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ISSUES AND CONTROVERSIES MAPPING IN RELATION TO THE SO CALLED "ZAN" BILL (AND BEYOND)[1]

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Introduction

Issues relating to the recognition of discrimination through legislative instruments always give rise to heated debates. They often are—and inevitably—at the basis of ideological clashes. The Bill "Measures to prevent and tackle discrimination and violence on sex, gender, sexual orientation, gender identity and disability" [2] was no exception. The Bill has given rise to meaningful controversies, in relation to which the reasons for ideological-political positioning have not always favored a more detached reflection on the most appropriate legal instruments to pursue the objectives of protection for various subjects exposed to discrimination and violence and, in doing so, had the effect of making them more vulnerable than others in social contexts.

1. The following reflections owe a lot to the dialogue developed in recent years with Federico Oliveri on the subject of discrimination, with particular attention to those relating to sex, gender, sexual orientation. A special thanks goes to Cesare Trabace for some suggestions relating to doctrinal categories specific to criminal law disciplines and to Barbara G. Bello for some precious suggestions. I also wish to thank Susanna Pozzolo, Filippo Filice, Luciana Goisis for some very frank exchanges on gender identity and functions of law, starting from the Bill, which took place online during the lockdown period.
2. The proposal, approved by the Chamber of Deputies on November 4, 2020 in a text resulting merging Bills no. 107, no. 569, no. 868, no. 2171 and no. 2255, has been blocked by the Senate on October 27, 2021 through a regulatory expedient known as "no passage to the examination of the articles". It has become commonplace, as is now popular in the media, to call the proposal the "Zan Bill", according to the name of the rapporteur and first signatory of Bill proposal no. 569.

The present contribution intends to examine some critical issues with respect to this Bill and to analyze, albeit succinctly, the main reasons underpinning them. It seeks to develop a possible map of controversies, by trying, in this way, to underline some relevant issues from a legal-philosophical point of view, without overlooking the political dimension of law, such as: the ambivalences of the concept of vulnerability in relation to protection of "victims" of discrimination, hatred and violence and their "visibility/invisibility"; the concept of equality (formal or substantive) and its effectiveness through the law and the legal recognition of differences; the relationship between life, body and law; the use of "scientific" definitions in law and in legal texts (with particular attention to gender identity and the right to personal identity); the margins of interpretation of judges in defining fluid and complex situations such as those related to the sexual and identity sphere; the *vexata quaestio* of the relations between criminal and moral law; the limits of criminal law in contrasting systemic phenomena, rooted in culture and society; the criteria for a reasonable balance between principles and rights, with particular regard to the protection of equal dignity and freedom of expression.

With regard to the Bill, it is possible to identify four different positions that have raised critical points: the first considers the law unnecessary (1); the second has put under critical scrutiny the heterogeneous definitions on which the very assumptions of the proposal are based (2); the third highlights the limits of recourse to criminal law in pursuing the objectives of the Bill (3); and, lastly, the fourth sheds light on the risk of determining real "crimes of opinion", following the argumentative trajectories of the Bill (4). Such positions will be briefly illustrated, by pointing out the crucial points and, at the same time, the possible counter-arguments, in order to sketch out some final considerations that go beyond the scope, however contingent, of the same Bill and look at the scenario that has arisen through the heated and articulate discussion that accompanied it (5).

An Unnecessary Law? (And the Threshold of Visibility)

A first critical position to be taken into consideration is undoubtedly the one offered by those who have argued that a law on the subject would be useless. Within this position it is possible to identify three different issues:

1. The subject does not give rise to sufficient social alarm to make legislative intervention necessary;
2. the rules that protect the people concerned by the Bill already exist;
3. there is no gap the legal system that the Bill should fill in, nor any obligation to criminalize the conducts covered by the Bill according to international or supranational standards.

Proceeding in order, with respect to the first argument it is useful to keep in mind that the phenomenon is widespread, alarming, systemic[3] even if it is necessary to specify that the statistical data can lead to statistically underestimate the phenomenon, due to the well-known reasons of under-reporting, poor receptivity by the police, and—a crucial aspect that points out here—the absence of a specific protection. Hate episodes, often accompanied by threats or actual violence, often remain below the threshold of visibility.

As a recent Report shows[4], among the reasons that lead people not to report the discrimination and violence they suffered to the police, are on the one hand, the perception that what they suffered was not punishable by law; on the other hand, that any claim would still have been useless because the necessary measures would not have been taken to prevent it from happening again. In many cases, there is a perceived need not to draw attention to oneself by giving visibility to the reported incident, in order not to undergo secondary victimization.

The indifference and silence in which (however dramatic) experiences of violence often fall are equivalent to a violation of the dignity of the "victims", and, at the same time, cause and consequence of the invisibility of the phenomenon as a whole. As this Report expressly suggests, in order to adopt the right tools for tackling and preventing the phenomenon, it is therefore necessary to be thoroughly familiar with the dimension of the problem and, therefore, to implement all possible initiatives in order for it to emerge. Moreover, that a homo and transphobic climate characterizes Italy is confirmed by the fact that 32% of the Eurobarometer interviewees (the latest edition of 2019) say they "totally disagree" with the phrase "Gay, lesbian, bisexuals should have the same rights as heterosexuals", against an average of 24% in the European Union.

3. See, by way of example, the inquiry carried out by Alliva (2020).
4. *Hate Crimes No More Italy*, 17 maggio 2021: http://risorselgbti.eu/wp-content/uploads/2020/05/Centro-Risorse-LGBTI_Hate-Crimes-No-More-Italy_Report.pdf.

With respect to the second argument, it is possible to object to it by pointing out that the already existing criminal laws are not specific, nor they recognize the specific negative value linked to discriminatory and violent practices motivated by hatred towards certain historically "subaltern" social groups[5]. And concerning the third argument, the Bill aims to implement Articles 2 and 3 of the Constitution with respect to grounds of discrimination not covered by the current art. 604bis of the Criminal Code ("Crimes against equality") which includes only "race", ethnicity, religion, nationality (see Goisis, 2020).

Definition-Related Problems (and the Knot of the Protected Discrimination and Violence Grounds)

A second position can be identified with regard to those who, while apparently sharing the need for a law on the subject, have proposed to amend the part of the Bill relating to the definition of the protected grounds of discrimination and violence, listed in art. 1: namely, sex, gender, sexual orientation, gender identity. Within these perspectives, it is possible to identify four main argumentative trajectories.

1. In general, the categorization and differentiation of the different personal status deserving protection has been criticized

> According to the feminist scholar Ida Dominijanni (2020) One may wonder however, and this is the general aspect of the politics of law that this law raises, whether in order to achieve this egalitarian goal it is more effective to introduce specific anti-discrimination rules referring to specific categories of subjects on a one-by-one basis in the legal system, or to strengthen principles and norms of a general nature by generalizing, in fact, the needs and pressures of these specific subjects. There are two different paths: one, we could say, of particularization of the universal, the other of universalization of the particular. The Zan Bill chooses the first option. […]. If we proceed in the direction of equality by identifying and categorizing differences—in our case, those of gay, lesbian, transsexual people—the unavoidable result is to further differential and identity multiplication of recognition applications, inevitably accompanied by as many claims of exclusion and misrecognition. (Italics by the Author)

5. Here I take up again Gramsci's expression wich has become crucial in critical theories of law: for a classification, see Bernardini, Giolo, 2017.

The jurist like Cesare Mirabelli (2020), President Emeritus of the Italian Constitutional Court and former professor of ecclesiastical law and constitutional law also expressed himself in similar terms:

> I wonder if a law aiming to prevent any form of violence damaging dignity, integrity and reputation, as well as the image of each person without any distinction, must necessarily create categorizations. Are we not in danger of causing a separation, of creating new minorities? It is just a doubt, let's think about it.

With reference to this type of observations, Stefano Rodotà had already shown, in a very effective way, the overcoming of an abstract and unitary notion of the legal subject in the direction of a concrete and plural notion of "person", characterized by diversities worthy of recognition and protection (see Rodotà, 2007a; 2007b; 2012). As is well known, even before, Norberto Bobbio (1991) had identified one of the characteristics of the "age of rights" in the specification of rights holders (see Pisanò, 2011).

2. Again, in general, the introduction of enhanced protection for some categories of subjects in the name of the principle of equality understood as formal equality—equal treatment—has been criticized.

With respect to this objection, it should be noted that formal equality before the law should be distinguished from substantive equality which, in order to be achieved or at least guaranteed, requires "treating those in different conditions differently" and an active role of the State (art. 3 of the Constitution) in removing obstacles to the full enjoyment of equal social dignity and the "full development of the human person" (see Casadei, 2019).

3. In connection with this objection, a criticism of the introduction of enhanced protection for some categories of subjects has been put forward, in the name of a "risk of victimization". An example of this is Tamar Pitch's observation of the recourse to criminal law that tends to become "compulsive" (2013):

> Today the victim has ended up replacing the cry of the social and political claims of the oppressed with charges filed in police offices using the language of the criminal system. Criminal law would thus be raised to a panacea for all evils.

This approach, which I will touch upon again later, highlights how victimization on the basis of an intrinsic vulnerability can lead to negative effects of stigmatization, by

limiting, de facto, the subjects' autonomous ability to act. In this perspective, a specific and distinct protection for women, LGBTQI + people, people with disabilities, etc. would confirm the "disabled", deficient and dependent condition of the protected subject (on this point, see Morondo Taramundi, 2018)—as far as it guarantees the victims of priority safeguards simply because they belong to a category considered vulnerable

With respect to this criticism, it is possible to leverage on a non-essentialistic or disempowering notion of vulnerability or, in other words, on its situated (Zanetti, 2019) and critical (Casadei, 2018; cf. Macioce, 2021) connotation: in this perspective, vulnerability is not intrinsic to certain subjects, but is rather the product of certain economic, social, cultural, legal contexts, which vulnerable people themselves, especially if combined, can actively modify.

4. Again, in a general way, the legal technique used in the drafting of the Bill was criticized, because of using, in the first article[6], definitions taken from a subject which is highly controversial and raises conflicts in the scientific community[7]. Also in this regard, Dominijanni's reflections (2020) can be taken as an example:

> For the first time, terms taken from the feminist and LGBTIQ+ theoretical-political lexicon are thus transferred and crystallized into a legal document. However, while in the theoretical-political debate we are dealing with mobile and porous terms, often controversial and in any case always open to interpretation, dispute and negotiation, when transposed into legal language the same terms become rigid and become normative and divisive.

Within this same argumentative horizon, but from a purely legal point of view, the lack of precision of some definitions has been criticized, since it would be against the principle of certainty and mandatory nature of criminal law[8]. In this regard, for example,

6. "For the purposes of this law: a) sex means biological or personal sex; b) gender means any outward manifestation of a person that conforms or conflicts with social expectations related to sex; c) sexual orientation means sexual or emotional attraction towards people of the opposite sex, of the same sex, or of both sexes; d) gender identity means the perceived and manifested identification of oneself in relation to gender, even if not corresponding to sex, regardless of having completed a transition path".

7. It can not be disregarded here that there are also those who have held an exactly opposite position: the "defining technique [is] made extremely clear by the use of a rigorously connotative language, [which] implements the official and institutionalized scientific definitions of the world's highest scientific authorities, first of all the World Health Organization" (Filice, 2020).

8. The principles of legal determination and exhaustivity, corollaries of the more general principle of criminal legality, are, as is well known, dogmatic and central themes of the criminal law discipline, to which numerous monographic studies and encyclopedic entries have been dedicated. For a detailed discussion as well as for useful bibliographic information, see Nisco, 2017.

criminal lawyer Alberto di Martino's position is insightful, who assessed the definitions of the Bill very severely, by considering them

> unnecessarily complicated, apparently descriptive but full of evaluative expressions not linked to corresponding, certain parameters qualification; plausible in the debate of ideas, but to be rejected as constitutive elements of criminal offenses. (di Martino, 2021, p. 12; cf. Dodaro, 2021)

More specifically, the distinction introduced between "sex" (biological or personal) and "gender" (social and cultural) was strongly criticized, and above all the notion of "gender identity" defined in the Bill as "the identification perceived and manifested by oneself in relation to gender, even if not corresponding to sex, regardless of having completed a transition" (art. 1).

The issue of gender identity has divided even the feminist world: those who believe that the category "woman" should be rethought and extended to include people who are not biologically born women (such as trans women) and those, instead, who think that a person cannot be considered a woman ignoring completely apart from the body, denying biological reality[9].

With reference to this latter position, Marina Terragni's words of the writer and journalist are suggestive; she stated very peremptorily:

> The masculine and the feminine are rooted in the bodies. These are not far-fetched speeches. The sexual binary—male, female—is an incontrovertible fact. No theory can subvert this fact. To be a woman, one pretends that it is enough to proclaim oneself as such. Don't you see what's underneath it too? There is a desire to erase women, their body, their difference. (Terragni, 2021)[10]

Within this perspective, which underlines the very problematic nature of the definitions underlying the Bill, specific examples have been provided concerning how these very definitions would produce negative effects: in this regard, the National President of Arcilesbica, Cristina Gramolini (2021) —attacking in fact, the very assumptions of the Bill in its basic formulation—stressed how

9. For an approach that instead aims to go beyond these positions, see, for example, Monceri, 2010.
10. The risk underlined by Terragni has long been the subject of his attention: Terragni, 2007; 2018.

> specifying that gender identity is "the perceived identification of oneself" even if "not corresponding to sex" means opening a door to the legal self-definition of gender. It is enough to declare oneself a woman in the registry office to become one.

The rule would then undermine women's rights, insofar as it too broadly defines gender identity as self-perception of self with respect to gender, assimilating cisexual women (whose gender identity corresponds to gender and biological sex assigned at birth) and trans women.

With regard to these criticisms, it is good to remember that "gender identity" has long been recognized in fact by law and case-law. Italian law no. 164/1982 contains the rules on the rectification of the attribution of sex, that is, the possibility for transsexual people to change their personal sex on the basis of their own gender identity (see Lorenzetti 2013). The Constitutional Court in this matter recognizes the existence of a right that is substantiated in the aspiration "of individuals to the correspondence of the sex attributed to them by the registry office, at the time of birth, with that perceived and experienced subjectively" (CC judgment no. 180/2017). It is an expression of the right to personal identity guaranteed by art. 2 of the Constitution and art. 8 of the ECHR (CC judgment no. 221/2015). On another note, within the European Union system

> [t]he Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.[11]

Critique of Criminal Law (and the Urgency of Prevention)

A third position maintains that a law on the matter is necessary, but that criminal law is not the adequate instrument to which to entrust its fate. The basic assumption of this orientation is that prevention is needed in relation to such a rooted and complex

11. Whereas no. 3, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

social and cultural phenomenon connected to the "heteropatriarchal norm" and the "horizon of heteronormativity" (Mastromartino, 2017).

There are different forms that this argumentative trajectory has taken, of which I report below an overall picture.

1. Within the now consolidated perspective of a "minimal criminal law", the use of criminal law must be understood as *extrema ratio*, against the risk of a further proliferation of types of crime. In this regard, Filippo Sgubbi" (2019, p. 23) believes that today "the prevailing idea in the community and in the political environment is that legal remedies for every injustice and every social evil can be found in criminal law".

2. More specifically, various actors underlined that criminal law is unable to intervene on the social, structural, cultural causes that produce the discrimination and violence that the law would like to counter, since it operates with a logic of deterrence linked to the sanction. For example, Dominijanni (2021) stated that "violence—verbal and not just verbal—against women, as well as against gays, lesbians, transsexuals and other 'irregular' ones, is a systemic cultural problem and requires systematic contrast strategies".

3. Furthermore, the risk of a "symbolic criminal law" has been pointed out (Manna, 2016), holding pedagogical purposes, through which imposing a sort of shared morality (Legal Enforcement of Morals). In this regard, di Martino (2021, 1-2) warns of the "radical ineffectiveness" and "counterproductive character of a policy aimed at guiding the cultural choices of the associates above all through criminal law".

In turn, constitutionalist Emanuele Rossi (2021, p. 565) noted that

> the constitutional framework of a liberal criminal law does not entail the use of crime and punishment in a pedagogical key, because it should rather secure values that have already established themselves in the public debate than imposing values with the threat of the sword.

4. Furthermore, it has been pointed out that duration and costs of criminal proceedings would risk excluding the most vulnerable subjects from the possibility of accessing it for socio-economic reasons, or—following another argumentative path, inspired by the feminism of difference, but always critical of the use of criminal law—that 5 criminal law cannot replace political demands:

> A law is not enough, neither to discourage those who commit violence nor to protect those who suffer it: more is needed and this more is called political practice, as feminism has always maintained and, in fact, has never asked a law against misogyny . Of course, a law can help: to stigmatize violence, to punish the plaintiff and compensate the victim. But that's not all, and it can even be an alibi for not doing the essentials, which comes first and goes beyond the law. (Italics by the Author)

With respect to this type of objection, however, it should be considered that the Bill also contains preventive measures. It envisages, for example, expanding the competences of the Office for the fight against discrimination within the Presidency of the Council of Ministers, by entrusting it with the implementation of a "national strategy for the prevention and contrast of discrimination" (art. 8).

The strategy should be developed within the framework of a permanent consultation of local authorities, trade unions and associations engaged in tackling discrimination based on sexual orientation and gender identity and should identify specific interventions aimed at preventing and combating the onset of phenomena of violence and discrimination based on sexual orientation and gender identity, expressly drawing attention to homophobia, lesbophobia, biphobia and transphobia (see Graglia, 2019).

In this regard, the Bill provides for the strengthening of the collection of statistical data on discrimination and gender-based violence (art. 10). With respect to this determination characterized by a promotional nature, in reality, a critical aspect seems to be the fact that the active measures provided for by the Bill are "at no cost" or without charges for the State, while they would require, instead, specific funding to be effective.

Again with a view to prevention, the Bill also provides for a "National Day against homophobia, lesbophobia, biphobia and transphobia" to be implemented also in schools (Article 7). Beyond the criticisms raised in particular (but not only) within conservative Catholic circles, it was emphasised how such institutional event, held annually, does not seem suitable on its own to promote a genuine culture of respect for diversity, which would require integrating issues related to sexuality and gender in curricular teaching, for example in the context of the new teaching of Civic Education[12].

12. An insightful example of good practice is undoubtedly illustrated in Cambi, 2015. See also Prati *et. al.*, 2010; Burgio, 2017[2].

The Risk of the "Crime of Opinion" (and the Issue of Instigation)

Finally, a fourth position, while acknowledging that a law on the matter is necessary, drew attention to the danger that the Bill would involve the introduction of a sort of "crime of opinion" (Bartoli, 2021) and excessively limit freedom of expression, freedom of teaching, freedom of research, freedom of artistic expression, also affecting freedom of association[13].

This type of critical argument can be answered in a twofold way.

1. In terms of principle, no constitutional right is absolutely valid, but it is often part of a complex balance of different potentially conflicting rights. In this case, respect for equal social dignity and personal integrity places limits on freedom of expression[14], which cannot go so far as to instigate the commission of crimes (in the specific context, acts of discrimination or violence).

2. More specifically, the Bill does not envisage punishment for conduct regarding the "propaganda of ideas" on grounds of sex, gender, etc. the (as is in the case with "ideas based on superiority or on racial or ethnic hatred"), but punishes - in my opinion appropriately - the instigation to discrimination and violence (as well as acts of discrimination and violence).

Furthermore, art. 4 introduced a sort of "safeguard clause", inspired by the case-law on racist hate speech that triggers the crime only in the event that the opinion expressed is such as to "determine the concrete danger of carrying out discriminatory acts or violence".

On the other hand, this last clause can provoke the opposite criticism, relating to the difficulty of proving the existence of a "concrete danger" that a certain opinion instigates effective discrimination or violence, leaving out of the scope of the Bill most anti-LGBTIQ+ hate, misogynist, ableist expressions, etc. In other words: the expressions of incitement to hatred and contempt would remain outside, regardless of their concrete possibility of resulting in discrimination or violence.

13. In fact, the Bill prohibits any organization having among its purposes the incitement to discrimination or violence for reasons based on sex, gender, sexual orientation or gender identity. Anyone who participates in such organizations or provides support to their activities is punished, for the only fact of participation or support; those who promote or direct such organizations are punished the most severely.

14. On the issue in general: Ansuátegui Roig, 2018. On the issue related to limits, let me refer to Casadei, 2016.

Concluding Remarks (in a Future Perspective)

The perspective underlying this contribution, in favour of the adoption of the Bill, has undoubtedly been grasped through the counter-arguments illustrated in response to the various objections and criticisms raised against the document. Starting from the controversies illustrated, the scenario that has nevertheless been determined now seems to be highly relevant to the author of the present article: the discussion around the proposal has consolidated the awareness in Italian society of the problem and has brought it to the center of public, political and institutional debate. This is an aspect that goes beyond the fact that the Bill has not been adopted, although this of course important.

Consequently, two profiles seem to be particularly worthy of attention. First, the notion of "homophobia" has obtained full and explicit recognition in the public sphere beyond the threshold of invisibility, finally bringing Italy within a horizon shared by other European countries. Second, the awareness of the need to develop tools to combat "normalized violence" (actually the result of social constructions: see Mauceri, 2015) seems to have triggered a process that is now irreversible.

The reasons that led to the proposed Bill no longer seem to be neglected or passed over in silence and above all they increasingly orient the struggle that organizations, associations and even institutions carry out with respect to hateful practices of discrimination and violence. The exultation of those opposed to the Bill could remain, we may hope, a sad memory sooner than one might think.

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