This article is dedicated to the memory of my friend Valerio Zanone: "He was a man, take him for in all, I shall not look upon his like again" (W. Shakespeare, Hamlet, Act 1, Scene 2).

Zan would be Law v. Freedom of speech. A case for liberal reflection.
by Andrea Bitetto

Undoubtedly Henry L. Mencken was right saying that "the trouble about fighting for human freedom is that you have to spend much of your life defending sons of bitches: for oppressive laws are always aimed at them originally, and oppression must be stopped in the beginning if it is to be stopped at all".

This quotation seems to be particularly true whenever you run into issue related to freedom of speech and hate speech.

Recently, Italian Parliament scheduled the discussion about the so called Zan bill (the proposal of a new law made by an Italian MP, Zan, member of the Democratic Party. Zan bill aimed to allegedly strengthen the protection of LGBTQ+[1] against harassment, abuse, violence and/or discrimination.

From a technical point of view, Zan bill tried to broaden the boundaries of a previous enacted statute, the so called Mancino Law[2] .

Mancino Law is a statute that sanctions and condemns as a criminal offence any phrase, gesture, action and slogan aimed at inciting hatred, incitement to violence, discrimination and violence on racial, ethnic, religious or national grounds. The law also punishes the use of emblems or symbols.

In such a context, the supporters of Zan bill seek to include new offences related to acts of discrimination on grounds of sexual orientation in the Mancino Law.

From a staunch liberal perspective such an attempt should be carefully scrutinized. Although liberal rights are widely accepted in the abstract, at least in Western democracies, but they are controversial in detail.

As a matter of fact, what is really at stake is the inner tenet of freedom of speech. Free speech, as it has come to be understood in Western democracies, covers more than traditional political speech[3] even broadly construed.

For sake of clarity and to avoid any risk of being misunderstood, the blame is not on Zan bill, but we should blame Mancino Law first. In fact, Zan bill seems to be consistent with the purpose aimed at by the older statute.

Any powerful case for freedom of speech must acknowledge that speech can be dangerous, that it can cause harmful acts, that the marketplace of ideas is not guarantee of safety. There

---

[1] LGBTQ+ is an acronym used to refer to lesbian, gay, bisexual, transgender, queer and, more generally, to all those people who do not feel fully represented under the label of heterosexual woman or man, while LGBT+ (or 'rainbow') families are those in which at least one parent identifies as such.

[2] Law No 205 of 25 June 1993, named after the then Home Affairs' Minister Nicola Mancino. Under the terms of the legislative decree if 1 March 2018, n. 21, a consolidation was carried out by transferring certain offences previously contained in the Mancino law to the Criminal Code.

[3] Political free speech relies upon the idea that freedom of expression should (i.e. must) be part and parcel of any defensible conception of self-government. According to R. Dworkin, for example, such a justification is found on at least two distinct and equally important reasons: on the one hand self-government requires free access to information, and, on the other hand, government is not legitimate, and thus has no moral title to coerce, unless all those coerced have had an opportunity to influence collective decisions.

are no guarantees, except that the costs of imposing a regime of censorship outweigh the costs of tolerating dangerous speech and its consequences.

But any rational opposition against any norm banning hate speech is part and parcel of the concept itself of democracy[4].
According to Ronald Dworkin freedom of expression is absolutely crucial to moral agency, and moral agency is the cornerstone of democratic culture[5].
In Dworkin's opinion, freedom of expression is deemed valuable, not just in virtue of the consequences it has, but because it as an essential feature (i.e. a constitutive feature) of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents[6]. Thus, Dworkin claims that each individual's having a sphere of independent decision-making around moral issues is a precondition of democracy itself, and that freedom of expression is closely tied to facilitating that sphere.
After all, as far as we share the creed that in a democracy each and every opinion count – and not just at the polling station – we must conclude that even the worst opinions, even the offensive opinions deeply rooted in bigotry should have room in the public debate.
As Dworkin once pointed out, if weak or unpopular minorities wish to be protected from economic or legal discrimination, then they must be willing to tolerate whatever insults or ridicule people who oppose such legislation wish to offer to their fellow voters, because only a community that permits such insult may legitimately adopt such laws. If we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to respect.
This argument should be upheld by liberals.
Oddly enough it seems to be rejected by progressives.
But after all, between liberals and progressive there is a non-composable fault line. Indeed, progressives from the left are trying to affirm a narrow vision of obtaining justice for oppressed identity groups, and in doing so they are aimed to dismantle racial, sexual and any other hierarchy, to build up a brand-new society. On the other hand, classical liberals believe in setting fair initial conditions and letting events unfold through competition: in such a process there is no room for pre-determined results.
And progressives and liberals clearly diverge about the role played by the individual. While for liberals the individual remains the main actor of human action, for progressives the group within which each individual is classified and grouped takes priority in their quest for fairness. This difference between the two different assumptions of social and political action is fraught with differences. Too often, liberals themselves seem to ignore, or at least forget, that some aspects of liberalism inevitably go against the grain of human nature[7]. Instead, liberalism requires you to defend your opponents' right to speak even when you know they are wrong. And let me add: even when you yourself, as a liberal, do not share, or despise, the illiberal, homophobic, racist, bigots and dangerous views of your opponents. I personally disapprove unreservedly of homophobic, denialist, racist, bigoted nonsense, not to mention all totalitarian and illiberal views (communism, in all its variants, fascism and Nazism with all their nostalgics, autarky, sovereignty and populism). But I think it is essential that these unacceptable positions are publicly discussed, annihilated, and ridiculed for what they actually are.

---

[4] I use the concept of democracy as a synonymous of liberal democracy.

[5] On this specific topic, Dworkin's approach is quite different from classical Stuart Mill's argument in defense of freedom of speech (as stated in J.S. Mill, On Liberty, 1859): on the one hand, Dworkin proposed a justification of freedom of speech deeply grounded on the constitutive element of democratic fairness. On the other hand, Mill's justification was more rooted on an instrumental justification of freedom of speech. A. Levin, Pornography, Hate Speech and Their Challenges to Dworkin's Egalitarian Liberalism, 23 Public Affairs Quarterly, 2009, 358.

[6] R. Dworkin, Freedom's Law, Oxford, 1996, 200. On this specific feature Dworkin's approach is non far from K. Minogue's one: K. Minogue, The Servile Mind, New York, 2010.

[7] The threat from the illiberal left, The Economist, September 4, 2021.

If these are, as I believe, the premises of a clear and coherent liberal position, my readers will understand why I am opposed not so much to Zan bill, but to the very approach of the Mancino Law, to which the proposal stopped in Parliament is strictly linked ant intertwined.

It is never easy to draw a clear line between lawful conduct and criminally sanctioned conduct.
For example, in the United States the same discussion took place dealing with racism. Within that legal system, some authors[8] have pointed out that the imposition of punitive sanctions against nontargeted racist speech would harm people of colour. According to such opinion, some racist speech would no doubt be deterred, however, some racist speech would not be wholly deterred, but rather transformed into an even more effective yet unprosecutable Willie-Horton-like[9] "code" speech.
In any case, we should remember how sensible the distinction made by the Brandenburg case[10] was between advocacy and incitement to violence. The first conduct should never be considered unlawful, whereas the second is already punishable under the Italian criminal code, possibly and appropriately aggravated on account of the abject or futile motives that led to it[11].
From a technical point of view, whenever offences consisting of 'acts of discrimination' are discussed, the real difficulty lies in clearly identifying what they consist of, in order to avoid excessive discretion on the part of the judge.
As a matter of fact, most of the acts which would be treated as crimes are already unlawful according to current Italian criminal law. A judge tasked with assessing whether or not an insult or violence was motivated by racial or sexual discrimination would be faced with a difficult task, with the risk of finding himself on a slippery slope. To confirm this, if one reviews the decisions in which the old Mancino Law has been used, there are few cases: either our country is not racist and therefore the law is superfluous, or it is an average racist country and therefore the law is useless.

A final remark. The Italian legislator must be suffering from schizophrenia. In fact, because of the inflation of verbal expressions, it has decided to eliminate the illegitimacy of insult, overcoming the 19th century concept of the victim's sense of decorum and honour. Perhaps, after all, it would have sufficed to keep that rule alive, and to use, when necessary, the other existing rules of the criminal code.

In all matters relating to the freedom of the individual and, above all, in matters of freedom of expression, we must not, as liberals, forget the words of T.S. Eliot's Samuel Beckett, for whom "the last temptation is the greatest treason: to do the right deed for the wrong reason".

---

[8] S.H. Shiffrin, Racist Speech Outsider Jurisprudence and the Meaning of America, 80 Cornell L. Rev. 43 ff. 93 (1994). According to this author a different approach could be tried dealing with targeted racist speech: applying racist speech sanctions to targeted racist speech does risk the same fanning of racial resentment, but this effect – according to Shiffrin – would be somewhat mitigated by the presence of a specific victim.

[9] During the 1988 presidential election, William "Willie" Horton became a central figure in Bush's campaign and a way for the candidate to imply that his opponent, Massachusetts governor Michael Dukakis, was soft on crime. His case stoked a debate on whether criminals should be allowed temporary furloughs from prison. When a political action committee used Horton's mug shot in an attack ad, he became part of an infamous election-season strategy to stoke fear and racial anxiety among white voters.

[10] Brandenburg v. Ohio, 1969.

[11] Pursuant to article 61, n. 1, Italian Criminal Code.