

THE TROUBLE WITH “GENDER”: A FEW CRITICAL COMMENTS ON THE ITALIAN “DDL ZAN”

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On October 15th, 2013 the Italian Legislative Decree of August 14th, 2013, n. 93, passed, with amendments, into law (n. 119/2013), after a period in which the “urgency” to elaborate a law against “gender violence” had become gradually a public concern, supported also by relevant initiatives. In the media and the public opinion this law is called “femicide law”, but the word femicide is not to be found either in the title or the text¹. Rather, the headline of the law reads as follows: “Urgent provisions on security and to contrast gender violence, as well as on civil protection and compulsory administration of the provinces”. At that time my idea was, and still is, that this law be just another instance of misunderstanding gender, if the notion means directly “women” without further discussion, as I will try to very briefly show (Monceri, 2013).

The law addresses very different matters within one and the same text: security issues, gender violence, civil protection, and compulsory administration of the provinces. But the most puzzling circumstance is that although the Title I, containing 5 articles, explicitly refers to “gender violence” there is no definition of the term gender throughout the articles, and especially, as you would have expected, in the first one. In fact, the first two articles merely contain modifications to the Italian Penal Code and the Code

1. For an introduction to “femicide” see Spinelli, 2008.

of Criminal Procedure for already existing categories of violations, crimes and misdemeanors, in the direction of exacerbating already foreseen penalties. The mentioned categories are “abuse”, “sexual violence”, “tormenting acts”, “crimes against the person”, while “gender” seems to remain in the background, only implicitly assumed as a general umbrella-term (see art. 1 and 2).

Anyway, to discover the real origin of the bill’s ambiguities, we must look at art. 5, in which it becomes completely clear that “gender violence” and “domestic violence” are both to be understood directly as “violence against women”, which is also the ultimate reason why this law can be defined as a “femicide law”. To put it bluntly: “gender” means “the feminine gender”, that is to say “(heterosexual) women” and “domestic violence” means “violence against women” in the context of the (traditional) family and/or more broadly defined “affective relationships”. This overlapping between gender violence and violence against women is surely due to the fact that in Italy the term “gender” was and still is understood as an equivalent to “women”, not only among “gender” scholars and intellectuals, but also in the wider community, so becoming the accepted definition when it came to elaborate a law about “gender violence”. As said, the expression “gender violence” is present both in the headline of the law and in Title I, but no definition is provided in the text, in which only “domestic violence” is defined in more details, and this adds to the lack of definition of the term “gender”, whose complexity is not at all addressed, ending up by being deployed as an equivalent to “women”.

Beyond that, I was personally struck by the complete lack of interest in the second traditional gender (“men”) as possible subjects of gender violence by the part of women, forgetting even those cases in which some men are regrettably put hierarchically under women (for instance, because they are labelled as “disabled”). Anyway, the complete lack of consideration was all the more astonishing for further “genders”, such as transsexuals and transgender people, or for people having different sexual preferences, such as homosexuals and bisexuals, or for differently sexed bodies, such as the so-called intersex bodies, although these are surely categories of people suffering from “gender violence”. In this sense, if the law can be indeed defined a “femicide law”, it surely cannot be understood as a “law against homophobia/transphobia”. And this is really strange, for it could have been a politically significant move already at that time to try and find allies among those other groups in order to lobby for a more comprehensive bill against “hate crimes” based on “gender”.

Now, the legislative proposal popularly known as “DDL Zan”, recently rejected by the Italian Senate, was expected just to amend the above-mentioned shortcomings, and

therefore was (and still is) considered as a much needed advancement². The first problem I see, however, lies in the fact that the definition of "gender" given in this proposal is not in line with the provisions of the femicide law, and I wonder how we should deal, in theory and practice, with two different ways to define the same term, i.e. "gender", within a general legislation at the end of the day addressing similar topics, that is to say "discrimination" and "violence". The second problem is that not even in this proposed draft we are able to find exhaustive and advanced definitions of the relevant terms, reflecting more an "urgency" to pass the law, so to speak, than a (indeed much needed) considered approach to this complex matters.

In the following, I will briefly comment on those two points in order to motivate my at least partially negative evaluation of the proposal. More generally, I would like to underline that if you decide to regulate something by passing a law, it should be as inclusive as possible, given that it will regulate, by its nature, all possible cases having to do with the addressed topic—here especially gender and "gender identity". The femicide law was already missing in that respect, and the proposal under consideration let similar concerns emerge, however comprehensive its headline—"Measures to prevent and contrast discrimination and violence for reasons based upon sex, gender, sexual orientation, gender identity and disability"—may seem.

Before proceeding, however, and although space constraints prevent me from more deeply discussing the point, I find it necessary to stress that even if "disability" is explicitly mentioned in the proposal's heading, no definition of "disability" is given and the term recurs a very few times, as an added category, when it comes to the foreseen modifications of previous laws and Codes. In other terms, as it seems, disability is something that must be named in the context of a would be "anti-discrimination law", but which is not explicitly linked, in an intersectional way, to sex, gender and sexual matters (Monceri, 2017; Mallett & Runswick-Cole, 2014). It seems to me especially odd that the word "disability" is not explicitly inserted in the art. 7, which institutes the "National Day against homophobia, lesbophobia, biphobia and transphobia" "at the aim to promote the culture of respect and inclusion, as well as to contrast prejudices, discriminations and violence motivated by sexual orientation and gender identity".

Apparently, the reference to disability has no need to be explicitly mentioned because it may fall directly within the promotion of "respect and inclusion", but surely

2. The legislative proposal's text to which I refer is N. 2005, XVIII Legislatura (see <http://www.senato.it/service/PDF/PDFFServer/BGT/01179390.pdf>). It was received by the Senate after the approval by the part of the Chamber of Deputies on November 4, 2020, and subsequently discussed and rejected on October 27, 2021 (for the parliamentary process, see <http://www.senato.it/leg/18/BGT/Schede/Ddliter/53457.htm>).

one may wonder why the other categories should be instead explicitly mentioned, if not for the simple reason that this National Day adopts something already decided at the European level since 2007, when a resolution by the European Parliament called for the celebration of the “International Day Against Homophobia”, originally dating 2004, and to which later also transphobia and biphobia added.

To come back to my first point, I would like to start with the following question: How do we deal with the fact that in the case of the femicide law “gender” is an equivalent for “women”, while in so-called “DDL Zan” gender is more broadly defined as “whatever external manifestation by a person, which is in accordance or contrasting with social expectations connected to sex” (art. 1 b)? In other terms, we are now confronted by two different understandings of gender, one narrower (gender as women) and one broader (gender as whatever external manifestation), both to be safeguarded and protected. The problem, however, lies in the fact that the definition of gender as women is not only narrower, but also not flexible, in the sense that in order to work, it must admit only two genders, women and men, whatever their “presentation”. Put differently, the category “women” must be clearly distinguishable from that of “men”, if you are to speak about a “femicide” as a category different from the usual and more general term “homicide”, and worthy of a particular, specific legislation. Therefore, if you widen the understanding of gender to the point that the borders of the binary men/women are dissolved, the problem remains how could you properly define a concrete situation or case as a femicide.

Things being so, the problem also remains open concerning the hierarchy between the two different notions of gender, given that there is no trace within the legislative proposal of a definitory confrontation with the previous femicide law. Of course, there could be a way out, resorting to the definition of “gender identity” given in the art. 1 d), according to which we should understand by the expression «the perceived and manifested identification of oneself in relation with gender, even if not corresponding to sex, regardless of having concluded a transition». Thus, if you *perceive* yourself as a heterosexual woman, you *manifest externally* yourself as such, and your body is aligned with your «biological or anagraphic/registered sex» (art. 1a), that is to say you have/are a female body, the discrepancy may be overcome. But of course, this pragmatic solution can be considered much less powerful, both in terms of numbers and political influence, than a clear-cut dichotomy such as the usual gender one, opposing only men and women. Also therefore, by the way, it seems not at all strange that the homo-, bi- and transphobia issues found no space within the femicide law. Be it as it may, the ques-

tion remains open concerning how to harmonize an already passed bill with one that would have established, if passed, kind of a contradiction between diverging definitions.

As for the second above-mentioned problem, which I find much more important, the definitions provided by the first article of the legislative proposal are not convincing, because they are still bound to the idea that while "gender" should be considered as a "social construct" the same does not apply to "sex". As a matter of fact, even this would-be anti-discriminatory proposal keeps on defining sex as «biological or anagraphic/registered sex» (art. 1 a), with the result that it maintains untouched the binary opposing male and female bodies as if it were rooted "in nature"—as something "naturally" given—. This excludes from the outset all those bodies that do not conform to the (only) two accepted shapes of the human body, of whom one is equipped with a penis and the other with a vagina (or is not equipped with a penis), forgetting altogether the circumstance that "in nature" human bodies do not come to life only in two forms. This means that not even in this proposal space enough is left open to so-called intersex bodies (Crocetti, 2013), who do not comply with the foundational rule imposed by the heteronormative regime, according to which two and only two types of body can be legitimated from the point of view of "sex".

This choice, possibly reflecting a difficulty to properly consider the most advanced positions in the field of gender, queer and transgender studies at the international level (Stryker, 2017; McCann & Monaghan, 2020), leads to a deep problem when it comes to define "sexual orientation", that is to say the most central category if you are to advocate against homo-, lesbo-, bi- and transphobia. Art. 1c, namely, defines sexual orientation as "the sexual or affective attraction towards persons of the opposite sex, the same sex or both sexes". This is a clear proof of the fact that differently from the notion of "gender", that should be considered as something at the person's disposal, which can be changed at will (under the contextual constraints) being a social/cultural construct, the notions of sex and of sexual orientation are something unavailable. In fact, the latter is understood as something inherent, inborn and innate, while the former is a given that can be changed only by dedicated (surgical) interventions in the service of "gender identity", in order to "correct" the "material" body to oblige it to comply to the "psychological perception" of oneself.

Unfortunately for the proponents, however, this is not the case. On the one hand, as already mentioned, there are people who do not come to life in one of the two admittedly "natural" shapes of the body. And I wonder how you would define the "sexual orientation" of at least some intersex bodies, for which there is no precisely "opposite" or

“same” sex, or only two possibilities, as foreseen by the sex binary Male/Female, that this proposal still accepts as untouchable, not differently from the various feminist movements whose positions it would like to variously correct or overcome. So, a disturbing question remains without answer, at least until today: What should this properly mean, and where are the provisions to safeguard and protect those concrete persons from being discriminated because their *sexes*, and not their *genders*, are not yet recognized by society at large? Should we simply resort, as with the case of disability, to a vague and general call to the promotion of “respect and inclusion”, for which however the simple provision of a new law cannot be enough?

On the other hand, this is not the case even for many other people who fall outside the domain of this allegedly “advanced” and “empowering” proposal. I will give only one concluding example. Say that I am a person registered as Female at birth, whose “externally manifested” gender is that of a man, as conceived within the usual gender binary (I dress, speak, behave, and so on “as a man”). In short, say that I might define myself as simply trans-gender, with the prefix *trans-* understood as going beyond the very category of gender, which is of no use for me. Furthermore, say that I perceive and define myself as a “gay man”, but I do not want in any case to change my body to align it to that perception, simply because I do not have any problem with my body, and I find that I might actually “sexually perform” as a gay man provided that I find a matching person to whom I am attracted and who is attracted to me. Now, in which of the only two admitted categories of “sexual orientation” (of which bisexuality is considered an extension-as-addition, so to speak) should I position myself, and according to whose definition of my “sex” and my “gender”?

At the end of the day, the problem with this legislative proposal is that it is (necessarily) constructed moving from a particular definition of gender, which is not able to include all people and all of their differences. This is a circumstance that the “DDL Zan” shares with all other thinkable legislative proposals, which are never a definitive “solution” to the problems they are addressing—here the discrimination and violence motivated by “gender” differences—but simply and solely “little steps” having a partial and provisional character, not least because they emerge from the political negotiations and compromises among those who, *in the given conditions*, are admitted to perform them. Just therefore, I would like to suggest to pause and reflect anew on the partial and incomplete character of the accepted definitions that would be imposed on all of us once included into a passed law. As a matter of fact, to adjust or change those fixed

definitions at a later moment might take a lot of time. Meanwhile, their discriminatory consequences, contrary to the intentions of the proponents, would unfortunately fall on those who would remain excluded.

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