



BRILL

THE ITALIAN REVIEW OF INTERNATIONAL AND
COMPARATIVE LAW 1 (2021) 454–461

The Italian Review
of International and
Comparative Law

brill.com/iric

Back at It. Italy's Struggle for a Law against Homophobia and Transphobia

Freedom of Expression versus Equal Dignity?

Angelo Schillaci

School of Law, Sapienza University, Rome, Italy

angelo.schillaci@uniroma1.it

Abstract

On 27 October 2021, the Italian Senate decided not to proceed further in the discussion of the so called Zan bill against homophobia and transphobia. Although such a vote does not prevent the Senate from resuming the discussion after six months, it has made clear that there is no majority to approve this bill in the Senate. Nevertheless, the paper focuses on the main issues discussed in the public debate regarding the bill and particularly on the deep conflict between, on the one hand, the recognition of different identities in the public space and, on the other, the protection of freedom of expression and its connection with pluralism of opinions.

Keywords

fundamental rights – freedom of expression – sexual orientation – gender identity
–homophobia – transphobia

1 Introduction and Goals of the Work

The Italian Parliament is currently struggling with the discussion and approval of the so-called 'Zan' bill¹ against discrimination and violence based on sex, gender, sexual orientation, gender identity and disability. The bill has been

1 Named after Alessandro Zan, a member of the Democratic Party, who was the first signatory of the text.

approved by the *Camera dei deputati* on 4 October 2020, and it is now under consideration in the *Senato della Repubblica*. Nevertheless, on 27 October 2021, the Senate has decided not to proceed further in the discussion of the bill, according to Article 96 of the *Rules of the Senate*. Although such a vote does not prevent the Senate from resuming the discussion after six months, its political meaning is quite clear: apparently, there is no majority to approve *this* bill in the Senate.

This is not the first attempt to approve a law against homophobia and transphobia in Italy: the approval of similar bills has regularly failed since 1996, due to a very bitter cultural and political conflict on the issue.

Nevertheless, both reports and the news show a constant and significant increase in gender- and disability-based hate crimes and violent discrimination against the LGBT+ community. For this reason, the demand for an intervention has grown in the last few months. In addition, Italy is currently one of the few founder states of the EU that has not approved such a law, and is in this position notwithstanding the resolutions of the Council of Europe and the European Parliament urging Member States to adopt effective measures against hate speech and hate crimes based on such grounds.

The public debate on the Zan bill focuses mainly on three issues. Primarily, the opponents fear that the extension of the criminal punishment of incitement to discrimination and violence to conduct based on sexual orientation and gender identity may put the right to freedom of expression at risk: this paper will focus specifically on this issue. Secondly, a major discussion has been triggered – among feminist movements too – by the concept of gender identity and its definition. The third issue concerns the intervention in the field of education and its compatibility with schools' autonomy.²

Whereas the approval by the *Camera* – although it was quite divisive – did not raise a major debate among the public, significant conflict has arisen during the discussion in the *Senato*, eventually determining the negative vote on 27 October 2021. As happened before in 2016 when the law on same-sex civil unions was discussed,³ political tensions have tested the parliamentary procedures. Even the Holy See has intervened in the debate, with an unprecedented diplomatic intervention against the Italian government, claiming that the bill

2 More details in SCHILLACI, "Riconoscere pari dignità promuovendo coesione: per una difesa del d.d.l. Zan", *Giustizia insieme*, 13 July 2021, available at: <<https://www.giustiziainsieme.it/it/diritto-penale/1855-riconoscere-pari-dignita-promuovendo-coesione-per-una-difesa-del-d-d-l-zan-di-angelo-schillaci>>.

3 See SCHILLACI, "Le unioni civili in Senato: diritto parlamentare e lotta per il riconoscimento", *GenUS*, 2016, p. 18 ff.

violates the prerogatives granted to the Holy See and the Catholic Church by an agreement signed in 1984 and therefore arguing for wholesale changes to the proposal.

It is quite evident, then, that the bill is creating deep conflicts between, on the one hand, the recognition of different identities in the public space and, on the other, pluralism of opinions and points of view. This is part of a broader process that is currently affecting many European societies, as demonstrated by the ongoing situations in Hungary and Poland. In these countries women and LGBT+ people share the status of victims of a violent attack whose aim is to restore a societal model based on a traditionalist and patriarchal paradigm. Such a paradigm, however, is plainly inconsistent with the founding principles and values of the European Union, enshrined in the Treaties and recently reaffirmed by the European Parliament in its approval, on 11 March 2021, of a resolution declaring Europe to be a 'free zone for LGBTIQ people', in response to the establishment, in Poland, of more than 100 zones that are 'free from' LGBT+ people. The same process led in Hungary to the approval of a law against LGBT+ 'propaganda' that, in its essence, prevents any minor from being exposed to any content related to sexual orientation or gender identity; this law aroused the indignation of the EU institutions and several Member States and ultimately resulted in the approval of a very tough resolution by the European Parliament.⁴

A few plain questions arise from such conflicts, comparable to those that the Italian parliament is currently trying to answer: in a democratic and pluralistic society, must differences be celebrated – especially when they are based on people's bodies and self-determination – or must they be feared as destabilizing? Further: must recognition of personal dignity be influenced by static and dogmatically-based models, or should it rather consider that the interpretations of dignity are as diverse as personal choices?

In the Italian experience, the answer cannot but be guided by Articles 2 and 3 of the Constitution, by sticking to the constitutionally guided balance between equality and freedom, fundamental rights and duties of solidarity, full development of the human person and social relations, and recognition of identities and equal dignity of differences.

4 *European Parliament Resolution of 8 July 2021 on Breaches of EU Law and of the Rights of LGBTIQ Citizens in Hungary as a Result of the Legal Changes Adopted by the Hungarian Parliament* (2021/2780(RSP), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0362_EN.html); *European Parliament Resolution of 11 March 2021 on the Declaration of the EU as an LGBTIQ Freedom Zone* (2021/2557(RSP), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0089_EN.html).

2 Content of the Zan Bill

Compared with the proposals previously discussed, the Zan bill entails a wider set of measures that exceed the traditional area of intervention and are represented by the extension to sexual orientation and gender identity of the protection accorded against hate speech and hate crimes based on race, ethnic and national origin, and religion by the so-called 'Mancino' law (l. No. 205/1993). On the one hand, the Zan bill also considers conduct based on sex, gender, and disability. On the other hand, in addition to the criminal provisions, the bill includes positive actions regarding the prevention of discrimination and violence through education, as well as other cultural policies and support for victims of discrimination and violence.

As to the criminal provisions, the bill aims to amend Articles 604 *bis* and 604 *ter* of the Penal Code by introducing a specific reference to sex, gender, sexual orientation, gender identity, and disability among the relevant factors that define the conduct regulated by Article 604 *bis* as well as among the reasons that justify the application of the aggravating circumstances provided by Article 604 *ter*.

Nevertheless, not all the types of conduct regulated by Article 604 *bis* are affected by the amendment. Article 604 *bis* does indeed punish acts of discrimination or violence, as well as incitement to commit those acts, but it also punishes racist propaganda; the bill only extends the first two criminal provisions to conduct based on sex, gender, sexual orientation, gender identity and disability, and propaganda remains limited to racial or ethnic grounds.

Similarly, the aggravating circumstance regulated by Article 604 *ter* increases the punishment for ordinary crimes when those crimes have been committed for racial, ethnic, or religious reasons; the bill aims to extend that provision to conduct based on hatred arising from the victim's sex, gender, sexual orientation, gender identity or disability.

The protected good is equality, in at least two dimensions. On the one hand, such criminal provisions protect equality as the equal right of every person to affirm their own identity and difference; on the other hand, they protect equality as a principle that structures the political community and might justify – if necessary – the criminal punishment of conduct that puts that principle at risk.⁵

5 See GOISIS, "Hate Crimes in a Comparative Perspective. Reflections on the Recent Italian Legislative Proposal on Homotransphobic, Gender and Disability Hate Crimes", *GenIUS*, 2020, p. 78 ff.

Given the worrying increase in the number of episodes of discrimination and violence against women, LGBT+ people, and people with disabilities, the amendment to the Penal Code appears to be necessary. Nevertheless, it is just one element of a broader strategy for the prevention and countering of discrimination, which is coherent with the residual and subsidiary function of criminal punishment in constitutional democracies, as has been emphasized by the European Court of Human Rights. According to Strasbourg case law, a criminal sanction – when countering hate speech, discrimination, or violence against a victim in a vulnerable category – must indeed be construed as *ultima ratio*; however, when the violent attack is directed against a person's physical or psychological integrity, “only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor”. Besides this, criminal punishment must be deemed necessary when there have been “direct verbal assaults and physical threats motivated by discriminatory attitudes”.⁶

In this vein, opponents of the bill claim that the criminal intervention is not necessary, since the provisions already existing in the Italian Penal Code might be sufficient for the purpose of countering violence based on misogyny, homophobia, transphobia and ableism. The answer to this objection is implicit in the original *ratio* of the Italian regulation of hate crimes based on race, ethnic or national origin, and religion. Physical integrity and dignity are indeed protected by the existing general criminal provisions. What is lacking and is therefore necessary – that is, the purpose fulfilled by the specific regulation of hate speech and hate crimes – is the acknowledgment and punishment of the specific seriousness of conduct of that nature (either material or moral) in which a human being is attacked exclusively because of a personal condition that relates to a dimension of its dignity. This is so because in those cases the attack is directed not only against that person, but also against some aspect of its identity and dignity that is shared by an entire group: this implies that

6 *Beizaras and Levickas v. Lithuania*, Application No. 41288/15, Judgment of 14 January 2020, para. III. In 2010 the Committee of Ministers of the European Council had adopted a specific Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity (available at: <<https://www.coe.int/en/web/sogi/rec-2010-5>>). The European Parliament has from time to time reminded Member States of the importance and necessity of adopting effective measures to counter discrimination and violence based on sexual orientation and gender identity. Besides the resolutions quoted *supra*, note 4, see the *European Parliament Resolution of 14 February 2019 on the Future of the LGBTI List of Actions (2019–2024)* (2019/2573(RSP), available at: <https://www.europarl.europa.eu/doceo/document/TA-8-2019-0129_EN.html>) as well as the *European Parliament Resolution of 18 December 2019 on Public Discrimination and Hate Speech against LGBTI People, Including LGBTI Free Zones* (2019/2933(RSP), available at: <https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html>).

attacks based on hatred of those personal conditions eventually result in an attack on democratic coexistence and the entire political community.

Therefore, the Zan proposal does not – as some opponents claim – aim to introduce some sort of inviolability for certain categories or groups: its purpose is rather to acknowledge that sex, gender, sexual orientation, gender identity and disability – as dimensions of dignity – enshrine both an individual and a socio-political value that deserve to be protected from criminal conduct based on hatred explicitly directed against them. In this vein, hatred is not only a ‘feeling’ but is also the outcome of the structural humiliation and subordination of those individuals and groups and it is punished as such; the purpose of such laws is, therefore, that of protecting *and promoting* equal social dignity, and granting safety and freedom to develop and express one’s personality in the public space. Considering its core in a criminological perspective, the punishment of hate crimes is justified to the extent that they jeopardize not only personal dignity but also peaceful coexistence and social cohesion in a pluralist society in which differences are acknowledged and respected.

3 Critical Remarks

Another relevant objection to the Zan bill concerns the feared contrast between its criminal provisions regarding hate speech – specifically, the criminalizing of incitement to discrimination and violence – and freedom of expression. As happened in previous legislative processes, this kind of objection gave rise to a major conflict in Parliament, and eventually led to the approval of a provision – now covered in Article 4 of the proposal – explicitly safeguarding freedom of expression, which states that: “for the purposes of this law, free expression of opinions and beliefs as well as any licit conduct related to pluralism of ideas and freedom of choices are safeguarded, when not of a type to determine the clear and present danger of discriminatory or violent acts”.⁷ Unlike previous cases – when the opponents obtained a context-based exemption regarding specific opinions (such as religious beliefs or opinions expressed in academic context) – the current formulation of Article 4 follows the balance already set by the case law regarding the existing legal framework on punishment of hate speech,⁸ as well as the case law of the Constitutional Court. According to the

⁷ Author’s translation.

⁸ See *Corte di Cassazione (Sez. I penale), Criminal proceeding against V.D.*, 22 May 2015, No. 42727 and *Corte di Cassazione (Sez. V penale), Criminal proceeding against P.D.*, 14 February 2018, No. 14200.

latter, a limitation of freedom of expression can be reasonably admitted when the opinion creates a clear and present danger for public security (e.g. in the case of public incitement)⁹ or when it directly violates personal dignity and honour (e.g. in the case of slander).¹⁰

Moreover, such a provision appears to be consistent with the case law of the European Court of Human Rights regarding hate speech. In the case of *Vejdeland v. Sweden*¹¹ – the first decision concerning homophobic hate speech in Strasbourg case law – the applicants had been convicted for agitation against homosexuals as a group after they had distributed leaflets containing homophobic statements in a secondary school; they alleged that their conviction constituted a violation of their freedom of expression. No violation was found by the Court, since the interference with the applicants' freedom of expression was deemed to be plainly justified in the light of Article 10(2) of the Convention. And indeed, as the Court pointed out, in a democratic society the recognition of rights (such as freedom of expression) cannot be separated from the exercise of duties, including the duty to “avoid statements that are unwarrantably offensive to others, constituting an assault on their rights” (Paragraph 57). Such principles have recently been reaffirmed in the case of *Lilliendahl v. Iceland*.¹² In this decision the Court reiterated, in the first place, that “discrimination based on sexual orientation is as serious as discrimination based on ‘race, origin or colour’” (Paragraph 45), and it then went on to uphold that the criminal punishment of hate speech humiliating dignity because of sexual orientation¹³ does not violate freedom of expression. Again, the interference is justified under Article 10(2) of the Convention to the extent that it aims to protect “the reputation or rights of others” (and particularly the right of homosexuals to respect for private life).

Therefore, those who worry about freedom of expression in relation to the Zan bill should carefully consider the purposes fulfilled by the criminal punishment of hate speech and, especially, the interweaving of the protection of peaceful coexistence and the protection of dignity. Freedom of expression is indeed the cornerstone of pluralist democracies, but democratic institutions are founded on the acknowledgment and protection of human dignity: in the

9 See *Corte Costituzionale, T.V.*, 23 April 1974, No. 108; *M.G. and others*, 27 February 1973, No. 16; *M.G.*, 11 July 1966, No. 100; *M.B.Z.*, 6 July 1966, No. 87.

10 See *Corte Costituzionale, C.G.*, 27 March 1974, No. 86.

11 *Vejdeland v. Sweden*, Application No. 1813/07, Judgment of 9 February 2012.

12 *Lilliendahl v. Iceland*, Application No. 29297/18, Judgment of 12 May 2020.

13 This is particularly the case when the contested opinions are “coupled with the clear expression of disgust”, which enables them to “promote intolerance and detestation of homosexual persons” (para. 38).

words of Peter Häberle, dignity is the anthropological and cultural premise of a constitutional State, and it implies democracy as its organizational consequence.¹⁴ Thus, enforcing dignity (even through the criminal punishment of hate speech and crimes) enhances the quality of democracy.

In this vein, punishing hate speech aims neither to regulate the circulation of ideas in the public sphere nor to restrict the public debate in a democratic and pluralistic society: rather, by acknowledging further dimensions of personal dignity, it protects those dimensions from public hatred, marginalization, and public humiliation.

An effect of the approval of the Zan bill would be that sexual orientation and gender identity (as well as sex, gender, and disability) were finally acknowledged as dimensions of dignity that deserve public protection, and this would meaningfully enrich the constitutional image of personality (*Verfassungsrechtliches Menschenbild*).¹⁵ Therefore, one final remark must be that the intervention assured by the Zan bill does not only relate to the criminal protection of equality, but also considers its promotion through positive actions. As a consequence, the purpose of preventing such violent episodes could be fulfilled through effective inclusion, thus overcoming a vulnerability-centred approach in favour of the enforcement of equal social dignity.

14 The quotation is taken from the title of one of the paragraphs of the encyclopedia entry: "Stato costituzionale" in *Enciclopedia giuridica Treccani* and now published in HÄBERLE, *Lo stato costituzionale*, Roma, 2005, p. 164.

15 See HÄBERLE, *Das Menschenbild in Verfassungsstaat*, Berlin, 2008.