, surgical medical interventions or hormonal treatments aimed at expressing a person’s perceived gender identity or to satisfy a person’s desire for a more masculine or feminine physical appearance, do not fall in the “conversion therapy” paradigm.²³⁴ However his ban is only “partial”. The reason is the protection being extended to:

- People under 18 years of age.
- Adults under coercion or unable to consent.²³⁵

Therefore, in the case of persons who are over 18 years of age, the conversion treatment is prohibited only when their consent to the execution of the conversion treatment is based on a lack of will.²³⁶ Such limited protection, has been widely criticized.²³⁷ The reason for the criticisms is due to the fact that also adults are subject to therapy, but they are not

²²⁹ LV of 2016 Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 Government Gazette of Malta No. 19,693 – 09.12.2016.

²³⁰ LV of 2016 Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 Government Gazette of Malta No. 19,693 – 09.12.2016. Articles 3(a) and 3(b).

²³¹ LV of 2016 Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 Government Gazette of Malta No. 19,693 – 09.12.2016. Article 4 Paragraph 1 (first half).

²³² LV of 2016 Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 Government Gazette of Malta No. 19,693 – 09.12.2016. Article 4 Paragraph 1 (second half).

²³³ G. v. 12.06.2020 BGBI. I S. 1285 (Nr. 28).

²³⁴ G. v. 12.06.2020 BGBI. I S. 1285 (Nr. 28) §1.

²³⁵ G. v. 12.06.2020 BGBI. I S. 1285 (Nr. 28) §2

²³⁶ G. v. 12.06.2020 BGBI. I S. 1285 (Nr. 28) §2.

²³⁷ Escritt T, “Minister Defends Germany's Limited Gay Therapy Ban” (Reuters, May 7, 2020) Available at <https://www.reuters.com/article/us-germany-equality-lgbt-idUSKBN22J2F5>.

protected by the law.²³⁸ A response to these criticisms could be found in the principle of freedom of expression and conscience, present both in the German Constitution²³⁹ and in various international Human Rights treaties to which Germany is a party (European Convention of Human Rights and Charter of the Fundamental Rights of European Union).²⁴⁰ Because these principles may complicate the situation for those over the age of 18 who wish to willingly receive this form of treatment, the legislation exclusively protects those above the age of 18 who have been forced to treatment by coercion or without consent.²⁴¹ On the contrary, among the qualities of this law, the attention of the legislator to the prevention of these practices is to be counted. First of all, according to the law, it is forbidden to advertise, offer or mediate conversion treatments.²⁴² Secondly, perhaps more significantly, the law establishes that *Bundeszentrale für gesundheitliche Aufklärung* (Federal Center for Health Education) will set up a telephone and online counselling service, in several languages and anonymously, aimed at all persons who are or may be subject to conversion treatment and also their family members, and all persons dealing with or advising on sexual orientation and perceived gender identity for professional or private reasons.²⁴³ As a result, even though consenting adults are not legally protected, they have certain guarantees provided by the law: it is difficult for them to become aware of these practices, of which not only the performance but also the advertisement is outlawed, and they can, in any case, contact the designated number or website for help.

In 2022 came into force the French law prohibiting conversion therapy.²⁴⁴ The main features are almost similar to other laws of the other EU Member States, but there are still some peculiarities. For example, if a parent is convicted, the criminal judge will have to consider whether or not parental authority should be withdrawn. Also, the law provides for two years in prison and 30,000 euros in fines for doctors claiming to treat a

²³⁸ Escritt T, “Minister Defends Germany's Limited Gay Therapy Ban” (Reuters, May 7, 2020) Available at <https://www.reuters.com/article/us-germany-equality-lgbt-idUSKBN22J2F5>

²³⁹ Escritt T, “Minister Defends Germany's Limited Gay Therapy Ban” (Reuters, May 7, 2020) Available at <https://www.reuters.com/article/us-germany-equality-lgbt-idUSKBN22J2F5>.

²⁴⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Articles 9 and 10; Charter of Fundamental Rights of the European Union 2012/C 326/02 (CFREU) Articles 10 and 11.

²⁴¹ Escritt T, “Minister Defends Germany's Limited Gay Therapy Ban” (Reuters, May 7, 2020) Available at <https://www.reuters.com/article/us-germany-equality-lgbt-idUSKBN22J2F5>.

²⁴² G. v. 12.06.2020 BGBl. I S. 1285 (Nr. 28) §3.

²⁴³ G. v. 12.06.2020 BGBl. I S. 1285 (Nr. 28) §4.

²⁴⁴ JORF n°0026 du 1 février 2022

person's sexual orientation or gender identity. These doctors will also be at risk of being banned from practising for up to 10 years.

An interesting phenomenon could be found in Spanish legislation. Despite the fact that there is no statewide prohibition, a “fragmented protection” is to be noted. Indeed, “conversion therapy” is prohibited in certain Spanish jurisdictions, such as Andalusia²⁴⁵, Aragon²⁴⁶, Madrid²⁴⁷, Murcia²⁴⁸, and Valencia²⁴⁹ ²⁵⁰. Approximately 48.7% of the Spanish population will have legal protection against “conversion therapy” by September 2020.²⁵¹

So-called “de facto ban” is to be noted in Albania.²⁵² Albania's National Psychological Association has prohibited its members from practicing conversion therapy since May 2020. Considering membership is required to practice in the country, conversion therapists are effectively prohibited among psychologists.

To summarize, only Germany, Malta, France, and some areas of Spain have prohibited these activities. Many other EU Member States, such as France and Belgium, are going to do the same, but several Member States are unlikely to pass such legislation in the near future.²⁵³ Therefore, the question is whether the EU Commission has a duty to act.

2.2 Council of Europe and ECHR

2021 marks the 40th anniversary of *Dudgeon* decision.²⁵⁴ The Strasbourg Court was the first international court to rule, in 1981, that laws criminalizing sexual orientation violate

²⁴⁵ BOE-A-2018-1549.

²⁴⁶ BOE-A-2019-2712.

²⁴⁷ BOE-A-2016-11096.

²⁴⁸ BOE-A-2016-6170.

²⁴⁹ BOE-A-2017-5118, Article 6.

²⁵⁰ BOE-A-2019-281, Articles 7, 60 (d, e), 62.

²⁵¹ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

²⁵² Savage R, “Albania psychologists barred from conducting gay “conversion therapy” (Reuters, 18 May 2020).

²⁵³ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

²⁵⁴ *Dudgeon v. United Kingdom*, Application No. 7525/76, ECtHR, 22 October 1981.

human rights, including the right to private and family life, enshrined in Article 8 of the ECHR.²⁵⁵ This groundbreaking decision resulted in the decriminalization of homosexuality in Northern Ireland, the United Kingdom, and Europe as a whole, granting human rights to millions of individuals. Since then, the Council of Europe has continued to offer its member states with the required legal and practical assistance to safeguard LGBTQI individuals.²⁵⁶

The Council of Europe's position on the protection of LGBTQI individuals' human rights is analogous to that of the European Union. In one of its Statements, the Advisory Council on Youth²⁵⁷ condemned any kind of violence against LGBTQI individuals and invited legislators to take young LGBTQI people's issues seriously and work toward "*building a climate of inclusion and diversity for all citizens without exception*".²⁵⁸ Further, the Advisory Council declared its opposition to all the practices of conversion therapies, defining them as a merely a feeble attempt by institutions and individuals to punish "*those who do not comply to heteronormative systems*".²⁵⁹ The Advisory Council urged all Council of Europe Member States to make conversion therapy illegal.²⁶⁰ More recently, the Congress of Local and Regional Authorities of the Council of Europe set new goals in order to protect LGBTI people "*in the context of rising anti-LGBTI hate speech and discrimination*"²⁶¹ : establish a local policy or regional legislation prohibiting hate crimes; LGBTI equality and human rights should be mainstreamed in local and regional public policy, and current anti-discrimination legislation should be monitored for

²⁵⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 8.

²⁵⁶ *L. and V. v. Austria*, Application nos. 39392/98 and 39829/98, and *S.L. v. Austria*, Application no. 45330/99, ECtHR 9 January 2003 (Criminalisation of homosexual relations between adults and adolescents); *Identoba and Others v. Georgia*, Application no. 73235/12, ECtHR 12 August 2015 (Right to life and prohibition of inhuman or degrading treatment, Allegations of ill-treatment by the police or by private individuals); *I.I.N. v. the Netherlands*, Application no. 2035/04, ECtHR 9 December 2004 (Risk arising from the return of homosexuals to their country of origin); *Fretté v. France* Application no. 36515/97, ECtHR 26 February 2002 (Adoption); *Vallianatos and Others v. Greece*, Application nos. 29381/09 and 32684/09, ECtHR November 2013 (Civil Unions).

²⁵⁷ The Advisory Council on Youth (CCJ) is the non-governmental partner in the co-management framework that determines the Council of Europe's youth sector's standards and work priorities and makes suggestions for future priorities, programs, and finances. It is composed of 30 delegates from youth NGOs and networks from across Europe, and its primary responsibility is to advise the Committee of Ministers on all issues concerning youth.

²⁵⁸ Council of Europe, Advisory Council On Youth, "Statement on International Day Against Homophobia, Transphobia and Biphobia" (17 May 2020).

²⁵⁹ Council of Europe, Advisory Council On Youth, "Statement on International Day Against Homophobia, Transphobia and Biphobia" (17 May 2020).

²⁶⁰ Council of Europe, Advisory Council On Youth, "Statement on International Day Against Homophobia, Transphobia and Biphobia" (17 May 2020).

²⁶¹ Council of Europe, Congress of Local and Regional Authorities - Resolution 470 (2021).

implementation.²⁶² In the memorandum of this resolution, Congress of Local and Regional Authorities explicitly mentioned conversion therapy practices.²⁶³ In Europe, inequality, discrimination, and violence continue to have an impact on the daily lives of LGBTI people. They encounter challenges in many aspects of social life, including education, health, politics, and the economy, that prevent them from fully participating in the European community.²⁶⁴ In Europe, people are still discriminated against because of their sexual orientation when it comes to health care. In the memorandum, conversion therapy is defined as “*explicitly discriminatory and degrading*”, and many Council of Europe Member States do not ban these practices. According to Congress of Local and Regional Authorities, it is essential to end discriminatory medical treatment that treats LGBTI+ people as though their sexuality or gender identity is a medical condition.²⁶⁵

The Court of Strasbourg has never directly ruled on conversion therapy, but it is possible to arrive, through its rulings, to frame a profile of conversion therapy within the European Court of Human Rights and the European Convention of Human Rights.²⁶⁶

i. Principle of non-discrimination

The principle of non-discrimination is one of the fundamental principles of ECHR (together with the rule of law principle, and the values of tolerance and social peace).²⁶⁷ The protection against discrimination in the enjoyment of the rights set forth in the Convention is enshrined in Article 14.²⁶⁸ This article does not provide a *numerus clausus* of grounds, instead it has an “*open-ended list*” of grounds protected against discrimination. The words “*any ground such as*” show that the grounds enlisted in the Article are only demonstrative and the term “any other status” included in the list makes

²⁶² Council of Europe, Congress of Local and Regional Authorities - Resolution 470 (2021) Paragraph 7, Letters a, b, d.

²⁶³ Council of Europe, Congress of Local and Regional Authorities - Resolution 470 (2021), Explanatory Memorandum, Section 3, Paragraph 76.

²⁶⁴ Council of Europe, Congress of Local and Regional Authorities - Resolution 470 (2021), Explanatory Memorandum, Section 3, Paragraph 68.

²⁶⁵ Council of Europe, Congress of Local and Regional Authorities - Resolution 470 (2021), Explanatory Memorandum, Section 3, Paragraph 76.

²⁶⁶ The European Court of Human Rights supervises the implementation of the Convention in the 47 member states of the Council of Europe. Individuals can file complaints about human rights violations with the Strasbourg Court after exhausting all other grounds of appeal in the member state in question.

²⁶⁷ *S.A.S. v. France*, Application no. 43835/11, ECtHR 1 July 2014.

²⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 14.

it possible to apply the protection enshrined by the Article to many other grounds.²⁶⁹ Furthermore, the Court has built a substantial body of case law that has enlarged the number of protected grounds by extensively interpreting the term “other status” in light of current circumstances. The principle of non-discrimination also protects on the grounds of sexual orientation or gender identity.²⁷⁰ Gender identity and sexual orientation were also recognized by the Court as two unique and intimate characteristics and any confusion between the two would thus represent an attack on one’s reputation capable of achieving a sufficient level of seriousness for addressing such an intimate aspect of a person.²⁷¹ Concerning the sexual orientation ground, the Court emphasized that sexual orientation discrimination was just as serious as discrimination based on “race, origin, or color”.²⁷² In the light of the above, the question arises as to whether conversion therapy constitutes a violation of the principle of non-discrimination. Conversion therapy is different from other forms of harmful or medically negligent therapies. The reason is target of such therapy: “*a protected socially salient group of people*”, namely LGBTIQ+ people.²⁷³ As a result, “conversion therapy” is fundamentally a problem of direct discrimination based on sexual orientation and gender identity. Additionally, it is a kind of *wrongful discrimination*, because, other than causing great bodily and psychological harm, “conversion therapy” practices are deeply disrespectful of LGBTIQ+ people’s “equal moral personhood”.²⁷⁴ These assumptions extend and apply to all forms of conversion therapy, from the physically and mentally toughest forms, to the lightest. All types of “conversion therapy” are fundamentally disrespectful because, aside from their real consequences on victims and social conventions about what constitutes disrespect, they fail to recognize that all people, regardless of their sexuality or gender identity, have equal moral value.²⁷⁵ To put it another way, they fail to demonstrate “*recognition respect*”.²⁷⁶ They fail to recognize that the status of LGBTIQ+ people as individuals must be taken

²⁶⁹ *Clift v. The United Kingdom*, Application no. 7205/07, 22 November 2010, Paragraph 55.

²⁷⁰ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 August 2015, Paragraph 96

²⁷¹ *Sousa Goucha v. Portugal*, Application no. 70434/12, 22 June 2016, Paragraph 27.

²⁷² *Vejdeland And Others v. Sweden*, Application no. 1813/07, 9 February 2012, Paragraph 55.

²⁷³ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, <https://doi.org/10.1093/ojls/gqab024>.

²⁷⁴ Eidelson B, *Discrimination and Disrespect* (OUP 2015) 84–90.

²⁷⁵ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

²⁷⁶ S. Darwall, ‘*Two Kinds of Respect*’ (1977) 88(1) *Ethics* 36, 38.

into account when making decisions about how to act.²⁷⁷ Apart from reducing LGBTIQ+ people's interests to physical health, "conversion therapy" demonstrates deliberative failure in two ways:

- it attacks the core aspects of identity of LGBTIQ+ individuals by denying them important freedoms related to sexuality and gender identity.
- it unfairly subordinates them on the basis of their sexuality.²⁷⁸

An objection may raise about consent in conversion therapy: is the principle of non-discrimination infringed only in cases when conversion therapy is not consented by the subject? The choice of the individual is not the point, because what really should matter the most are the circumstances under which a person made that choice.²⁷⁹ As previously stated, "conversion therapy" is predicated on a social background of historical stigmatization of homosexuality. The result of summing the social background and the pressure on many LGBTIQ+ people to fight their sexuality or gender identity (a pressure that heterosexual, cisgender people do not face) has "*independent moral significance*".²⁸⁰ A too narrow interpretation, that looks only at the choice of the individual and does not consider the social background of such choice, is "*under-inclusive*".²⁸¹ In conclusion, in order to determine whether there is a breach of the principle of non-discrimination in cases where victims have chosen to undergo to conversion therapy practices, the consent of that person is irrelevant.

ii. Prohibition of torture and inhuman or degrading treatment or punishment: application of Article 3 ECHR to "conversion therapy"

Another problem of interpretation could arise with regard to Article 3 of the ECHR, since torture, inhuman and degrading treatment or punishment are all prohibited under the

²⁷⁷ Ilias Trispiotis, Craig Purshouse, 'Conversion Therapy' As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

²⁷⁸ Ilias Trispiotis, Craig Purshouse, 'Conversion Therapy' As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

²⁷⁹ Ilias Trispiotis, Craig Purshouse, 'Conversion Therapy' As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

²⁸⁰ Ilias Trispiotis, Craig Purshouse, 'Conversion Therapy' As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

²⁸¹ Ilias Trispiotis, Craig Purshouse, 'Conversion Therapy' As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

European Convention.²⁸² That is because Article 15 of the ECHR, states that it is not possible to enact derogations from the provisions of Article 3 can be made.²⁸³

The European judicial system has developed complex definitions and distinctions between the three forbidden actions, out of the mere declaration of the prohibition on torture, inhuman and degrading treatment or punishment included in Article 3 of the ECHR. First of all, an act of ill-treatment, torture, cruel or humiliating treatment or punishment, must meet the so-called “*minimum level of severity*” to fall within the scope of Article 3.²⁸⁴ In the evaluation of the “entry level threshold” of severity, the Strasbourg Court has to take in consideration many aspects such as: the duration of the treatment, both physical and mental effects that result in the treatment, the sex, age and state of health of the victim.²⁸⁵ Once the European Court of Human Rights has determined that the conduct complained of crosses this “entry level threshold”, there is the need to draw a distinction between acts of torture, inhuman and degrading treatment and punishment. The distinction between all these three acts is largely determined by the level of severity.²⁸⁶ At this point a question arises: is it necessary for “conversion therapy” to reach a certain level of severity in order to fall within the scope of Article 3 of ECHR and, in particular, as a degrading treatment? The European Court of Human Rights has not ruled on cases concerning “conversion therapy” yet, but a solution could be found analysing similar cases and the principles, trends and interpretations that can be drawn from them. Generally, ECtHR uses the so-called “Pretty test” to evaluate if the “entry level threshold” of severity has been crossed.²⁸⁷ The Pretty test consists in two evaluative elements: the “severity” of treatment and the “intensity” of suffering. According to the Test, the Court can analyse perpetrator’s intentions and actions to assess “severity”.²⁸⁸ Then, the Courts turn the attention away from the perpetrator and toward the victim’s subjective experience in order to determine the “intensity” of the suffering of the victim.²⁸⁹ “Severity” and “intensity” are degrees that may vary depending on the nature

²⁸² Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 3.

²⁸³ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 15.

²⁸⁴ *Ireland v. UK*, 5310/7, 13 December 1977, Paragraph 162.

²⁸⁵ Pustorino P., “*Lezioni Di Tutela Internazionale Dei Diritti Umani*” (Cacucci 2020).

²⁸⁶ *Ireland v. UK*, 5310/7, 13 December 1977, Paragraph 162.

²⁸⁷ *Pretty v United Kingdom*, Application No. 2346/02, 29 April 2002, Paragraph 52.

²⁸⁸ *Pretty v United Kingdom*, Application No. 2346/02, 29 April 2002, Paragraph 52.

²⁸⁹ *Pretty v United Kingdom*, Application No. 2346/02, 29 April 2002, Paragraph 52.

and context of treatment.²⁹⁰ So, aside from the fact that Article 3 establishes a high severity threshold, it is difficult to determine *ex ante* whether a treatment will be able to achieve the required threshold. As a consequence, also determining *ex ante* whether “conversion therapy” violates Article 3 is difficult.²⁹¹ As may be seen, there is some doubt about the severity threshold, particularly for phenomena like “conversion therapy”, which have never been brought to trial. As the ECtHR’s jurisprudence on Article 3 develops, the evaluative terms “severity” and “intensity” are being replaced with two standards underlying Article 3:

- First, the Court introduced presumptions, standards, and principles to define the conditions under which a conduct may violate Article 3.²⁹²
- Second, the Court established a list of severe activities that invariably violate Article 3.²⁹³

Over time, the ECtHR has shifted its focus to a *quantitative* approach.²⁹⁴ This approach is founded on the idea that the greater the suffering of the victim, the more severe the act is. Consequently, since torture involves “the most severe pain and suffering”, it deserves a “special stigma”.²⁹⁵ Reducing the degree of pain and suffering of the victim, we can define the actions of the wrongdoer as inhuman treatment. It involves more severe pain than degrading treatment, but not as severe as torture.²⁹⁶ And finally, there is degrading treatment: it involves pain that is severe enough to meet the threshold set by Article 3, but not as severe as inhuman treatment.²⁹⁷ A negative aspect of the *quantitative* approach consists in the underlying idea that severity is almost solely determined through a quantitative exercise.²⁹⁸ And this does not reflect the reality of the facts, especially when talking about no cases in which physical or physiological pain or no bodily injury, as

²⁹⁰ *Ireland v. UK*, 5310/7, 13 December 1977, Paragraph 162.

²⁹¹ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

²⁹² *Yavuz v. Turkey* (2007) 45 EHRR 16, Paragraph 38; *Kalashnikov v. Russia* (2003) 36 EHRR 34, Paragraph 97; *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, Paragraph 63.

²⁹³ *Aydin v. Turkey*, Application No. 23178/94, 25 September 1997, Paragraph 86; *Maslova and Nalbandov v. Russia*, Application No. 839/02, 24 January 2008, Paragraph 107.

²⁹⁴ *Cestaro v Italy*, Application No. 6884/11, 7 April 2015, Paragraphs 171–176.

²⁹⁵ *Ireland v. UK*, 5310/7, 13 December 1977, Paragraph 167.

²⁹⁶ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

²⁹⁷ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

²⁹⁸ *Cestaro v Italy*, Application No. 6884/11, 7 April 2015, Paragraphs 171–176.

could happen in certain cases of conversion therapy (e.g., spiritual gatherings, talk therapy, 12-steps programs).²⁹⁹ As a countertrend, a qualitative approach can be identified in the latest rulings of the ECtHR. Indeed, the Court has recently ruled that a treatment is “degrading” if it displays a “lack of respect for, or diminishes, human dignity”.³⁰⁰ The ECtHR places a strong emphasis on two aspects: the aim of the ill-treatment and its meaning for the victims in the context in which it was perpetrated.³⁰¹ It is not necessary to have physical or mental suffering, because even where there is no bodily injury, any action that undermines human dignity may be classified as degrading treatment under Article 3.³⁰² The ECtHR has found numerous cases of ill-treatment in violation of Article 3, based on this principle, which have not resulted in injury or suffering. For example, in *Lyalyakin* case, the “punishment” of parade naked in front of other soldiers, with the clear intent of inducing humiliation in the victim, is considered a violation of Article 3.³⁰³ In these circumstances, the victims are not subjected to treatments that have significant bodily or mental consequences. Nonetheless, the ECtHR found them in contravention of the substantial threshold of Article 3 ECHR.³⁰⁴ To understand the qualitative approach, there is the need to analyse the meaning of the word “degrading” in Article 3. Again, this is an evaluative term, and the Court interprets it on the basis of various assessments, such as: the influence that some ideas (e.g., human dignity, power) have on degradation; the importance of the intention of the agent and/or the perception of the victim; the involvement of factual components, as the consequences of such acts.³⁰⁵ The word “degrading” brings to mind a hierarchical image.³⁰⁶ When someone is treated as if they have a lower position than they actually do, as a second-class citizen, they are degraded.³⁰⁷ This is why degrading treatment violates human dignity. Similarly, even conversion

²⁹⁹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 Paragraphs 42 – 45, 50 – 54.

³⁰⁰ *Aghdgomelashvili and Japaridze v Georgia*, Application No. 7224/11, 8 October 2020, Paragraphs 48–49.

³⁰¹ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³⁰² *Wiktorko v. Poland*, Application No. 14612/02, 31 March 2009, paragraphs 54–55; *Iwańczuk v Poland*, Application No. 25196/94, 15 November 2001, paragraphs 54–60.

³⁰³ *Lyalyakin v. Russia*, Application No. 31305/09, 12 March 2015.

³⁰⁴ *Lyalyakin v. Russia*, Application No. 31305/09, 12 March 2015.

³⁰⁵ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³⁰⁶ J. Waldron, *Torture, Terror and Trade-Offs: Philosophy for the White House* (OUP 2010) 284–287.

³⁰⁷ J. Waldron, *Torture, Terror and Trade-Offs: Philosophy for the White House* (OUP 2010) 284–287.

therapy violates human dignity, because it is based on the idea that LGBTQI+ individuals have something of inherently evil or wrong that must be extirpated to become normal or acceptable from the community.³⁰⁸ The ECtHR has ruled many times about the link between human dignity and degrading treatment. In *Bouyid* case, the Court has focused on the “situation of vulnerability” of the victims, in particular the powerlessness of individuals in custody.³⁰⁹ In situation where the victims are in a vulnerable position respect that of the agent, even a slap in the face is degrading, because it means that the victims “counts for less”.³¹⁰ According to *Bouyid* case, an act must satisfy two conditions in order to be defined as deteriorating. Firstly, degrade someone means to treat them in a way that shows a disregard for their moral worth. Treating others as objects rather than human beings or denying them the bare minimum of personal liberty and self-respect, is incompatible with someone’s intrinsic dignity.³¹¹ Second, degrading others necessitates the person or entity acting having sufficient authority or rank to do so. The ECtHR suggests investigating further whether, if those two elements are met, an act can be classified as degrading under Article 3 even if there are no material consequences for the victims.³¹²

Identoba is a similar case, but more relevant for this analysis: in this case emerges a link between degrading treatment and human dignity, together with LGBTQI+ human rights and the principle of non-discrimination.³¹³ Because state authorities failed to offer adequate protection to LGBT individuals during their peaceful march on the International Day Against Homophobia, the ECtHR determined a violation of Article 3 in connection with the ban of discrimination under Article 14.³¹⁴ The LGBT demonstrators were subjected to homophobic assault and verbal abuse by counter-demonstrators due to insufficient police involvement.³¹⁵ As a consequence, LGBT flags and posters were ripped to shreds, and a large mob encircled the marchers, calling them “faggots” and

³⁰⁸ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, Paragraphs 37 – 41.

³⁰⁹ *Bouyid v. Belgium*, Application No. 23380/09, 28 September 2015 (Grand Chamber) Paragraph 112.

³¹⁰ *Bouyid v. Belgium*, Application No. 23380/09, 28 September 2015 (Grand Chamber) Paragraph 112.

³¹¹ *Bouyid v. Belgium*, Application No. 23380/09, 28 September 2015 (Grand Chamber) Paragraph 112.

³¹² *Bouyid v. Belgium*, Application No. 23380/09, 28 September 2015 (Grand Chamber) Paragraph 87.

³¹³ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015.

³¹⁴ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015, paragraph 71.

³¹⁵ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015, paragraph 69 and 70.

“perverts”, and screaming death threats. They become target of hate speech and aggressive behavior, with the aim to make the demonstrators “desist from their public expression of support for LGBT community”.³¹⁶ As happened in *Bouyid*, the Court has given relevance to those treatments, classifying those as “degrading”, even though any physical injury or serious mental suffering occurred.³¹⁷ For the purposes of “conversion therapy” there are even more interesting aspects. The victims of the aggression were in that position because they are the target of pervasive homophobic prejudice.³¹⁸ This background, together with the fear and the anguish experienced during the aggression, is not compatible with human dignity.³¹⁹ The Court recognized that the homophobic bias played the role of an aggravating factor. As a result, while determining whether ill-treatment satisfies the threshold provided by Article 3, wrongful discrimination is an aggravating factor.³²⁰

Is sexual orientation discrimination, like racial discrimination, a “special” affront³²¹ to human dignity for the purposes of “conversion therapy”? Analysing the jurisprudence of the ECtHR should be noted that sexual orientation is the “*most intimate*” and “*vulnerable*” aspect of life,³²² and any discrimination based on sexual orientation must be justified by “*very compelling reasons*”.³²³ The ECtHR’s jurisprudence shows that the answer is now affirmative, after years of evolution. In fact, in the cases above-mentioned the Court confirms that “*wrongful direct discrimination*” is a “*special affront*” to human dignity that violates Article 3 in certain circumstances.³²⁴ For example, a degrading form of direct discrimination can be observed when state officials abuse LGBTIQ+ persons, or when, as happened in *Identoba*, they refuse or systematically fail to protect them from abuse

³¹⁶ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015, Paragraphs 70.

³¹⁷ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015, Paragraph 65.

³¹⁸ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015, Paragraphs 68-70.

³¹⁹ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015, Paragraphs 68-70.

³²⁰ *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015, Paragraph 67.

³²¹ *East African Asians v. UK*, (1981) 3 EHRR 76.

³²² *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981 (Grand Chamber) Paragraph 52; *X v. Turkey*, Application No. 24626/09, 27 May 2013.

³²³ *Vallianatos and Others v. Greece*, Application Nos. 29381/09 and 32684/09, 7 November 2013 (Grand Chamber) para 77.

³²⁴ Johnson P.J., and Falcetta S., *Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities*. (European law review 2018). pp. 167-185. ISSN 0307-5400.

that they knew or should have known about. Even when there is not a serious material effect on victims.

Another aggravating factor to a degrading treatment is the “*public nature*” of the discrimination. The public nature of a treatment alone, of course, is not sufficient to fulfill the threshold of Article 3. This factor must be analyzed in conjunction with a degrading treatment.³²⁵ Speaking of cases in which degrading treatment is due to sexual orientation or gender identity discrimination, it is possible to identify the “public nature” of the discrimination in the indifference of public authorities. Respect for dignity requires the State to protect moral security.³²⁶ When state authorities fail to prevent or regulate hatred or aggressions toward LGBTQI+ community, the faith in state and in its protection fades.³²⁷ The authorities’ failure to provide a protected group with reasonable protection is an affront to their moral standing and it labels them as inferior members of the society.³²⁸

Before trying to understand whether “conversion therapy” falls within the scope of Article 3 ECHR, we need to analyse two more defining aspects of degrading treatments: the intention of the wrongdoers and the perception of the victims. As regards the first aspect, the ECtHR has developed an objective-meaning interpretation of degrading treatment. The wrongness of degrading treatment is determined by the objective meaning it conveys rather than the wrongdoer’s mental condition. Depending on the social or traditional connotation of the conduct, the condition that degrading treatment must convey that the other is not of equal moral worth is satisfied. As a result, whether an act is degrading is not determined by the wrongdoer’s intentions.³²⁹ The ECtHR has consistently held that the intent to degrade or humiliate is not a condition for degrading treatment. Even if there is no intent to degrade, a finding of degrading treatment is possible.³³⁰ Speaking of the perception of the victims, it could appear counter-intuitive, but what is crucial to define whether an act is degrading is its meaning in a particular social context and is not how

³²⁵ *Lyalyakin v. Russia*, Application No. 31305/09, 12 March 2015 Paragraph 69.

³²⁶ *Van Kück v. Germany*, Application No. 35869/97, 12 June 2003, Paragraph 69.

³²⁷ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³²⁸ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³²⁹ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³³⁰ *Gäfgen v. Germany*, Application No. 22978/05, 1 June 2010 (Grand Chamber) Paragraph 103.

the victim experienced their ill-treatment.³³¹ Since *Ireland v. UK*, the European Court of Human Rights has often said that a treatment can be defined as degrading if it causes “fear, anguish and inferiority capable of humiliating and debasing” the victims.³³²

The analysis of the application of Article 3 ECtHR automatically raises another question: do conversion therapy practices fall within the scope of Article 3 ECtHR? The answer to this question depends on the forms of conversion therapy we are looking at: “extreme”, “forcible” and “mild” forms. The extreme forms of conversion therapy involve aversion therapy, electroshocks, injections of drugs, corrective rape, and many other invasive methods.³³³ Those forms of conversion therapy violate Article 3 because of the consequences of those practice may result in in significant bodily and mental suffering.³³⁴ Such “physical” forms of conversion therapy, depending on their severity, could be even considered torture rather than degrading treatment.³³⁵ The use of “gratuitous violence aimed at degrading others” deserves the stigma connected to torture, as the ECtHR found in many rulings.³³⁶ As a result, extreme physical types of “conversion therapy” are more akin to torture than degrading treatment because of their intensity and gratuity.³³⁷

In cases of so-called “forcible” conversion therapy, the individual consented to therapy knowing that they would not be able to stop it if they changed their mind. As the Court stated in many other cases of forcible medical treatments, unless the therapy imposed on a patient is medically necessary, it is considered degrading treatment.³³⁸ Only when substantial benefits can be derived from the forcible imposition of treatment on someone (both on capacitated an incapacitated patients) it can be justified.³³⁹ Those substantial benefits must be justified by “*recognized principles of medicine*”.³⁴⁰ And conversion therapy, as analyzed in the previous chapter, is not medically or psychologically

³³¹ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³³² *Ireland v. UK*, 5310/7, 13 December 1977, Paragraph 167.

³³³ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, p. 43.

³³⁴ *Maslova and Nalbandov v. Russia*, Application No. 839/02, 24 January 2008.

³³⁵ *Jalloh v. Germany*, Application No. 54810/00, 11 July 2006 (Grand Chamber) Paragraph 67

³³⁶ *Cestaro v Italy*, Application No. 6884/11, 7 April 2015; *Vladimir Romanov v. Russia*, Application No. 41461/02, 24 July 2008, paragraphs 67–70.

³³⁷ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ As Degrading Treatment, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³³⁸ *Herczegfalvy v. Austria*, Application No. 10533/83, 24 September 1992, Paragraph 82.

³³⁹ *Herczegfalvy v. Austria*, Application No. 10533/83, 24 September 1992, Paragraph 82.

³⁴⁰ *Herczegfalvy v. Austria*, Application No. 10533/83, 24 September 1992, Paragraph 82.

recognized. Even worse, these practices mostly derive from the unscientific idea that homosexuality or gender diversity are a pathology.³⁴¹ There is evidence that it has long-term negative consequences for LGBTIQ+ people’s physical and mental health.³⁴² Conversion therapy provides no health benefits, let alone the “substantial” benefits that the law demands to justify its forcible imposition.³⁴³ As a result, imposing it on children, adolescents, or adults without their consent is a violation of Article 3. This is true regardless of how forcible conversion therapy is carried out and regardless of the victims’ age and capacity to consent.³⁴⁴

The last conversion therapy form to analyse is the “mild” one (e.g., talk therapy, “spiritual journeys”, 12-steps programs).³⁴⁵ As previously stated, an act is degrading “*if it expresses the unequal moral worth of the other and if the wrongdoer has sufficient power over the victim*”.³⁴⁶ For these reasons, certain examples of direct sexual orientation discrimination amount to degrading treatment. Therefore, those two prerequisites of degradation are arguably met by all forms of conversion therapy, not only its physical or coercive manifestations, but also in its mildest forms. All types of conversion therapy are degrading because they combine basic disregard for a protected category of people, namely LGBTIQ+ individuals, with a major imbalance of power or status between the parties involved. Also, it is degrading because it dismisses the interests and welfare of LGBTIQ+ persons for no good reason.³⁴⁷

³⁴¹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, Chapter 5.

³⁴² UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, Chapter 5.

³⁴³ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³⁴⁴ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³⁴⁵ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 paragraph 37.

³⁴⁶ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

³⁴⁷ Ilias Trispiotis, Craig Purshouse, ‘*Conversion Therapy*’ *As Degrading Treatment*, (Oxford Journal of Legal Studies, 2021); gqab024, Available at: <https://doi.org/10.1093/ojls/gqab024>.

iii. State obligations under article 3 ECHR: the need for criminalization

Article 3 of ECHR sets out several positive state obligations, two of which are particularly relevant in this context: framework state duty and operational measures. The Court established in many cases that Article 3 produces framework duties. This consists in the state obligation to take legal measures and establish an effective system that prevents and punishes ill-treatment, supported by enforcement mechanisms for the prevention, suppression, and punishment of Article 3 violations. Framework duty also extends to private actors that deliver ill-treatment.³⁴⁸ The framework duty deriving from Article 3 often results in an obligation of the State to use criminal law to combat prohibited types of ill-treatment. Criminalisation has evolved as part of the framework duty referred to in Article 3 in a variety of cases, including rape³⁴⁹, domestic violence³⁵⁰, and sexual abuse of minors³⁵¹. The ECtHR has also explained the necessity for criminalization by arguing that degrading treatment has a substantial impact on human dignity and psychological well-being regardless of whether injuries of a specific severity have been inflicted.³⁵² If one wonders if criminal law protection against “conversion therapy” is required by the Article 3 framework duty, the answer could be affirmative. As stated previously, all types of conversion therapy meet the severity threshold required to invoke the applicability of Article 3 because they all constitute a significant violation of human dignity. Therefore, the criminalisation of the provision of all forms of conversion therapy may be justified in the context of the framework duty referred to in Article 3. In doing so, Contracting States to the ECHR shall adopt specific conversion therapy bans that specify the extent of the practice and set out remedies, reporting mechanisms and support for the victims, as happened in Malta and Germany.³⁵³ This brings us to the second category of state obligation: operational measures. Contracting States have an obligation to take operational measures when the authorities knew or should have known of “the existence of a genuine and immediate risk of ill-treatment against designated individuals due to the

³⁴⁸ *Šečić v. Croatia*, Application No. 40116/02, 31 May 2007, Paragraph 53; *Moldovan and Others v. Romania*, Application Nos. 41138/98 and 64320/01, 12 July 2005, Paragraph 98; *M.C. v. Bulgaria*, Application No. 39272/98, 4 December 2003, Paragraph 151.

³⁴⁹ *M.C. v. Bulgaria*, Application No. 39272/98, 4 December 2003, Paragraph 166.

³⁵⁰ *Volodina v. Russia*, Application No. 41261/17, 9 July 2019, Paragraph 81.

³⁵¹ *M. and C. v. Romania*, Application No. 29032/04, 27 September 2011.

³⁵² *Volodina v. Russia*, Application No. 41261/17, 9 July 2019, Paragraph 81.

³⁵³ LV of 2016 Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 Government Gazette of Malta No. 19,693 – 09.12.2016; G. v. 12.06.2020 BGBl. I S. 1285 (Nr. 28).

actions of a third party”.³⁵⁴ In these cases, the obligation set out by Article 3 is modifiable on grounds of proportionality in order to have more room for manoeuvre in their implementation- otherwise the obligation would impose a disproportionate burden on the authorities.³⁵⁵

In conclusion, so-called “conversion therapy” practices violate the substantive limb of Article 3 read together with Article 14 ECHR, since those are both discriminating and degrading treatments. Contracting States to the ECHR shall criminalize such practices to protect LGBTIQ+ human rights in their national legal system.

2.3 United Nations and Human Rights Council: call for a global ban

Among all the intergovernmental and international organizations of the world, United Nations, and its specialized body, Human Rights Council, have been the first to address the matter of “conversion therapy” practices and draw the attention of governments around the world to the subject. The Human Rights Council (UNHRC) is the main inter-governmental forum for human rights issues within the United Nations. Unlike ECtHR judgements³⁵⁶, its resolutions and actions are not legally binding, but they include considerable political commitments.

In February 2016, The Committee against Torture (CAT), in its observations about the fifth periodic report of China, stated for the first time its concerns regarding conversion therapy.³⁵⁷ As we shall see in more closely in the next chapter, the CAT was concerned about the received reports regarding private and publicly run clinics offering the so-called “gay conversion therapy”.³⁵⁸ Those “treatments” aimed at changing sexual orientation of

³⁵⁴ *Osman v. United Kingdom*, Application No. 23452/94, 28 October 1998 (Grand Chamber) Paragraph 116.

³⁵⁵ *Dorđević v. Croatia*, Application No. 41526/10, 24 July 2012, Paragraph 138.

³⁵⁶ Judgments finding violations are binding on the states involved, and they must be carried out. The Council of Europe’s Committee of Ministers oversees the execution of judgements, notably to ensure that the amounts awarded by the Court to the applicants in compensation for the damage they have sustained are paid.

³⁵⁷ Committee against Torture, *Concluding observations on the fifth periodic report of China*, CAT/C/CHN/CO/5, 3 February 2016, Paragraph 55.

³⁵⁸ Committee against Torture, *Concluding observations on the fifth periodic report of China*, CAT/C/CHN/CO/5, 3 February 2016, Paragraph 55.

lesbian and gay persons, and included the administration of electroshocks and unconsented confinement in psychiatric facilities.³⁵⁹ On that occasion the CAT suggested the State Party to take legislative measures to guarantee respect for “physical and personal integrity” of LGBTIQ+ individuals and prohibit the practice of so-called “conversion therapy”, and other forced treatments against them - suggesting that the latter shall be subject of investigation.³⁶⁰ The CAT also suggested the State Party to provide training to health professionals and public officials on respecting the human rights of LGBTIQ+ persons, “including their rights to autonomy and physical and psychological integrity”.³⁶¹ As we have seen, a “*de facto ban*” on conversion therapy coming from health professionals associations could be a positive alternative to an institutional ban.³⁶² Efficiently educating health professionals to understand and respect LGBTIQ+ human rights could lead doctors and psychologists associations to act in this regard.

The Committee on the Rights with People with Disabilities (CRPD), in April 2018, explicitly demanded Poland to share details on any actions taken or planned to prevent “*intersectional discrimination*” encountered by disabled LGBTIQ+ individuals³⁶³ – allegedly violating Article 4 of the Convention on the Rights of Persons with Disabilities.³⁶⁴ The CRPD also asked the State Party to state whether intends to make so-called “conversion therapies” illegal.³⁶⁵ To this day, Poland has witnessed many episodes of State-sponsored homophobia. About 100 municipal authorities have adopted, in 2019, resolutions proclaiming their territories as zones “free” from LGBT and “gender ideology”.³⁶⁶ Instead, in 2020, the Polish Ministry of Health has openly proclaimed its

³⁵⁹ Committee against Torture, *Concluding observations on the fifth periodic report of China*, CAT/C/CHN/CO/5, 3 February 2016, Paragraph 55.

³⁶⁰ Committee against Torture, *Concluding observations on the fifth periodic report of China*, CAT/C/CHN/CO/5, 3 February 2016, Paragraph 56(a, c).

³⁶¹ Committee against Torture, *Concluding observations on the fifth periodic report of China*, CAT/C/CHN/CO/5, 3 February 2016, Paragraph 56(b).

³⁶² Savage R, "Albania psychologists barred from conducting gay “conversion therapy” (Reuters, 18 May 2020).

³⁶³ Committee on the Rights of Persons with Disabilities, *List of issues in relation to the initial report of Poland*, CRPD/C/POL/Q/1, 25 April 2018, Paragraph 10.

³⁶⁴ A/RES/61/106.

³⁶⁵ Committee on the Rights of Persons with Disabilities, *List of issues in relation to the initial report of Poland*, CRPD/C/POL/Q/1, 25 April 2018, Paragraph 10.

³⁶⁶ Ciobanu C., “A Third of Poland Declared ‘LGBT-Free Zone’”, (Reporting Democracy, 25 February 2020). Available at: <https://balkaninsight.com/2020/02/25/a-third-of-poland-declared-lgbt-free-zone/>.

opposition to “conversion therapy” and has severely opposed any types of discrimination against patients based on their sexual orientation.³⁶⁷

Yet the most influential and significant report is the one carried out by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE-SOGI), reported to Human Rights Council in 2020.³⁶⁸ The report has the merit of shedding light to the degrading practices that many LGBTIQ+ persons experience every day, since it collects about 130 submissions from States, civil society organisations, faith-based organisations, medical practitioners, and individuals who had been subjected to such practices. As a result of the report, the IE-SOGI has urged States to ban so-called “conversion therapy”.³⁶⁹ After this report, in October 2021, fifty-two UN countries, including Italy, have signed a declaration to the UNHRC to “protect the rights of intersex people”.³⁷⁰ In this statement, States have pointed out the necessity to take measures protecting the autonomy of intersex persons and “their rights to health and to and to physical and mental integrity”. Once again, signatory States have drawn attention to unconsented medically unnecessary surgeries, hormonal treatments and other invasive or irreversible non-vital medical procedures.³⁷¹

Despite various recommendations from the United Nations’ bodies, only 5 out of 193 UN Member States have enacted state-wide bans against “conversion therapy”, namely Brazil, Ecuador, Malta, Germany, Canada.³⁷²

Brazil banned conversion therapy in 1999. The Federal Council of Psychology not only banned the “*pathologisation of homoerotic behaviours and practices*”, but also ordered all licensed psychologists to “*avoid coercive or unsolicited treatment of homosexuals*”.³⁷³

³⁶⁷ Bip.brpo.gov.pl. 2021. MZ do RPO: "terapię konwersyjną" niezgodne z aktualną wiedzą medyczną | Rzecznik Praw Obywatelskich. [*Polish Ombudsman (web page)*] Available at: <https://bip.brpo.gov.pl/pl/content/mz-do-rpo-terapia-konwersyjna-niezgodne-z-wiedza-medyczna>.

³⁶⁸ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53.

³⁶⁹ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, Paragraph 100.

³⁷⁰ UNHRC, forty-eight session 13 September – 11 October 2021, Joint Statement on the Human Rights of Intersex Persons (4 October 2021) General Debate Item 8.

³⁷¹ UNHRC, forty-eight session 13 September – 11 October 2021, Joint Statement on the Human Rights of Intersex Persons (4 October 2021) General Debate Item 8.

³⁷² International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (*ILGA* December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

³⁷³ Resolução CFP N° 001/99, 22 March 1999.

Over the years there have been attempts to judicially overrule the ban³⁷⁴, however, the final ruling put an end to any judicial attempts to repeal the ban in Brazilian federal courts.³⁷⁵

An interesting legal framework can be noted in Ecuador. In 2013 a Ministerial Order prohibited conversion therapies particularly in rehabilitation hospitals (originally established for the treatment of drug addiction)³⁷⁶, and in 2014 the act of torture that aims to change one's sexual orientation has been criminalized.³⁷⁷ Even so, the Committee on the Elimination of Discrimination against Women (CEDAW), in 2013, explicitly expressed the concern about "*the persistence of deep-rooted social and cultural stereotypes in the State party*", and about the continuation of practices of conversion therapy in rehabilitation facilities.³⁷⁸ The CEDAW suggested to "ensure the implementation of article 176 of the Comprehensive Organic Criminal Code", to implement effective sanctions, and to establish a monitoring mechanism for institutions for the treatment of drug dependency.³⁷⁹ CEDAW concerns show that national bans are not always the most effective legislative choice. The example of Ecuador demonstrates that, even if the State criminalizes these "treatments", the lack of education and the inherent prejudices of the society can lead to the illegal perpetuation of the prohibited action. Some even believe that nation-wide ban is not the most important or relevant tool a State may take to address the problem.³⁸⁰ A solution is perhaps to be identified in the active policies of raising awareness and educating about the harms and risks of conversion therapy.³⁸¹

³⁷⁴ Farias V., "*Ministra do STF suspende decisão que permitia terapia da 'cura gay'*", (*O Globo*, 24 April 2019). Available at:

http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/Rev-Secao-Jur-RJ_n.49.pdf.

³⁷⁵ Supremo Tribunal Federal (STF) RCL 31818 A GR-ED / DF.

³⁷⁶ Ministerial Order No. 767 of 2013, Section 20(a).

³⁷⁷ Código Organico Integral Penal, Article 151(3).

³⁷⁸ Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Ecuador*, CEDAW/C/ECU/CO/8-9, 11 March 2015, Paragraph 18.

³⁷⁹ Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Ecuador*, CEDAW/C/ECU/CO/8-9, 11 March 2015, Paragraph 19(c).

³⁸⁰ ILGA World: Lucas Ramon Mendos, *Curbing Deception: A world survey on legal regulation of so-called "conversion therapies"* (Geneva: ILGA World, 2020).

³⁸¹ ILGA World: Lucas Ramon Mendos, *Curbing Deception: A world survey on legal regulation of so-called "conversion therapies"* (Geneva: ILGA World, 2020).

2.4 IACHR and ACHPR

The Inter-American Commission on Human Rights (IACHR), similarly to other regional international organizations for human rights, has urged for the prohibition of “conversion therapies” across the Americas in many statements in recent years.³⁸² IACHR also welcomed law enacted at the time by various jurisdictions in the Americas³⁸³ and invited its Member States to regulate the matter likewise.³⁸⁴

What is surprising is the fact that IACHR had the opportunity to comment on a case involving conversion therapy³⁸⁵, submitted by petition ex Article 44 of the American Convention on Human Rights³⁸⁶, an occurrence that seems still far away within other regional organizations’ judicial bodies, such as ECtHR. Petitioners explained that Sandra Cecilia Pavez, a religion teacher in Chile, was revoked of her certificate of suitability, a legal requirement for teaching religion.³⁸⁷ This document, issued by religious authorities, was revoked by the Vicar of Education of the diocese of San Bernardo, René Aguilera Colinier, because of the teacher’s homosexuality.³⁸⁸ Previous to this, the vicar had urged the alleged victim to terminate her “homosexual life” under penalty of not being allowed to work as a religious education teacher and imposed on her the additional condition of undergoing psychiatric treatment to “reverse her mental disorder”.³⁸⁹ The alleged victim refused to adhere to such terms, according to the party, and her certificate of suitability

³⁸² IACHR, *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas* (2018), Recommendation (8)(a); IACHR, Press Release No. 61/17: “Embrace Diversity and Protect Trans and Gender Diverse Children and Adolescents International Day against Homophobia, Transphobia and Biphobia - 17 May, 16 May 2017; Press Release 153/18: “IACHR Welcomes Change by WHO to Stop Regarding Gender Identity as a Disorder, 18 July 2018.

³⁸³ City of Miami Ordinance, File Number: 16-01057, Sec. 37-13; Seattle Charter (January 1, 2016) Title 14, Human Rights 14.21.050 Enforcement (d, j).

³⁸⁴ IACHR, Press Release No. 28/17: “IACHR Hails Regional Progress on Human Rights of LGBTI People in the Americas”, 10 March 2017; (2018), paragraph 221; *Annual Report 2017, Chapter IV* (2017), paragraph 149.

³⁸⁵ IACHR, Report No. 30/15, Petition 1263-08. Admissibility. Sandra Cecilia Pavez. Chile. July 21, 2015.

³⁸⁶ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 44.

³⁸⁷ Chile Ministry of Education Decree 924/1984, Article 9.

³⁸⁸ IACHR, Report No. 30/15, Petition 1263-08. Admissibility. Sandra Cecilia Pavez. Chile. July 21, 2015, Paragraph 9.

³⁸⁹ IACHR, Report No. 148/18, Case 12.997. Merits. Sandra Cecilia Pavez. Chile. December 7, 2018, Paragraph 26.

was revoked as a result.³⁹⁰ The IACHR declared the petition admissible with respect of the American Convention on Human Rights³⁹¹, and, deciding on the merits of the case, concluded that the state of Chile was responsible for violating many human rights enshrined in the American Convention, including right to privacy and autonomy, the principle of equality and nondiscrimination, access to public service under conditions of equality, to work, to benefit from reasoned decisions and to judicial protection.³⁹² IACHR recommended to the Member State to reinstate Sandra Pavez to her previous job as religion teacher (if she wishes to) and to repair the human rights violations in both material and immaterial aspects.³⁹³ The Commission also recommended adjustments of the regulatory framework under domestic law, including the legal provision establishing the issue of certificates of suitability in teaching religion by religious authorities³⁹⁴, “in order to ensure that it does not promote acts of discrimination based on sexual orientation in its implementation”.³⁹⁵

The IACHR urged that OAS Member States appropriately monitor the activities of practitioners who provide “conversion therapy”.³⁹⁶ Accordingly, a sexual orientation counselling task force was established in Hawaii, United States, to address the issues of minors seeking counselling on sexual orientation, gender identity, gender expression, and related behaviors.³⁹⁷ This was mentioned as an example of policies about conversion therapy adopted by an enforcement agency.³⁹⁸

The African Commission on Human and Peoples’ Rights (ACHPR), in 2014, adopted a “Resolution on Protection against Violence and other Human Rights Violations against

³⁹⁰ IACHR, Report No. 148/18, Case 12.997. Merits. Sandra Cecilia Pavez Pavez. Chile. December 7, 2018, Paragraph 26.

³⁹¹ IACHR, Report No. 30/15, Petition 1263-08. Admissibility. Sandra Cecilia Pavez Pavez. Chile. July 21, 2015; *American Convention on Human Rights*, Articles 8, 11, 24, and 25.

³⁹² IACHR, Report No. 148/18, Case 12.997. Merits. Sandra Cecilia Pavez Pavez. Chile. December 7, 2018; *American Convention on Human Rights*, Articles 8, 11, 24, and 25 11.2, 24, 23.1(c), 26, 8.1, and 25.1.

³⁹³ IACHR, Report No. 148/18, Case 12.997. Merits. Sandra Cecilia Pavez Pavez. Chile. December 7, 2018.

³⁹⁴ Chile Ministry of Education Decree 924/1984, Article 9.

³⁹⁵ IACHR, Report No. 148/18, Case 12.997. Merits. Sandra Cecilia Pavez Pavez. Chile. December 7, 2018.

³⁹⁶ Inter-American Commission on Human Rights, “Advances and challenges towards the recognition of the rights of LGBTI persons in the Americas”, 2018, recommendation (8) (a).

³⁹⁷ Senate Bill 270, A bill for an act relating to minors (2018), section 2.

³⁹⁸ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 paragraph 80 (a).

Persons on the basis of their real or imputed Sexual Orientation or Gender Identity”.³⁹⁹ In this document, ACHPR draws the strong conclusion that under the African Charter on Human and Peoples' Rights, everyone, including LGBTIQ+ people, is entitled to equal protection, and expresses concern about the persistent acts of violence and other human rights violations “committed against individuals based on their sexual orientation or gender identity by both state and nonstate actors”.⁴⁰⁰ The coercive form of conversion therapy, is the most widespread in Africa, and typically amounts to form of violence against LGBTQ+ people.⁴⁰¹ The continuation of such practices is a violation of LGBTQ+ people’s right to be protected from violence, as stated in above-mentioned Resolution. This diffusion is due not only to the lack of laws protecting LGBTIQ+ rights within the national legal systems of the ACHPR Member States, but above all to prejudices, lack of education, and the disinformation of society. Due to a lack of awareness that conversion therapy does not work, families in Africa continue to resort to it.⁴⁰² This is particularly true for those LGBTIQ+ citizens of ACHPR Member States where homosexuality is not accepted, or worse, where homophobia is sponsored by the State itself.⁴⁰³ Algeria, Burundi, Chad, Comoros, Egypt are only a few ACHPR Member States where the prohibition of conversion therapy can be achieved only if the criminalisation of consensual same-sex sexual acts between adults in private is first removed and basic human rights are finally granted.⁴⁰⁴

³⁹⁹ ACHPR/Res.275(LV)2014.

⁴⁰⁰ ACHPR/Res.275(LV)2014.

⁴⁰¹ Thiruna Naidoo, Ayodele Sogunro, *Conversion therapy: Current practices, emerging technology, and the protection of LGBTQ+ rights in Africa*, African Human Rights Policy Paper 3 (Pretoria University Law Press, September 2021), ISBN: 978-1-920538-98-9, Available at <http://www.chr.up.ac.za/ahrpp>.

⁴⁰² Thiruna Naidoo, Ayodele Sogunro, *Conversion therapy: Current practices, emerging technology, and the protection of LGBTQ+ rights in Africa*, African Human Rights Policy Paper 3 (Pretoria University Law Press, September 2021), ISBN: 978-1-920538-98-9, Available at <http://www.chr.up.ac.za/ahrpp>.

⁴⁰³ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

⁴⁰⁴ International Lesbian and Gay Association (ILGA), “State-Sponsored Homophobia Report - 2020 Global Legislation Overview Update” (ILGA December 15, 2020). Available at <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview>.

2.5 Yogyakarta Principles

A notable group of 29 international human rights experts – including the current IE-SOGI – convened in Yogyakarta, Indonesia at Gadjah Mada University, in 2006, to draft a set of international principles on sexual orientation and gender identity.⁴⁰⁵ These were known as the Yogyakarta Principles (YPs), and they are often cited as an authoritative expression of international human rights principles in fields of sexual orientation and gender identity. Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression, and Sex Characteristics were adopted in November 2017 to reinforce the Yogyakarta Principles, with the name of “Yogyakarta Principles Plus 10” (YP+10).⁴⁰⁶ The Principles try to demonstrate that States have a responsibility to ensure equitable access to human rights, and each principle suggests ways to do so, emphasising the role of international organizations in promoting and maintaining human rights. The Yogyakarta Principles are not binding law *per se*, but they constitute “an authoritative interpretation of international law derived from the legal interpretation of several international human rights treaties” that are binding on signatory States.⁴⁰⁷ They have been commonly referred to as embodying binding legal international standards.⁴⁰⁸

After having clarified the legal nature of YPs, we can move on to analyze what innovations they have brought in the protection of LGBTIQ+ rights from discriminating and degrading practices such as conversion therapy. The YPs were, and still are, a milestone for the opening of the international conversation on right to health of homosexual and gender diverse people. The Preamble to the Yogyakarta Principles acknowledges the international recognition of everyone’s right to decide on sexuality-

⁴⁰⁵ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

⁴⁰⁶ International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017.

⁴⁰⁷ Ettelbrick P. L., Trabucco Zerán E. A., *The Impact of the Yogyakarta Principles on International Human Rights Law Development A Study of November 2007 – June 2010 Final Report* (10 September 2010).

⁴⁰⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008.

related issues freely and responsibly, without coercion, discrimination, and violence.⁴⁰⁹ This choice, though, is often denied to LGBTQI+ people. Gender identities that differ from those assigned at birth, or socially rejected gender expressions, are considered as mental diseases in many cultures.⁴¹⁰ This can result in the confinement of LGBTQI+ people in psychiatric institutions, where they may be subjected to aversion techniques, including electroshock therapy, as a “cure” for this “disease”. The YPs unequivocally state that sexual orientation and gender identity are not medical disorders, therefore they cannot be cured, treated, or suppressed.⁴¹¹ They also cannot be used to justify imprisonment in a medical facility, or any other harmful treatments. Gender judgments based on cultural or stereotyped gender norms are included.⁴¹² Principle 17 articulates the freedom of choice and complete, informed consent for every medical operation or treatment.⁴¹³ There are no circumstances in which medical operations can be imposed or ordered by law.⁴¹⁴ Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, referenced in a report both Principles 17 and 18.⁴¹⁵ The document highlights the necessity for national and international law to account for the vulnerability of particular individuals whose rights are endangered “*as a result of power imbalances and structural inequalities*”. While referencing Principles 17 and 18, the report points out the need for health professionals to adapt to the specific needs of LGBTQI+ individuals.⁴¹⁶ With regards to the Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or

⁴⁰⁹ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

⁴¹⁰ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53 paragraphs 17 – 23.

⁴¹¹ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principle 18.

⁴¹² An Activist’s Guide to The Yogyakarta Principles. (2010) [online] Available at: <http://yogyakartaprinciples.org/activists-guide>.

⁴¹³ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principle 17.

⁴¹⁴ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principle 17.

⁴¹⁵ A/64/272 Paragraph 46.

⁴¹⁶ A/64/272 Paragraph 46.

Punishment⁴¹⁷, it was implemented in 2017 with YP+10. Two letters – and then two suggestions to States – have been added to Principle 10. States shall recognize that the involuntary change of sex characteristics may constitute torture or other cruel, inhuman, or degrading treatment.⁴¹⁸ Also, States shall prohibit any practice allowing intrusive and irreversible treatments including “conversion” therapies, “*when enforced or administered without the free, prior, and informed consent of the person concerned*”.⁴¹⁹ That being the case, it is good to say that “conversion therapies” are in conflict with Principles 10 (in particular letters d and e), 17 and 18.

⁴¹⁷ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principle 10.

⁴¹⁸ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principle 10.d.

⁴¹⁹ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principle 10.e.

Chapter 3

Individual States: Judiciary, Policies and National Law

3.1 Introduction

The legislative process concerning conversion therapy is quite complicated. Sometimes, to reach a State ban or limitation, solicitations, or invitations from the International organizations, as well as the statements of professional associations such as doctors or psychologists are not enough.

Often the underlying problem lies in culture, tradition, or religion.⁴²⁰ And in many cases, as in China, the prohibition of conversion therapy is placed in an ancillary position with respect to the need to regulate with legislative instruments the lack of tolerance, and therefore the rampant discrimination, against the LGBT community.⁴²¹ These discriminatory circumstances lead LGBT individuals to a state of fear and remission, which pushes them to undergo conversion therapy in order to fall into the “*canons of normality*”.⁴²² Therefore, discrimination is not only the reason why conversion therapy exists, but also the sap that prolongs its use. When the state fails to repress or delimit this phenomenon, it becomes an accomplice of the promoters and perpetrators of conversion therapy, as it *de facto* authorizes or acquiesces it.⁴²³

⁴²⁰ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53, para. 37 – 41.

⁴²¹ Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices Of So-Called “Conversion Therapy”*, Paul Tsai China Center Yale Law School (21 December 2019). Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

⁴²² Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices Of So-Called “Conversion Therapy”*, Paul Tsai China Center Yale Law School (21 December 2019). Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

⁴²³ Alempijevic, Djordje et al. “*Statement of the Independent Forensic Expert Group on Conversion Therapy.*”, *Torture: quarterly journal on rehabilitation of torture victims and prevention of torture* vol. 30,1 (2020): 66-78. doi:10.7146/torture.v30i1.119654.

To this date, no State Supreme Court or International Tribunal has ever ruled on conversion therapy. There have been no rulings that overturned a ban on conversion therapy, nor rulings that stated against the practice, inviting the legislator to regulate conversion therapy. It is possible to notice, however, cases in which the lack of national or local legislation – or the impossibility of application of the existing law for the specific case because it does not fall under the conditions of the law itself – did not prevent the application of other rules violated by conversion therapy practices.⁴²⁴ This shows that conversion therapy is a crime regardless of whether or not there is a criminal law prohibiting it.

3.2 U.S.A.

As mentioned in the previous chapter despite the statements of both the Inter-American Commission on Human Rights⁴²⁵ and the UN Human Rights Council⁴²⁶, there is no federal legislation banning “conversion therapy” in the U.S.

Nonetheless, about 20 States and many municipalities have enacted local laws banning these practices⁴²⁷. The US Supreme Court has to rule on conversion therapy yet⁴²⁸, but a number of State and Federal Courts have ruled that bans are constitutional⁴²⁹. Those State bans, in particular, were challenged for infringing freedom of speech,

⁴²⁴ New Jersey Superior Court, *Ferguson et al. v. JONAH et al.*, No. L-5473-12, June 2015; Peng v. Xinyu Piaoxiang Psychotherapy Centre, Haidian District People's Court of Beijing (2014) Haimin Chuzi No. 16680 "P. and a consulting center infringement dispute case"; Yu X vs. No. 2 Zhumadian Hospital, Civil Judgment of the People's Court of Yicheng District, Zhumadian City, Henan Province, (2016) Yu 1702, Min Chu 4122.

⁴²⁵ IACHR, *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas* (2018), Recommendation (8)(a); IACHR, Press Release No. 61/17: “Embrace Diversity and Protect Trans and Gender Diverse Children and Adolescents International Day against Homophobia, Transphobia and Biphobia - 17 May, 16 May 2017; Press Release 153/18: “IACHR Welcomes Change by WHO to Stop Regarding Gender Identity as a Disorder, 18 July 2018.

⁴²⁶ UNHRC, forty-fourth session 15 June–3 July 2020, Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (1 May 2020) A/HRC/44/53.

⁴²⁷ To mention a few: Assembly Bill No. 2943/2018 (California); House Paper 755, Legislative Document 1025/2019 (Maine); Assembly Bill A576/2019 (New York); Senate Bill No. 5722/2018 (Washington); Act 20-530/2014 and Act 22-573/2019 (District Of Columbia).

⁴²⁸ The US Supreme Court has denied various petition for *certiorari*: King v. Murphy, 139 S. Ct. 1567 (2019); Welch v. Brown, 834 F.3d 1041 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2093 (2017); King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 135.

⁴²⁹ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013; US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014.

freedom of religion – both granted by U. S. Constitution⁴³⁰ and IACHR⁴³¹ – and certain parental rights. Only in one case the Court declared the ban unconstitutional.⁴³²

The infringement of freedom of speech is the most common element in cases that challenged conversion therapy bans.⁴³³ Plaintiffs argued that the law banning conversion therapy infringed conversion therapists' right to free speech or, more specifically, that the law violated freedom of speech because conversion therapy was administered, in that specific context, through verbal communication.⁴³⁴ The Courts stated that the law regulates conduct not speech, intended as discussions, recommendations, and/or expressions of opinions about conversion therapy.⁴³⁵ Therefore, any impact on free speech is incidental.⁴³⁶ Psychotherapists are not entitled to special First Amendment protection because the technique used to deliver mental health treatment is the spoken word, and the prohibitions of conduct are not considered violations of free speech simply because they are carried out by means of language.⁴³⁷ The “only” speech protection for health providers under the First Amendment occurs when they engage in a public discussion, “[...] *even if they advocate for a therapy that the medical establishment views out of the mainstream or harmful* [...]”.⁴³⁸

Thereby, nothing prevented professionals from expressing their views in public or private as long as they did not practice conversion therapy.⁴³⁹ Further, the Courts noted multiple

⁴³⁰ U.S. Const. amend I: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

⁴³¹ Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, Artt. 12 and 13.

⁴³² US Court of Appeals for the Eleventh Circuit, *Otto et al. v. City of Boca Raton*, 981 F.3d 854 20 November 2020.

⁴³³ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013; US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014; US Court of Appeals for the Eleventh Circuit, *Otto et al. v. City of Boca Raton*, 981 F.3d 854, 20 November 2020.

⁴³⁴ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013; US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014.

⁴³⁵ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, p. 14, 15.

⁴³⁶ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 14, 15.

⁴³⁷ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 17, 19, p. 23-25.

⁴³⁸ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, p. 20, 21.

⁴³⁹ US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014, pp. 17, 37, 38.

times that the adoption of a conversion therapy ban aims at protecting public health, safety, and welfare.⁴⁴⁰ The state has extensive authority to regulate the practice of professions (which must include professional speech) to safeguard the public from untrustworthy or irresponsible practitioners. Even more so when mental health is at risk. In this way, the law advances the State’s compelling interest in forbidding a professional practice that poses substantial health hazards to patients, specifically children, that constitute the most vulnerable slice of population.⁴⁴¹

There has recently been a reversal in American jurisprudence regarding the relation between the conversion therapy bans and freedom of speech. “Speech-based treatment” is not considered as a medical action – as happened in the previous cases – but rather the expression of an opinion, and that regulating an opinion is unconstitutional.⁴⁴² The Court failed in distinguishing constitutionally protected speech from speech ancillary to professional practice.⁴⁴³ As a consequence, a State cannot constitutionally prohibit professionals from freely debating or discussing the benefits of treatments that are scientifically recognized as harmful, but they can prohibit their use.⁴⁴⁴ Talk therapy is a medical treatment, and the fact that it is delivered through speech does not make it constitutionally protected speech exempt from state regulation.⁴⁴⁵ The *Otto et al. v. City of Boca Raton* case caused a circuit split⁴⁴⁶ and stood in stark contrast to sister circuits that have upheld bans on SOCE therapy for minors.⁴⁴⁷ It also has far-reaching implications, not just subjecting all limits on professional speech to strict scrutiny, but

⁴⁴⁰ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, p. 26, 28; US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014, p. 51.

⁴⁴¹ US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014, p. 51

⁴⁴² US Court of Appeals for the Eleventh Circuit, *Otto et al. v. City of Boca Raton*, 981 F.3d 854, 20 November 2020, p. 879 – 880.

⁴⁴³ Sachs S., *Otto v. City of Boca Raton, Eleventh Circuit Invalidates Minor Conversion Therapy Bans*, Harvard Law Review Vol. 134 N. 8, 10 June 2021, Available at: <https://harvardlawreview.org/2021/06/otto-v-city-of-boca-raton/>.

⁴⁴⁴ Sachs S., *Otto v. City of Boca Raton, Eleventh Circuit Invalidates Minor Conversion Therapy Bans*, Harvard Law Review Vol. 134 N. 8, 10 June 2021, Available at: <https://harvardlawreview.org/2021/06/otto-v-city-of-boca-raton/>.

⁴⁴⁵ Sachs S., *Otto v. City of Boca Raton, Eleventh Circuit Invalidates Minor Conversion Therapy Bans*, Harvard Law Review Vol. 134 N. 8, 10 June 2021, Available online at: <https://harvardlawreview.org/2021/06/otto-v-city-of-boca-raton/>.

⁴⁴⁶ “When two or more circuits in the United States court of appeals reach opposite interpretations of federal law. This is sometimes a reason for the Supreme Court to grant *certiorari*.”

⁴⁴⁷ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013; US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014.

also outlawing bans regarding practicing conversion therapy on minors in a number of states.⁴⁴⁸ Because licensed medical practitioners hold unique positions of authority, credibility, and trust in society, suffering conversion treatment at the hands of certified therapists is extremely harmful. The Eleventh Circuit’s decision in *Otto* is a significant setback in the fight for LGBTQ+ civil rights in the U.S.A.⁴⁴⁹

Freedom of religion was another right allegedly infringed by conversion therapy local bans. According to plaintiffs the bill violates their right to free exercise of religion because it subtly targets their religion by forbidding counseling, which generally is religious in nature, while permitting not religiously motivated forms of counseling that are substantially comparable.⁴⁵⁰ The Court reasoned that religious freedom is not absolute. If a law has the “indirect effect” of burdening a particular religious practice, it will withstand a free exercise of religion challenge if it is neutral, broadly applicable, and rationally related to a legitimate state interest.⁴⁵¹

The Court stated that the conversion therapy ban has a neutral content because it “[...] *does not target religiously motivated conduct* [...]”: it prohibits health providers from engaging in conversion therapy with children regardless of whether the practitioner or the patient is motivated by religion or any other reason, and the State has a “[...] *compelling interest in protecting children from a practice deemed harmful* [...]”.⁴⁵²

As for parental rights, and more specifically, the parents’ right to direct their children’s upbringing⁴⁵³, the Court emphasized that parents do not have an absolute constitutional right to make decisions about their children’s care, custody, and control. Limitations are applied in particular when the physical or mental health of the child is at risk.⁴⁵⁴ The Court also stated that if adult patients do not have a constitutionally protected right to obtain a specific type of treatment or treatment from a specific provider that the

⁴⁴⁸ Sachs S., *Otto v. City of Boca Raton, Eleventh Circuit Invalidates Minor Conversion Therapy Bans*, Harvard Law Review Vol. 134 N. 8, 10 June 2021, Available at: <https://harvardlawreview.org/2021/06/otto-v-city-of-boca-raton/>.

⁴⁴⁹ Sachs S., *Otto v. City of Boca Raton, Eleventh Circuit Invalidates Minor Conversion Therapy Bans*, Harvard Law Review Vol. 134 N. 8, 10 June 2021, Available at: <https://harvardlawreview.org/2021/06/otto-v-city-of-boca-raton/>.

⁴⁵⁰ US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014, p. 63.

⁴⁵¹ US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014, p. 61.

⁴⁵² US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014, p.61.

⁴⁵³ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 33.

⁴⁵⁴ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 34.

state has prohibited due to a “compelling interest”, “[...] *they do not have the fundamental right to choose specific treatment for their children that the state has reasonably deemed harmful*[...]”⁴⁵⁵ This is particularly true when considering the State wields more authority over children than adults: parents cannot compel the State to allow practitioners to engage in damaging practices like conversion therapy, “[...] *therefore prescribing the prevalent standard of care based on their own beliefs*[...]”⁴⁵⁶

With regards to right of association, plaintiffs claimed that a conversion therapy ban restricts its application because it prohibits health providers and patients from engaging and maintaining intimate personal relationships with one another.⁴⁵⁷ The Court responded that practitioners may give therapy services as always, as long as they do not engage in conversion therapy. The relation between therapist and clients, which lasts just as long as the patient is ready to pay the fee, is “[...] *neither a personal relationship nor an association that is protected by the Constitution* [...]”⁴⁵⁸

American judicial experience shows that conversion therapy not only violates certain human rights but also other national rules that criminalise other conducts or that protect the consumer.⁴⁵⁹ In the “JONAH” case, in fact, the plaintiffs did not cite the infringement of the conversion therapy ban as an argument in this case, marking the difference between this case and the cases forementioned. That is because the ban in question prohibits licensed professional counsellors from working with minors - people under the age of 18 - to change their sexual orientation.⁴⁶⁰ The victim was not a minor and, therefore, the case did not fall under the scope of the ban.⁴⁶¹ Thus, despite the impossibility of invoking the breach of the State ban, the plaintiffs were able to bring the infringement of other State laws – New Jersey Consumer Fraud Act – to the court, proving an example of using litigation as a tool for curbing conversion therapy.⁴⁶² This

⁴⁵⁵ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 35.

⁴⁵⁶ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 36.

⁴⁵⁷ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 28, 29.

⁴⁵⁸ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 30.

⁴⁵⁹ New Jersey Superior Court, *Ferguson et al. v. JONAH et al.*, No. L-5473-12, June 2015.

⁴⁶⁰ New Jersey Assembly Bill 3371/2013.

⁴⁶¹ New Jersey Superior Court, *Ferguson et al. v. JONAH et al.*, No. L-5473-12, June 2015.

⁴⁶² Dubrowski P. R., *The Ferguson v. Jonah Verdict And A Path Towards National Cessation Of Gay to-Straight “Conversion Therapy*, Northwestern University Law Review Online (2015). Available at:

demonstrates that conversion therapy not only infringes human rights, but it also consists of other crimes, like consumer fraud, the punishment of which is provided for in the majority of the world's legal systems.

The guidelines of the American courts are not dissimilar to those established by international human rights law, particularly with regard to the European Court of Human Rights. Similarities can be found especially with regard to interpretations of freedom of expression, freedom of religion and freedom of association.

Firstly, as described above, US courts found themselves having to assess whether freedom of expression was violated by local bans of conversion therapy and had to determine whether psychotherapy involved “speech”.⁴⁶³ Freedom of expression is enshrined also in ECHR, precisely in Article 10.⁴⁶⁴ This is not an absolute right, since ECHR admits restrictions to freedom of expression. Among the justifications to those restrictions, there is the protection of health. According to the ECtHR, this interest prevails also when opinion expressed is a minority one, because “[...] *it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas [...]*”.⁴⁶⁵ In the light of these premises, it is questionable to consider psychotherapy as a form of expression under the ECHR. The activities that fall under the scope of art 10 are three: holding opinions, receiving, and imparting information and ideas.⁴⁶⁶ Taking in consideration that psychotherapy is a healing process conducted by health professionals⁴⁶⁷ it is positive to state that the exercise of a profession is not considered expression under Article 10 ECHR.

Secondly, the American courts have recognized a limit in the freedom of religion, although in the specific case this has not been violated by the conversion therapy local ban.⁴⁶⁸ This interpretation is not new to International Human Rights Law. For example, the second paragraph of Article 9 of ECHR provides a list of legitimate aims that can be

<https://northwesternlawreview.org/articles/the-ferguson-v-jonah-verdict-and-a-path-towards-national-cessation-of-gay-to-straight-conversion-therapy/>.

⁴⁶³ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013; US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014.

⁴⁶⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 10.

⁴⁶⁵ *Case Of Hertel v. Switzerland*, Application No. 25181/94, 25 August 1998, Paragraph 50.

⁴⁶⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 10.

⁴⁶⁷ Parekh R., and Givon L., *'What Is Psychotherapy?'* (American Psychiatric Association, 2019). Available at: <https://www.psychiatry.org/patients-families/psychotherapy>.

⁴⁶⁸ US Court of Appeals for the Third Circuit, *King et al. v. Christie et al.*, 11 September 2014, p. 61.

invoked to justify an interference with the freedom to manifest religion or belief: public safety, protection of public order, health or morals and protection of the rights and freedoms of others.⁴⁶⁹ If a limitation of this freedom is to be compatible with the Convention it must, in particular, pursue an aim that can be linked to one of those listed in this provision.⁴⁷⁰ Even though in the ECtHR caselaw the legitimate aim of protecting public health is rarely discussed, there are few interesting examples.⁴⁷¹ Because of their refusal to have blood transfusions, public health has been used to justify interfering with Jehovah's Witnesses' right to manifest their beliefs.⁴⁷² The Court determined that while the laws intended at dissolving Jehovah's Witnesses communities had a legitimate purpose of protecting public health, such dissolutions were not proportionate to the aim pursued.⁴⁷³

Finally, as for the right of association, US courts stated that the relation between patients and doctors does not fall under the scope of right of association.⁴⁷⁴ ECtHR also gave a similar interpretation of "association". The concept of "association" has an autonomous meaning and presupposes a voluntary grouping for a common goal.⁴⁷⁵ An association is an organized, independent, not-for-profit body based on the voluntary grouping of persons with a common interest, activity, or purpose.⁴⁷⁶ Patient-doctor relationship does not fall within this meaning, because it is based on consent, as can be inferred from ECtHR orientations.⁴⁷⁷ Furthermore this orientation is the most internationally common, since also in the American jurisprudence this relation is defined as "[...] a consensual relationship in which the patient knowingly seeks the physician's

⁴⁶⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 9 (2).

⁴⁷⁰ *SAS v. France*, Application no. 43835/11, 1 July 2014, p. 113.

⁴⁷¹ Alves Pinto T., "An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights", *Religion & Human Rights* 15, 1-2 (2020): 96-133, doi: <https://doi.org/10.1163/18710328-BJA10005>.

⁴⁷² *Jehovah's Witnesses of Moscow and Others v. Russia*, Application No. 302/0210, June 2010, p. 106.

⁴⁷³ *Jehovah's Witnesses of Moscow and Others v. Russia*, Application No. 302/0210, June 2010, p. 160.

⁴⁷⁴ US Court of Appeals for the Ninth Circuit, *Pickup et al. v. Brown et al. and Welch et al. v. Brown et al.*, 29 August 2013, 30.

⁴⁷⁵ *Young, James & Webster v. The United Kingdom*, Applications nos. 7601/76 7806/77, Report (31), 14 December 1979.

⁴⁷⁶ Guide on Article 11 of the European Convention on Human Rights (Strasbourg: CoE, 2021), para. 121.

⁴⁷⁷ *V.C. v. Slovakia*, Application n. 18968/07, 8 November 2011. The informed consent of the patient was a prerequisite for sterilization procedure, even assuming it to have been "necessary" from a medical point of view.

assistance and in which the physician knowingly accepts the person as a patient [...]".⁴⁷⁸

As all consent-based relations, it continues until it is ended by the consent of the parties or revoked by the dismissal of the doctor, or comes to a natural end, when medical services are no longer needed.⁴⁷⁹ This kind of relation does not fulfil the necessary elements of an association, therefore it cannot be defined as one.

3.3 China

i. **De-criminalizing and de-pathologizing Homosexuality: a three-step process**

In China, homosexuality is neither a crime nor an officially recognized illness. It is possible to observe a legislative process that has spanned decades and can be broken down into three steps.⁴⁸⁰

Firstly, the 1997 reform of the Criminal Law of the People's Republic of China removed any uncertainty about the legal status of consensual⁴⁸¹ male same-sex conduct. The National Supreme People's Court has previously interpreted the crime of "hooliganism" to include anal sex, using this crime as a de facto ban on private, adult, non-commercial and consensual homosexual conduct. China has legalized consensual, non-commercial same-sex activities between men since 1997.⁴⁸² Instead, sexual intercourse between women has never been considered a crime. Citizens in China are now free to engage in same-sex behavior without fear of retaliation under domestic law.⁴⁸³

⁴⁷⁸ "Physician Patient Relationship Law And Legal Definition", US Legal Inc. (US Legal, 2022).

Available at: <https://definitions.uslegal.com/p/physician-patient-relationship>.

⁴⁷⁹ QT, Inc. v. Mayo Clinic Jacksonville, 2006 U.S. Dist. LEXIS 33668 (N.D. Ill. May 15, 2006).

⁴⁸⁰ SRI, "Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China For the 17th Session of the Universal Periodic Review", Sexual Rights Initiative (October 2013) Available online at

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=69&file=EnglishTranslation>.

⁴⁸¹ The age of consent in China is 14 years, regardless of gender or sexual orientation.

⁴⁸² Criminal Law of the People's Republic of China, adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997. Available at:

<http://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>.

⁴⁸³ SRI, "Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China For the 17th Session of the Universal Periodic Review", Sexual Rights Initiative (October 2013) Available online at

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=69&file=EnglishTranslation>.

The second step consist of removing homosexuality from the list of mental disorder. The Chinese Society of Psychiatry amended its Chinese Classification of Mental Disorders (CCMD) in 2001, and homosexuality was removed from the list of mental illnesses and disorders.⁴⁸⁴ The CCMD retained the category of “ego-dystonic homosexuality”, which refers to “*instances in which people are uncomfortable with their sexual orientation and experience mental or behavioral problems as a consequence*”. The World Health Organization (WHO) has stated that “*any sexual orientation is not a mental disorder by itself, and that the concept of ‘ego-dystonic homosexuality’ should not be used to encourage professionals to undertake conversion therapy aimed at changing someone’s sexual orientation*”.⁴⁸⁵ Furthermore, China’s first mental health law went into force in May 2013. The diagnosis and treatment of mental disorders “must respect individuals’ basic rights and human dignity”, and “*the diagnosis and treatment of mental disorders must adhere to diagnostic and classification standards*”, according to Article 26 of the PRC Mental Health Law.⁴⁸⁶ Consequently, conversion therapy, whether provided by state-run hospitals or private practitioners, is incompatible with the Chinese Society of Psychiatry’s national standards, because homosexuality is not a mental disorder, according to both national and international standards, and homosexuals should not be treated as if they were mentally ill.⁴⁸⁷ Human Rights Watch found that the majority of the cases it investigated took place at state-run public hospitals. This reveals a fundamental lack of regulation, oversight, and law enforcement.⁴⁸⁸

Thirdly, people who have changed their sex through sex reassignment operations (SRO) in China or abroad, according to official responses from the Ministry of Public Security

⁴⁸⁴ Tcheng J., “*Have You Considered Your Parents’ Happiness?*” (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁴⁸⁵ Tcheng J., “*Have You Considered Your Parents’ Happiness?*” (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁴⁸⁶ Mental Health Law of the People’s Republic of China, art. 26. Available at: http://www.gov.cn/jrzq/2012-10/26/content_2252122.htm.

⁴⁸⁷ Tcheng J., “*Have You Considered Your Parents’ Happiness?*” (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁴⁸⁸ Tcheng J., “*Have You Considered Your Parents’ Happiness?*” (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

in 2002 and 2008, could change their sex on their legal identity documents, such as Chinese legal identity (“*shenfenzheng*”) and passports.⁴⁸⁹

Nonetheless, the Chinese government still needs to take more progressive steps to close the gaps. First and foremost, there is currently no law or policy in China ensuring that LGBT individuals have the same rights as other citizens. In their daily lives, LGBT people face a variety of forms of discrimination, in all kinds of environments, including at school and at work – which interfere with their rights of education and their rights to work. Second, the CCMD’s classification of mental diseases still includes transgender people.⁴⁹⁰ Additionally, transsexual people who have undergone sex reassignment operation (SRS) find it difficult to change their sex on other key documents as diplomas, academic qualifications, and passports due to a lack of clear protocol and accountable sector under the government.⁴⁹¹

ii. The spread of Conversion Therapy in China: the combined action of legal and social factors

Through online searches, phone interviews, and undercover investigations, Chinese civil society advocates have verified conversion therapy procedures in China.⁴⁹² Their findings show that conversion therapy is still widely practiced, with a broad range of professionals employing various pseudoscientific methodologies. It is not known whether

⁴⁸⁹ SRI, “*Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China For the 17th Session of the Universal Periodic Review*”, Sexual Rights Initiative (October 2013)
Available online at

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=69&file=EnglishTranslation>.

⁴⁹⁰ SRI, “*Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China For the 17th Session of the Universal Periodic Review*”, Sexual Rights Initiative (October 2013)
Available online at

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=69&file=EnglishTranslation>.

⁴⁹¹ SRI, “*Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China For the 17th Session of the Universal Periodic Review*”, Sexual Rights Initiative (October 2013)
Available online at

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=69&file=EnglishTranslation>.

⁴⁹² Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices Of So-Called “Conversion Therapy”*, Paul Tsai China Center Yale Law School (21 December 2019).

Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

the Chinese government or any professional organisations have conducted studies on conversion therapy, and even if it is, they are currently not publicly available.⁴⁹³

In a survey of 800 people conducted by the Beijing LGBT Center in 2014, more than half of those polled had heard of conversion therapy, and over 10% had considered undergoing for this treatment. More than 75% of those polled had heard of conversion therapy through the internet, where numerous psychological clinics advertise.⁴⁹⁴

LGBT Rights Advocacy China discovered 107 conversion therapy providers in a randomized study of 169 health service providers in 25 regions. There were 49 public hospitals among them.⁴⁹⁵ Talk therapy, hypnosis, electroshock, medications, snapping rubber bands on clients' wrists, traditional Chinese medicine, and renaming customers in accordance with the Yi Jing, a classical scripture, have all been verified by investigations.⁴⁹⁶ Researchers at Zhejiang University sprayed oxytocin up homosexual men's noses to see if it might change their sexual orientation.⁴⁹⁷

Conversion therapy practitioners have also been known to give pseudoscientific tests to assess whether a client is "pseudo-gay", which, in their opinion, increases the likelihood of successful conversion. For example, in 2015, a clinic and government-run Beijing National Olympic Psychological Hospital forced a young woman to hold a metal rod connected to an unidentified medical equipment to test her "48 chromosomes" to

⁴⁹³ Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices Of So-Called "Conversion Therapy"*, Paul Tsai China Center Yale Law School (21 December 2019). Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

⁴⁹⁴ Chinese LGBT Mental Health Survey Report, Beijing LGBT Center, May 2014. Available at: <http://en.bjlgbtcenter.org.cn/s--195.html>.

⁴⁹⁵ FanFan, "Five Years Later, Who Really Needs to be Converted?", LGBT Rights Advocacy China Public WeChat Account, (May 17, 2019), available at <https://mp.weixin.qq.com/s/5CzIP3b59wZCNoirtc6kzA>.

⁴⁹⁶ FanFan, "Five Years Later, Who Really Needs to be Converted?", LGBT Rights Advocacy China Public WeChat Account, (May 17, 2019), available at <https://mp.weixin.qq.com/s/5CzIP3b59wZCNoirtc6kzA>.

⁴⁹⁷ Kenneth Tan, "Chinese researchers studying what spraying oxytocin up a gay man's nose does to his sexuality", Shanghaiist (May 5, 2018), available at <http://shanghaiist.com/2017/11/30/oxytocin-gay-study/>.

determine whether she was “innately” homosexual.⁴⁹⁸ Psychiatrists have also employed brain scans and blood hormone levels to make similar findings.⁴⁹⁹

The persistent spread of conversion therapy in China is due to several factors: the continued stigmatization of LGBT people, which is of course fueled by the common belief among mental health practitioners and the general public that homosexuality is a form of mental illness; the lack of effective regulations in the mental health services sector and the repression of public education and advocacy.⁵⁰⁰

Many people seek conversion therapy because of social pressure, particularly from family members.⁵⁰¹ The stigmatization of LGBTQ individuals is the main reason of conversion therapy practitioners and promoters (manifest or hidden) presence on the Chinese market. LGBT individuals may internalize society’s prejudices against them, and this results in emotions of shame, guilt, or inferiority.⁵⁰² “*Only around 5% of LGBT individuals decide to declare their sexual orientation, gender identity, or gender expression at school, in the workplace, or in religious communities*”, according to a United Nations Development Program report.⁵⁰³ Despite the fact that few LGBT persons come out at work, a study by the United Nations Development Program and the International Labor Organization

⁴⁹⁸ Beijing LGBT Center, “*Poor Quality Hospital ‘48 Chromosomes’ to Test for Homosexuality*”, Beijing LGBT Center Public WeChat Account (Jan. 26, 2015), available at <https://mp.weixin.qq.com/s/GGWrm4pGYiOnZHDfD9VSBw>.

⁴⁹⁹ Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices Of So-Called “Conversion Therapy”*, Paul Tsai China Center Yale Law School (21 December 2019). Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

⁵⁰⁰ Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices Of So-Called “Conversion Therapy”*, Paul Tsai China Center Yale Law School (21 December 2019). Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

⁵⁰¹ Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices Of So-Called “Conversion Therapy”*, Paul Tsai China Center Yale Law School (21 December 2019). Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

⁵⁰² Meyer I., “*Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*,” 129(5) *Psychological Bulletin*, 674–697 (2003).

⁵⁰³ United Nations Development Program, “*Being LGBTI in China: A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression*” (May 16, 2016), available at http://www.cn.undp.org/content/china/en/home/library/democratic_governance/being-lgbt-in-china.html.

found that 20% of LGBT employees in China who were surveyed had experienced workplace bullying, harassment, or discrimination.⁵⁰⁴

The persistent stigmatization experienced by the LGBT community in China has also been acknowledged by Chinese government. In fact, during a hearing of the United Nations Committee against Torture, the former Chinese Ministry of Justice stated that this issue deserves the government's attention since "*LGBTI people face some real challenges in terms of social acceptance, employment, education, health, and family life*".⁵⁰⁵

Another factor is the lack of effective regulation in the sector of mental health services. Conversion therapy is not expressly prohibited under Chinese law. However, through interpretation is possible to interpret the existing laws as forbidding conversion therapy. Article 30 of China's Mental Health Law, for example, regulates involuntary hospitalization: "individuals shall only be hospitalized involuntarily if they present a harm to themselves or others".⁵⁰⁶ Another example are Article 8 of the Consumer Rights Protection Law⁵⁰⁷ and Article 28 of the Advertising Law⁵⁰⁸, both "protecting consumers from false information about services they purchase" and "*prohibiting false or misleading advertisement*". Additionally, according to some professional ethics codes, "healthcare service providers must not discriminate against clients based on their sexual orientation".⁵⁰⁹ However, the reach of these regulations appears to be very limited, and its anti-discrimination provisions appear to be rarely implemented.⁵¹⁰

⁵⁰⁴ United Nations Development Program & International Labor Organization, "*LGBTI People and Employment: Discrimination Based on Sexual Orientation, Gender Identity and Expression, and Sex Characteristics in China, the Philippines and Thailand*" (Sep. 24, 2019), available at http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/lgbti-people-and-employment-discrimination-based-on-sexual-orie.html.

⁵⁰⁵ Comments of YANG Jian, Ministry of Justice, Country Review of China Under the Convention against Torture, (Nov. 18, 2015), available at <https://www.youtube.com/watch?v=VNsxeZZa7bQ&feature=youtu.be&t=52m58s>.

⁵⁰⁶ Mental Health Law of the People's Republic of China, available at <http://en.pkulaw.cn/display.aspx?cgid=313973&lib=law>.

⁵⁰⁷ Protection of Consumer Rights and Interests Law of the People's Republic of China, available at <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=6384&EncodingName=big5>.

⁵⁰⁸ Advertising Law of the People's Republic of China, available at <http://en.pkulaw.cn/display.aspx?cgid=c741e11afef0bbc2bdfb&lib=law>.

⁵⁰⁹ *Code of Ethics for Clinical and Counseling Psychology of the Chinese Psychological Society*, Chinese Psychological Society (5 July 2010). Available at: <https://www.psychspace.com/psych/viewnews-8229>; "*Application Guide for Registered Psychologists*," CPS Clinical Psychological Registration System Henan Supervisory (16 March 2018). Available at: https://mp.weixin.qq.com/s/iBogjWOQH3j_669fomcl7g.

⁵¹⁰ Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices*

Another fundamental factor consists in the governmental repression of public education and advocacy. Because of political sensitivity, LGBT rights advocates are unable to educate the general public, mental health professionals, and government officials about the dangers of conversion therapy and LGBT concerns in general. The government regularly closes LGBT gatherings and associations, restricts the media, and detains LGBT activists⁵¹¹: this results in the message that being involved in LGBT advocacy is dangerous and can have dangerous effects.⁵¹² For example, in 2017, LGBT advocates used an online education video platform to film a day of lectures on “*LGBT-affirmative therapy*”, but the platform never uploaded the videos due to recently enforced censoring guidelines for video streaming platforms. With the increase of censorship, professionals, such as mental health experts, feel unsafe to work with this kind of associations, promoting a different angle to discuss LGBT human rights.⁵¹³ With so many obstacles in the way of campaigning and open scientific debate, obsolete, stigmatizing, and pseudoscientific beliefs persist.

iii. Government-run conversion therapy clinics in China: International Human Rights Law violations.

In China conversion therapy is practiced in government-run hospitals or government-approved clinics, where some individuals may also be forcibly confined.⁵¹⁴ According to sources, states are significantly responsible for the perpetuation of conversion therapy “by

Of So-Called “Conversion Therapy”, Paul Tsai China Center Yale Law School (21 December 2019). Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

⁵¹¹ Ring T., ‘*Chinese LGBTQ+ Activist Group Shuts Down Amid Growing Repression*’ (Advocate.com, 2021). Available at: <https://www.advocate.com/world/2021/11/05/chinese-lgbtq-activist-group-shuts-down-amid-growing-repression>.

⁵¹² Longarino D., *Re: Call For Inputs For The Report Of The Independent Expert On Protection Against Violence And Discrimination Based On Sexual Orientation And Gender Identity With Focus On Practices Of So-Called “Conversion Therapy”*, Paul Tsai China Center Yale Law School (21 December 2019). Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Academics/Darius_Longarino_Response_to_Call_for_Inputs_on_Conversion_Therapy_Darius_Longarino_Yale_Law_School.doc.

⁵¹³ Longarino D., “*Converting the Converters*”, China File (18 October 2019). Available at www.chinafile.com/reporting-opinion/viewpoint/converting-converters.

⁵¹⁴ Alempijevic, Djordje et al. “*Statement of the Independent Forensic Expert Group on Conversion Therapy.*”, *Torture: quarterly journal on rehabilitation of torture victims and prevention of torture* vol. 30,1 (2020): 66-78. doi:10.7146/torture.v30i1.119654.

conducting, supporting, promoting, and even acquiescing in it".⁵¹⁵ In certain states, such as China, government or public institutions are directly involved in conversion therapy or in financial assistance for its practitioners. Failure to prevent conversion therapy or punish practitioners is accompanied by failure to comply with the international obligations assumed by the States, to prevent torture, ill-treatment, and child abuse.⁵¹⁶ In particular, when a State fails to act in due diligence, it is leading a form of *de facto* permission of those harmful practices.⁵¹⁷

In 1986, the People's Republic of China signed and, later, ratified the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.⁵¹⁸ According to the convention, all State Parties "*are committed to take all necessary measures to prevent torture and cruel, inhuman, or degrading treatment or punishment in any territory under their jurisdiction*".⁵¹⁹

The UN Committee Against Torture expressed concern about conversion therapy in China, stating that "private and publicly run clinics offer the so-called 'gay conversion therapy' to change the sexual orientation of lesbian and gay persons, and that such practices include the administration of electroshocks and, sometimes, involuntary confinement in psychiatric and other facilities, which could result in physical and psychological harm".⁵²⁰ The committee expressed dissatisfaction – citing Articles 10, 12, 14, and 16 of the convention – that China "*failed to clarify whether such practices were forbidden by law, if they had been investigated and ended, and whether the victims had received reparation*".⁵²¹ Furthermore, in 2016, the Human Rights Council echoed this

⁵¹⁵ Alempijevic, Djordje et al. "Statement of the Independent Forensic Expert Group on Conversion Therapy.", *Torture: quarterly journal on rehabilitation of torture victims and prevention of torture* vol. 30,1 (2020): 66-78. doi:10.7146/torture.v30i1.119654.

⁵¹⁶ Alempijevic, Djordje et al. "Statement of the Independent Forensic Expert Group on Conversion Therapy.", *Torture: quarterly journal on rehabilitation of torture victims and prevention of torture* vol. 30,1 (2020): 66-78. doi:10.7146/torture.v30i1.119654.

⁵¹⁷ Alempijevic, Djordje et al. "Statement of the Independent Forensic Expert Group on Conversion Therapy.", *Torture: quarterly journal on rehabilitation of torture victims and prevention of torture* vol. 30,1 (2020): 66-78. doi:10.7146/torture.v30i1.119654.

⁵¹⁸ Status of Treaties – Convention Against Torture, and Other Cruel, Inhumane, or Degrading Treatment or Punishment, Chapter IV, United Nations Treaty Collections, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

⁵¹⁹ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, art. 2.

⁵²⁰ Committee against Torture, Concluding observations on the fifth periodic report of China, CAT/C/CHN/5, 2016, para. 55.

⁵²¹ Committee against Torture, Concluding observations on the fifth periodic report of China, CAT/C/CHN/5, 2016, para. 55.

statement by condemning conversion therapy as “*a form of torture or ill-treatment based on sexual orientation and gender identity*”.⁵²² In some situations, the use of electroshocks – also claimed by Chinese interviewees – may constitute torture or inhuman or degrading treatment.⁵²³

The People’s Republic of China also signed the International Covenant on Civil and Political Rights (ICCPR) in 1998 but has yet to ratify it.⁵²⁴ Articles 9 of the Universal Declaration of Human Rights and 9 of the International Covenant on Civil and Political Rights (ICCPR) enshrine the fundamental human right of the right to freedom from arbitrary deprivation of liberty. Due to its entrenching in the Universal Declaration of Human Rights and other human rights treaties, the right to liberty reflects customary international law, which is “*universally binding on all nations regardless of treaty obligation*”.⁵²⁵

The UN Working Group on Arbitrary Detention gave a definition of arbitrary deprivation of liberty: “*when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.*”⁵²⁶ Since Chinese Constitution⁵²⁷, Mental Health Law, and laws on detention⁵²⁸ do not provide any legal basis to justify the non-consensual confinement of individuals, the involuntary confinement that occurs in forced conversion therapy violates International Human Rights Law and is not consistent with China’s international

⁵²² UN Human Rights Council, resolution 29/23, Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23 (4 May 2015), para. 14, 38.

⁵²³ SRI, “*Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China For the 17th Session of the Universal Periodic Review*”, Sexual Rights Initiative (October 2013) Available online at

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=69&file=EnglishTranslation>.

⁵²⁴ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁵²⁵ UN Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/22/44 (24 December 2012).

⁵²⁶ UN Working Group on Arbitrary Detention, “*Fact Sheet No. 26, The Working Group on Arbitrary Detention*”. Available at: <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>.

⁵²⁷ Article 37 of China’s Constitution states that arrest and detention can only be carried out by authorized government bodies or courts. No citizen may be arrested except with the approval or by decision of a people’s prosecutor or by decision of a people’s court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens’ freedom of person by detention or other means is prohibited.

⁵²⁸ Article 238 of the Criminal Law of the People’s Republic of China criminalizes arbitrary imprisonment and unlawful deprivation of individuals’ liberty.

obligations.⁵²⁹ Furthermore, it violates the requirements of China's Constitution and laws on detention, making it illegal and unconstitutional.⁵³⁰

As the right to freedom from arbitrary deprivation of liberty, also the prohibition of discrimination on the basis of race, gender, sexual orientation, or gender identity is a widely accepted principle of customary international law, since it is enshrined in the UN Charter, Universal Declaration of Human Rights, the ICCPR and ICESCR, and numerous international treaties. The United Nations Human Rights Committee has included sexual orientation and gender identity in the protected ground.⁵³¹ China has a legal obligation to protect LGBT individuals from discrimination based on sexual orientation or gender identity under international law.⁵³² As regards discrimination, it is important to stress that conversion therapy is based on social prejudice and discriminatory cultural practices, and it is perpetrated with an inherently discriminatory purpose, as it assumes that a heterosexuality is more socially accepted and that same-sex attraction is a problem that needs to be fixed.⁵³³

Both the existence and tolerance of conversion therapy in private and public hospitals, as well as the failure to address abuses and lack of informed consent, are incompatible with China's legal obligations under the fundamental principle of non-discrimination.⁵³⁴

Lastly, conversion therapy, as conceived in China, contrasts the State's international obligations towards the Convention on the Rights of the Child (CRC), signed by PCR in 1990, and ratified in 1992.⁵³⁵ All State Parties to CRC have to ensure

⁵²⁹ Tcheng J., *"Have You Considered Your Parents' Happiness?"* (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁵³⁰ Tcheng J., *"Have You Considered Your Parents' Happiness?"* (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁵³¹ UN Human Rights Committee, *Young v Australia*, CCPR/C/78/D/941/2000 (September 18, 2003), <http://hrlibrary.umn.edu/undocs/941-2000.html>; UN Human Rights Committee, *Toonen v Australia*, CCPR/C/50/D/488/1992 (March 31, 1994), <http://hrlibrary.umn.edu/undocs/html/vws488.htm>.

⁵³² Tcheng J., *"Have You Considered Your Parents' Happiness?"* (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁵³³ Tcheng J., *"Have You Considered Your Parents' Happiness?"* (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁵³⁴ Tcheng J., *"Have You Considered Your Parents' Happiness?"* (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁵³⁵ Status of Treaties – on the Rights of the Child, Chapter IV, United Nations Treaty Collections, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

to children the highest attainable standard of health, the freedom from any cruel, inhumane, or degrading treatment, and from any form of violence⁵³⁶ (including mental violence, such as verbal abuse or mental abuse).⁵³⁷ The Committee on the Rights of the Child, while emphasizing the “*rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity, and emerging autonomy*”, condemned conversion therapy and all treatments that tried to change sexual orientation and “forced surgeries or treatments on intersex adolescents”.⁵³⁸ At the same time, the Committee urged the States to eliminate such practices, repealing all the laws that discriminate against individuals on the basis of their sexual orientation, and to raise public awareness in order to eliminate violence, discrimination, or bullying against LGBT individuals.⁵³⁹ To determine whether a treatment is harmful, the Committee has specified some criteria, including “*prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors*” and “*imposed on women and children by family members, community members or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent*”.⁵⁴⁰

As indicated in many investigations, it is usual that individuals under the age of 18 are forced into conversion therapy.⁵⁴¹ China should promptly take appropriate efforts to end all types of conversion therapy performed on people under the age of 18 in accordance with its legal commitments under the CRC.⁵⁴² Furthermore, in China, such practices are frequently imposed on people by family members and community members. China has

⁵³⁶ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577. Artt. 24, 37, 19.

⁵³⁷ UN Committee on the Rights of the Child, General comment No. 13 (2011), “The right of the child to freedom from all forms of violence,” CRC/C/GC/13, para. 21.

⁵³⁸ UN Committee on the Rights of the Child, General comment No. 13 (2011), “The right of the child to freedom from all forms of violence,” CRC/C/GC/13, para. 34.

⁵³⁹ UN Committee on the Rights of the Child, General comment No. 13 (2011), “The right of the child to freedom from all forms of violence,” CRC/C/GC/13, para. 34.

⁵⁴⁰ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and general comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014), CEDAW/C/GC/31-CRC/C/GC/18, para. 15-16.

⁵⁴¹ SRI, “Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China For the 17th Session of the Universal Periodic Review”, Sexual Rights Initiative (October 2013) Available online at

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=69&file=EnglishTranslation>.

⁵⁴² Tcheng J., “Have You Considered Your Parents' Happiness?” (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

an obligation under the CRC to take all necessary measures to eliminate practices that are harmful for children.⁵⁴³

iv. Caselaw

Despite the lack of a special law banning conversion therapy, it has been possible for some Chinese citizens to bring the matter before local courts. It is interesting to note, once again, that the absence of appropriate legislation does not preclude the possibility of obtaining a favorable decision, even if it does not directly discuss the violation of the human rights of LGBT individuals.

The first case, known as Peng v. Xinyu Piaoxiang Psychotherapy Centre, is about a 30-years-old man who was pressured by his family to search for providers of conversion therapy on internet, in order to help him overcome his attraction to people of the same sex.⁵⁴⁴ Baidu – the most popular search engine in China – directed him to the advertisement of an allegedly professional Psychotherapy Centre, where, later, he will undergo conversion therapy through painful electric shocks.⁵⁴⁵ The plaintiff filed a lawsuit against both the Xinyu Piaoxiang Center and Baidu in the expectation of receiving an appropriate apology and compensation for the mental trauma he suffered as a result of the “therapy”. The case was accepted by the Beijing Municipality Haidian District People's Court on May 15, 2014. The clinic’s director and lead therapist did not have a legitimate license to practice hypnosis or electroshock therapy, according to the three judges who wrote the verdict. Furthermore, even if they didn’t come to any further conclusions about the legality of “conversion therapy”, the judges said unequivocally that homosexuality is not a disease.⁵⁴⁶

As for Baidu’s allegations, the search engine was cleared of all allegations. The judgment, on the other hand, suggested that Baidu stop funding ads for “homosexual conversion

⁵⁴³ Tcheng J., *"Have You Considered Your Parents' Happiness?"* (Human Rights Watch, 2017). Available at: <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

⁵⁴⁴ Peng v. Xinyu Piaoxiang Psychotherapy Centre, Haidian District People's Court of Beijing (2014) Haimin Chuzi No. 16680 "P. and a consulting center infringement dispute case".

⁵⁴⁵ *"Victory for plaintiff in gay conversion case"*, China Daily, 19 December 2014. Available at: http://www.chinadaily.com.cn/china/2014-12/19/content_19128895.htm.

⁵⁴⁶ Parkin S., *"LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation"*, Fordham International Law Journal, Volume 41, Issue 5, Article 7, 2018. Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2718&context=ilj>.

therapy” keyword searches, which the technology company allegedly agreed to.⁵⁴⁷ Also, The plaintiff's right to dignity was not breached by Xinyu PiaoXiang and Baidu's acts, according to the decision.⁵⁴⁸

Finally, the court ordered Xinyu PiaoXiang to “[...] *compensate the plaintiff 3,500 yuan for economic losses*⁵⁴⁹ *and to publish an apologize on the homepage of its website for 48 hours [...]*”.⁵⁵⁰ The Xinyu Center is still practicing conversion therapy. Its website features a section entitled “Sexual Consultation”, which includes, among others, treatments for “transvestism” and “fetishes”.⁵⁵¹

The second and most recent case is known as Yu X vs. No. 2 Zhumadian Hospital.⁵⁵² According to sources, after his wife and relatives compelled him to undergo “conversion therapy”, a 38-year-old man sued the No. 2 Zhumadian Hospital in Henan Province.⁵⁵³ The plaintiff was locked up in the hospital for 19 days after being diagnosed with “sexual preference disorder” and was forced to take drugs and injections.⁵⁵⁴ The psychiatric hospital was ordered by the Yicheng District Court of Zhumadian to pay 5,000 yuan in compensation and publish an apology in local media within 10 days.⁵⁵⁵

⁵⁴⁷ Parkin S., *"LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation"*, Fordham International Law Journal, Volume 41, Issue 5, Article 7, 2018. Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2718&context=ilj>.

⁵⁴⁸ Parkin S., *"LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation"*, Fordham International Law Journal, Volume 41, Issue 5, Article 7, 2018. Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2718&context=ilj>.

⁵⁴⁹ Article 78 of the PRC Mental Health Law requires accountability and reasonable compensation for conduct that violates the relevant provision of the law, including admitting or treating non-mentally ill individuals as mentally ill patients, illegally confining individuals against their will, and discriminating against or humiliating patients.

⁵⁵⁰ Parkin S., *"LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation"*, Fordham International Law Journal, Volume 41, Issue 5, Article 7, 2018. Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2718&context=ilj>.

⁵⁵¹ Parkin S., *"LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation"*, Fordham International Law Journal, Volume 41, Issue 5, Article 7, 2018. Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2718&context=ilj>.

⁵⁵² Yu X vs. No. 2 Zhumadian Hospital, Civil Judgment of the People's Court of Yicheng District, Zhumadian City, Henan Province, (2016) Yu 1702, Min Chu 4122.

⁵⁵³ Phillips T., *"Gay man sues Chinese psychiatric hospital over 'sexuality correction'"*, The Guardian, 14 June 2016. Available at: <https://www.theguardian.com/world/2016/jun/14/gay-man-sues-chinese-psychiatric-hospital-over-sexuality-correction>.

⁵⁵⁴ "Gay Chinese man wins legal battle over forced conversion therapy", BBC News, 4 July 2017. Available at: <https://www.bbc.com/news/world-asia-40490946>.

⁵⁵⁵ "Gay Chinese man wins legal battle over forced conversion therapy", BBC News, 4 July 2017. Available at: <https://www.bbc.com/news/world-asia-40490946>.

This case, according to LGBT rights campaigners, was the first triumph against a state psychiatric institution for forcing patients to undergo therapy against their will.⁵⁵⁶

In both cases, more or less serious breaches of Articles 27⁵⁵⁷, 30⁵⁵⁸ and 41⁵⁵⁹ of the PRC Mental Health Law can be found. Regrettably, neither case is likely to achieve a widespread deterrent effect or to significantly alter the current situation. There are multiple reasons to this. First, both rulings did not address the issue of conversion therapy itself. Second, in China, the decisions of the courts are not legally binding, but they are considered as persuasive. And third, the damages awarded by the courts are probably too low to discourage other professionals to practice conversion therapy.⁵⁶⁰

⁵⁵⁶ Tcheng J., "*China Court Rules Against Forced Conversion Therapy*", Human Rights Watch, 10 July 2017. Available at: <https://www.hrw.org/news/2017/07/11/china-court-rules-against-forced-conversion-therapy>.

⁵⁵⁷ Article 27 of the PRC Mental Health Law prohibits the diagnosis of a mental disorder, or any medical procedure performed against an individual's will.

⁵⁵⁸ Article 30 of the PRC Mental Health Law asserts the principle of voluntariness and prohibits confinement of patients for mental disorder unless the individual has harmed himself/herself or others or has well-founded tendency to harm himself/herself or others.

⁵⁵⁹ Article 41 of the PRC Mental Health Law addresses the use of medicine in the context of mental illness and disorder and prohibits the use of medicine for purposes beyond the legitimate scope of psychiatric diagnosis and treatment.

⁵⁶⁰ SRI, "*Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China For the 17th Session of the Universal Periodic Review*", Sexual Rights Initiative (October 2013) Available online at <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=69&file=EnglishTranslation>.

CONCLUSION

Conversion therapy is performed in every area of the world. Sources confirm that it is widespread in over 60 countries.⁵⁶¹ It is performed by health professionals and religious leaders, in public or private health facilities or in private settings. The practice is carried out with both adults and minors who identify as homosexual, bisexual, transgender, or gender diverse. Conversion therapy is not medically nor scientifically valid. The practice is unproductive, repressive, and it is prone to cause significant or severe bodily and emotional pain and suffering, as well as long-term injury. In addition, only a small number of States have banned conversion therapy, and there is a lack of legal research in this field.

One of the European Union's next challenges will be determining how to establish a ban on conversion therapy. The *de iure condendo* analysis resulted in the identification of various legislative instruments which could be used for this purpose. The directive could be the most convenient instrument, but – depending on the area in which EU will decide to regulate conversion therapy – the limits of EU competence with regard to health and criminal law must always be taken into account.

All types of conversion therapy – physical and non-physical, forcible and non-forcible – as a major violation of human dignity, fall qualitatively within the scope of the absolute prohibition of torture under the ECHR, and, at the very least, amount to degrading treatment. A breach of the principle of non-discrimination was also noted, regardless of the consent of the subject. This sets out several positive state obligations to take effective measures to safeguard LGBT people from the harms of conversion therapy. Yogyakarta Principles are certainly important in this area because their primary purpose is precisely to demonstrate that States have a responsibility to ensure equitable access to Human Rights.

Despite the lack of rulings by the Supreme Court, in the United States it is possible to find cases in which attempts have been made to break down local bans on conversion therapy. The cases mainly concern the alleged violation by these prohibitions of certain human rights guaranteed by the Constitution. Besides a recent

⁵⁶¹ Alempijevic D, Beriashvili R, Beynon J, et al., “*Statement of the Independent Forensic Expert Group on Conversion Therapy*.” (Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture, 2020).

exception, in all cases the Courts have not found any violation. Also, even in cases where it was not possible to apply the local ban, plaintiffs were able to demonstrate that conversion therapy is a crime under other pre-existing laws.

The example of China shows that, in certain situations, the prohibition of conversion therapy is a necessity ancillary to appropriate legislation regulating the resultant discrimination against the LGBT community. The State, allowing or tolerating the practice of conversion therapy in public health facilities, on one hand, violates its own Constitution, on the other, the International Human Rights Law, and furthermore, is not consistent with the international obligations assumed.

In the view of the above, the hope is towards a greater diffusion of the academic discussion about this matter, especially in Italy, where this topic has never been properly addressed either academically or institutionally. The detrimental impact of conversion therapy in the lives of LGBT individuals and the responsibility of legislators to regulate this phenomenon are worthy of a great deal of consideration.

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