

GENDER-BASED STEREOTYPES AND THE JUDICIARY.  
ITALY BEFORE THE ECHR

*ESTEREOTIPOS DE GÉNERO Y PODER JUDICIAL. ITALIA ANTE  
EL TEDH*

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**ABSTRACT:** As recently evidenced by the European Court of Human Rights (ECHR, *JL v. Italy*, 2020), the “tolerated residuum” of sexual abuse and violence by males is far from limited to Italian societal structures; it also has a significant impact on legal institutions and particularly on criminal proceedings.

Within rape trials, the endorsement of negative attitudes towards women is frequently coupled with the acceptance of an array of ‘monstrous’ rape myths (stereotyped and/or false beliefs about rape, rape victims, and rapists). These myths shift the blame for sexual assault from the perpetrators to the victims, reaching a point where the victim’s claim becomes a test of her character and credibility, particularly concerning her sexual behavior and moral integrity. Consequently, this phenomenon contributes to allowing the Italian criminal justice system to become a system of secondary victimization rather than a source of support for women who have been raped.

A critical analysis of the *JL v. Italy* decision allows us to expose the underlying internalization of gender-based stereotypes and the epistemic injustice that continues to influence Italian judges and society, which, in turn, increases the divide between the law in the books – the formal protections enshrined in rape shield laws – and the law in action.

**KEY WORDS:** Gender stereotyping; rape myths; victim blaming; secondary victimization; epistemic injustice.

**RESUMEN:** Como ha puesto de manifiesto recientemente el Tribunal Europeo de Derechos Humanos (TEDH, *JL contra Italia*, 2020), el “residuo tolerado” de abusos y violencia sexuales por parte de varones dista mucho de limitarse a las estructuras sociales italianas; también tiene un impacto significativo en las instituciones jurídicas y, en particular, en los procesos penales.

En los juicios por violación, la aprobación de actitudes negativas hacia las mujeres suele ir acompañada de la aceptación de una serie de “monstruosos” mitos sobre la violación (creencias estereotipadas y/o falsas sobre la violación, las víctimas de violación y los violadores). Estos mitos desplazan la culpa de las agresiones sexuales de los agresores a las víctimas, llegando a un punto en el que la denuncia de la víctima se convierte en una prueba de su carácter y credibilidad, especialmente en lo que se refiere a su comportamiento sexual y su integridad moral. En consecuencia, este fenómeno contribuye a permitir que el sistema de justicia penal italiano se convierta en un sistema de victimización secundaria en lugar de una fuente de apoyo para las mujeres que han sido violadas.

Un análisis crítico de la sentencia del caso *JL contra Italia* nos permite sacar a la luz la interiorización subyacente de estereotipos basados en el género y la injusticia epistémica que sigue influyendo en los jueces y la sociedad italianos, lo que, a su vez, aumenta la brecha entre la ley en los libros -las protecciones formales consagradas en las leyes de protección contra la violación- y la ley en acción.

**PALABRAS CLAVE:** Estereotipos de género; mitos sobre la violación; culpabilización de la víctima; victimización secundaria; injusticia epistémica.

**SUMMARY.- I. STEREOTYPES: WHAT ARE WE TALKING ABOUT?- II. JUDICIAL GENDER STEREOTYPING AND RAPE MYTHS.- III. THE «ITALIAN STYLE» BEFORE THE ECHR.- IV. LESSONS FROM STRASBOURG. THE SOCIETAL PARADOX.- V. FACTS VS. GENDER STEREOTYPES.- VI. FROM IDENTITY TO SOCIETAL DISCRIMINATION.**

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## **I. STEREOTYPES: WHAT ARE WE TALKING ABOUT?**

Talking about stereotypes is something quite new in legal discourses, which need to intersect with other social sciences to fully understand the phenomenon.

The social psychology literature presents an array of varying conceptions. One might propose a broad and neutral conception which assumes that «stereotypes are widely held associations between a given social group and one or more attributes»<sup>1</sup>. This assumption allows us to shed light on some significant facets of stereotypes: they are social and cultural constructions shared within a society, i.e. social norms that create expectations about how each person should behave (preconceptions); they entail different levels of generalization; and they are quite rigid and stratified in the social collective imaginary.

These aspects express what stereotypes can do, as tools to simplify both reality and the way one thinks about reality. However, such a process of simplification brings two important consequences: on the one hand, it implies a form of «over-categorization» by inference, since there is a surreptitious overlapping between the personal characteristics of an individual and his or her belonging to a certain social group, thus producing oversimplified images or ideas of a particular type of person or thing; on the other hand, it generates a perception of homogeneity among social categories, based on which certain characteristics of social groups are arbitrarily associated with all its members, and vice versa.

It is quite clear that stereotypes are ubiquitous. The positive function arises from their cognitive role, for stereotypes, as mental representations of real differences among groups, allow easier and more efficient processing of information and, in so doing, they become tools for understanding individuals and groups of individuals as an aid to rationalizing the world we live in.

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<sup>1</sup> FRICKER, M.: *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford, Oxford University Press, 2007, p. 30 f. For further conceptions, see STANGOR, C. (ed.): *Stereotypes and Prejudice: Essential Readings*, Philadelphia, Psychology Press, 2000; MCGARTY, C.-YZERBYT, V.Y. and SPEARS, R. (eds.): *Stereotypes as Explanations: The Formation of Meaningful Beliefs about Social Groups*, Cambridge, Cambridge University Press, 2002; LEYENS, J.P.-YZERBYT, V.Y. and SCHADRON, G.: *Stereotypes and Social Cognition*, London, Sage Publications, 1994, p. 11.

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Regrettably, virtues rarely exist in isolation. There is always a dark side that we have to acknowledge, understand, and address. Indeed, while stereotypes allow for a quick and intuitive judgment of some groups, they may also cause, consciously or unconsciously, distorted judgments and biased behavior, such as discrimination and inter-group conflicts or the violation of individual and/or collective identities. The triadic slippery-slope relationship between stereotypes, prejudices, and discrimination opens the door to many dangerous effects on society and human beings that the law is still far from grasping.

The nature of stereotypes is not completely understood. From the legal perspective, the main challenge at stake is: How can legal rules and principles take stereotypes seriously? From a more general and theoretical perspective, what is the relationship between law and society? What society do we want to live in? Finally, what kind of law do we want when it comes to social justice and equality?

If it is true that such questions are too vast for a complete analysis, it is no less true that the inescapable task for all legal scholars who aspire to be socially responsible is to heed the rumors and even the noises stemming from social conflicts and explore feasible ways of responding to them.

Gender stereotypes are powerful and paradigmatic examples for understanding what stereotypes are and what they do in our society. They belong to the so-called 'big three' in the field of inequality and discrimination, which include class, race, and gender as the main traditional markers of human identity<sup>2</sup>.

A gender stereotype is a generalized view or preconception about attributes or characteristics, or the roles that are – or ought to be – possessed by, or performed by, women and men (sex, gender role, sexual, intersexual stereotypes).

Beyond the socio-legal, post-structuralist, post-modernist, and queer theories that help demystify such topics, it seems useful to differentiate between some features that typify these social constructions.

Gender stereotypes, like any others, have *descriptive* components, or beliefs about how males and females typically are or act (e.g. descriptive statements such as 'most part-time workers are women'), as well as *prescriptive (normative)*<sup>3</sup> components, or beliefs about how males and females should act or be (e.g. women

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2 This conventional classification is not complete as it appears under-inclusive of the new and fluid identities in postmodern society: DATOR, J.: *Beyond Identities: Human Becomings in Weirder Worlds*, Springer, Cham, 2022, p. 21 ff.

3 It seems worth noting that this legal taxonomy originated in the US after the milestone decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) stating that discrimination against an employee based on sex stereotyping – that is, a person's nonconformity to social or other expectations of that person's gender – constitutes impermissible sex discrimination in violation of Title VII of the Civil Rights Act of 1964. A cisgender nonconforming woman did not receive a promotion at the accounting firm where she worked

are supposed to be nurturing and avoid dominance, and men are supposed to be agentic and avoid weakness).

Furthermore, they can be «role typing» since they collect sets of behavior and typify roles (e.g. women should be mothers). This means that they are discursive practices that subjectify individuals, as Foucault would have said.

Ultimately, everyone knows that each individual has multiple, multifaceted features making him or her unique to a certain extent. Lesbian, black, and Muslim women encompass three distinct indexes of discrimination. The key insight of intersectionality theory, coined in 1989 by Kimberlé Crenshaw<sup>4</sup>, is that discrimination is not just additive; categories may intersect to produce unique forms of disadvantage. This assumption is paramount to prevent legal and/or interpretative *lacunae*. Following this premise, a new taxonomy emerges: stereotypes can be «intersectional» or «compounded»<sup>5</sup> and cause multiple or «intersecting» axes of discrimination<sup>6</sup> for legal discourses to address.

## II. JUDICIAL GENDER STEREOTYPING AND RAPE MYTHS.

The crucial point is that stereotypes are sometimes unconscious and internalized individual beliefs of societal shared expectations, so neuroscientists talk about implicit bias. As social norms, they produce social sanctions when one does not act in conformity with the «conventional view» and does not perfectly fit into what the mainstream culture expects.<sup>7</sup>

These social norms, in turn, affect judges and the decision-making process too, including the legal reasoning and outcomes of judgments. Once this happens, one moves from potentially wrongful gender stereotypes and judicial stereotyping<sup>8</sup> that may breach human rights and fundamental freedoms. Wrongful

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because her gender expression was not sufficiently feminine (Ann Hopkins was repeatedly told by her employers to dress, speak, and act in a manner more appropriate to her gender).

- 4 CRENSHAW, K.: "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum*, 1989, p. 139 ff.; EAD.: "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color", *Stanford L. Rev.*, 43, 1991, p. 1241 ff.
- 5 COOK, R. and CUSACK, S.: *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, 2010; CASADEI, T.: "Giusfemminismo: profili teorici e provvedimenti legislativi", *Politeia*, XXXII, 124, 2016, p. 33 f. (analyzing, from gender legal studies and feminist approaches, further classification such as ideological and epistemological stereotypes).
- 6 MACDOWELL, E.L.: "Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence", *J. Gender Race & Just.*, 2013, p. 531 ff. (applying intersectionality doctrine to domestic violence).
- 7 KENNEDY, D.: "Sexual Abuse, Sexy Dressing and the Eroticization of Domination", *26 New Eng. L. Rev.*, 1991-1992, pp. 1309-1310.
- 8 CUSACK, S.: "Eliminating judicial stereotyping". *Equal access to justice for women in gender-based violence cases. Office of the High Commissioner for Human Rights*, 2014, p. 16; S. CUSACK and A. TIMMER, *Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v The Philippines*, in *Human Rights Law Review*, 2011, 11(2), pp. 329-342.

gender stereotyping is a frequent cause of discrimination against women. It is a contributing factor in violations of a vast array of rights such as the right to health, an adequate standard of living, education, marriage and family relations, in addition to those concerning work, freedom of expression, freedom of movement, political participation and representation, effective remedy, and freedom from gender-based violence.

The latter is one of the more sensitive issues arising from the non-criminalization of marital rape, perceiving women as the sexual property of men, failing to investigate, prosecute and sentence sexual violence against women, believing that victims of sexual violence agreed to sexual acts, as they were not dressed and behaving modestly.

In the context of rape trials, gender stereotypes can also be described as rape myths. Just to mention some symbolic examples of rape myths that act against women, one can think of some very common assertions: a) if a woman gets drunk, it is her own fault if she is raped<sup>9</sup>; b) if one is in a relationship with someone, there is no sexual violence; c) rape is usually violent and involves a stranger; e) rape happens only to “certain” types of women who behave provocatively.

Rape myths are prejudiced, stereotyped, or false beliefs about rape, rape victims, and rapists themselves that shift the blame from the perpetrators to the victims<sup>10</sup>.

It is quite clear that all these social constructions are derived from the so-called ‘rape culture’. Thus, for a rape to be ‘real’ – to quote Susan Estrich’s milestone book<sup>11</sup> – it is supposed to happen with a stranger, without consent, to very sensitive, pretty but not provocative women who don’t take drugs, and so on. In the absence of these mainstream rape features, society tolerates rape. Indeed, this «‘tolerated residuum’ [...] is plausibly attributed to contestable social decisions about what abuse is and how it is important to prevent it»<sup>12</sup>.

Rape myths influence justice and the criminal justice system, since they undermine the claims or expectations of victims, in addition to reinforcing the

9 This assumption seems to remind us of the so-called «*ius osculi*», a cultural model and a social practice established in ancient Rome which allowed the male relatives of a woman to kiss her to test if she were drunk (BETTINI, M.: “Il divieto fino al «sesto grado» incluso nel matrimonio romano”, *Parenté et stratégies familiales dans l’Antiquité romaine. Actes de la table ronde des 2-4 octobre 1986* (Paris, Maison des sciences de l’homme), Rome, École Française de Rome, 1990, p. 38 ff.).

10 See BURT, M.R.: *Cultural Myths and Supports of Rape*, in *Journal of Personality and Social Psychology*, 38, 1980, pp. 217-230; GRUBB, A. and HARROWER, J.: “Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim”, *Aggression and Violent Behavior*, 13, 2008, pp. 396-405.

11 ESTRICH, S.: *Rape: How the Legal System Victimized Women Who Say No*, Cambridge, Harvard University Press, 1987.

12 KENNEDY, D.: *Sexual Abuse, Sexy Dressing*, n 7 above, at p. 1320.

perpetrators, and reproducing social norms. The impact on judicial reasoning is both huge and concealed: the assessment of a victim's credibility is not free, for it depends on how consistent the victim and her behavior are with dominant values and narratives.

It is not surprising, therefore, that feminist legal theories have long emphasized the close link between patriarchal<sup>13</sup> and sexist social structures on the one hand and a high level of 'acceptance' of rape myths, on the other.

The tendency to deny, minimize, or normalize male sexual aggression against women based on false myths and stereotypes, stems from a clear ideology that tries to preserve or impose a hierarchical relationship between men and women<sup>14</sup>. This trend is also produced and reproduced in the media and judicial representation of victims of gender-based violence, since these representations revictimize the condition of women, who are already victims or potential victims of violence. Thus, it is quite clear that rape myths, such as gender stereotypes in rape cases, deprive women of 'rape victim' status.

Bearing on women rather than men (i.e. on the alleged victims rather than the alleged aggressors), the dual burden of avoiding the perpetration of violence and abuse, on the one hand, and adjusting their behavior accordingly on the other, is the most significant and typical disciplinary effect of this state of things<sup>15</sup>.

### III. THE «ITALIAN STYLE» BEFORE THE ECHR.

Italy is not immune from such phenomena. There is an «Italian style»<sup>16</sup> that shows how national courts use judicial gender stereotyping in rape trials and, more generally, in gender violence criminal proceedings.

To expose the genealogies of power and disciplinary discursive practices produced by the judiciary, it therefore seems useful to draw upon some symbolic cases: a domestic decision, whose legal reasoning reveals a long-standing and archaic connection between sexist stereotypes and rape myths; the subsequent

13 From a legal anthropology viewpoint coupled with feminist approaches to domestic violence, see GRIBALDO, A.: *Unexpected Subjects Intimate Partner Violence, Testimony, and the Law*, University of Chicago Press, 2020; EAD., "The paradoxical victim: Intimate violence narratives on trial in Italy", *American Ethnologist*, 41(4), 2014, pp. 743-756, 744. For helpful sociological insights, see SACCA, F. (ed.): *Stereotipo e pregiudizio. La rappresentazione giuridica e mediatica della violenza di genere*, Franco Angeli, Milano, 2021.

14 BROWN MILLER, S.: *Against our will: Men, Women and Rape*, New York, 1975; BURT, M.R.: "Cultural Myths and Supports of Rape", *J. Person. and Soc. Psych.*, 38, 1980, p. 217.

15 FRANKS, M.A.: "How to Feel Like a Woman, or Why Punishment Is a Drag", 61 *UCLA L. Rev.*, 2014, p. 566.

16 According to the traditional but never-ending view of John Henry Merryman ("The Italian Style III: Interpretation", *Stanford L. Rev.*, 18 (4), 1966, pp. 583-611; Id.: "The Italian Style II: Law", *ivi*, 18 (3), 1966, pp. 396-437; Id.: "The Italian Style I: Doctrine", *ivi*, 18 (2), 1965, pp. 39-65). These articles eventually became part, in modified form, of an 'Introduction' to 'the Italian Legal System': MERRYMAN, J.H.- CAPPELLETTI, M. and PERILLO, J.M.: *The Italian Legal System: An Introduction*, Stanford, Stanford University Press, 1967.

judgment by the European Court of Human Rights<sup>17</sup> which, upon an application from the presumed victim of an Italian rape case, rule against Italy due to the national court's monstrous legal reasoning, for it raised guilt-inducing, moralizing and sexist arguments breaching the applicant's private life.

Here, in summary, are the facts of the case. In 2008, J.L., a 22-year-old female student claimed that after a party to which she had been invited by one of her alleged assailants, she was forced to engage in sexual activity with seven men inside a car while she was under the influence of alcohol.

In 2013, the court of first instance sentenced six of them for group sexual assault aggravated 'by the conditions of physical and mental inferiority' of the victim.

Two years later, however, the Court of Appeal of Florence<sup>18</sup> overturned the verdict, deconstructing the woman's credibility and assuming there was no evidence that the defendants had committed the alleged attack without her consent.

This judgment referenced J.L.'s sexuality and family/personal life, stigmatizing her as a «fragile», «vulgar», and even «lascivious» woman, labeling her behavior as «uninhibited», «non-linear», «adept at navigating (bi)sexuality and of having casual sex encounters of which she was not entirely convinced», criticizing her «ambivalent attitude to sex».

Thus, the Court focused on her previous relations with two of the men, on her provocative acts such as «'displaying' red underwear, mounting a mechanical bull, acting in a sexually violent documentary by an abuser, and participating in sex-themed art practices shortly after the abuse»<sup>19</sup>. All these arguments served to condemn the victim and contributed to showing that J.L. had not withdrawn her consent to the sexual acts with the group of abusers. She was stigmatized as a prostitute, effectively asking for what had happened.

Blaming victims is a way to exercise control over women's lives and bodies, essentially trying to perpetuate the structure of the patriarchal society and the normalizing model of heteronormativity.

This decision was to be regarded as the 'final' decision, as the Florence Public Prosecutor's Office took the view that the case should not proceed and decided

17 *J.L. v. Italy*, ECHR, Application No. 5671/16, judgment of 27 May 2021 (*hudoc.echr.coe.int*).

18 Corte d'Assise di Appello di Firenze, 3 June 2015, n. 858.

19 ILIEVA, M.S.: *J.L. v. Italy: A Survivor of Trivictimization – Naming a Court's Failure to Fully (Recognize and) Acknowledge Judicial Gender-Based Revictimization*, September 6, 2021 (*strasbourgobservers.com*).



not to prosecute<sup>20</sup>. In the light of the applicable domestic law, the only thing the woman could do was to submit the case to the ECHR and complain about the way the criminal proceeding had been conducted and the arguments that had been considered relevant to the assessment of her credibility.

The European Court of Human Rights could not challenge the verdict of the court of appeal, but the applicant (a woman) successfully complained that, as a result of the arguments on which the court had based its decisions, her right to respect for private life and personal integrity had been violated, in breach of Article 8 of the Convention.

In addition, the European Court of Human Rights stated that the wording of the judgment had illegally and unnecessarily caused further harm to the alleged victim, and it more generally questioned the surreptitious connection between the judgmental and moralizing comments used by the national judges and the persistence in Italian society of sexist stereotypes regarding the role of women.

The sexist lexicon and arguments – such as, among others, the reference to the applicant's family situation, her relationships, sexual orientation and clothing choice – were irrelevant to assess both the facts and the applicant's credibility. Furthermore, they exposed the women to what the ECHR calls «secondary victimization»<sup>21</sup>. This judicial gender stereotyping goes beyond the violation of fundamental rights: it is the mirror of a widespread sexist culture designed to affect all women who suffer violence, and «discourage them from relying [...] on the judicial system» because of the risk of «secondary victimization» they would run<sup>22</sup>.

The criticism from Strasbourg, and the positive obligation for States to protect victims of gender-based violence from secondary victimization, therefore, expose the ubiquitous, governmental effects<sup>23</sup> of prejudices about women in Italian society,

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20 For critical comments on the rule of exhaustion of domestic remedies in the *J.L.* case, see DI MATTEO, F.: "Diritto alla privacy, stereotipi sessisti nelle decisioni giudiziarie e Corte europea dei diritti umani: il caso *J.L.*", *Diritti umani e diritto internazionale*, 2022, pp. 185-197.

21 Secondary victimization can be defined as the negative effect occurring when the victim suffers further harm not as a direct result of the criminal act but due to how institutions and other individuals treat the victim. Indeed, secondary victimization may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation regarding the same things, and the use of inappropriate language or insensitive comments by all those who came in contact with victims (WILLIAMS, J.E.: "Secondary Victimization: Confronting Public Attitudes About Rape", *Victimology*, 1984, 9, pp. 66-81). Beyond what happens in rape trials and procedures, victimization comes from the negative reactions of the social community (i.e., family, friends): AHRENS, C.E.: "Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape", *Am J Community Psychol.*, 2006, 38(3-4), pp. 263-74.

22 *J.L. v. Italy*, ECHR, n 17 above, (§ 141).

23 FOUCAULT, M.: *Sicurezza, territorio, popolazione. Corso al Collège de France 1977-78*, in Italian translation, NAPOLI, P., Milan, Feltrinelli, 2007.

and the risk of discourses that both subjectify and immobilize women's identities, controlling and stabilizing power relations based on male hegemony<sup>24</sup>.

#### IV. LESSONS FROM STRASBOURG. THE SOCIETAL PARADOX.

The ECHR revealed the huge societal paradox affecting the Italian system. Indeed, the court admitted that many domestic (and international) legal rules shield rape victims from being subjected to traditional notions of rape, and, at the same time, forbid gender stereotypes as a typical basis for discrimination and revictimization. Article 5 of CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) qualifies gender stereotypes as a real cause of violation of women's rights in the public and private spheres since they influence both ordinary people's and institutional actors' conducts (such as legislators, public authorities and courts)<sup>25</sup>.

Theoretically, this convention, which seems to be a sort of Bill of Rights for women, seeks to produce a transformative equality<sup>26</sup> modifying the educational and social system as whole. It clearly recognizes the role of each country's culture and tradition in discriminatory practices. Accordingly, it calls on State parties to «take all appropriate measures [...] to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women».

Still, the Council of Europe's Convention on 'Preventing and Combating Violence against Women and Domestic Violence' (better known as the 'Istanbul Convention'<sup>27</sup>) indicates, among the general obligations of the State parties, the adoption of specific measures to promote socio-cultural changes «with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men» (Art. 12). Moreover, both the latter convention (Arts 15 and 16) and the European legislation (Art. 18, EU Directive 2012/29/EU establishing minimum

24 MARINI, G.: "L'Italian style fra centro e periferia ovvero Gramsci, Gorla e la posta in gioco nel diritto privato", *Riv. it. sc. giur.*, 2016 (7), p. 101.

25 HOLTMAAT, R.: "The CEDAW: A Holistic Approach to Women's Equality and Freedom", in A. HELLMUM and H.S. AASEN (eds.), *Women's Human Rights: CEDAW in International, Regional and National Law*, Cambridge, Cambridge University Press, 2013, p. 105 f.

26 Transformative equality is coupled with the so-called anti-stereotyping doctrine in the US legal system: FRANKLIN, C.: "The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law", 85 *N.Y.U. L. Rev.*, 2010, p. 83.

27 See BRASCHI, S.: "Combating Domestic Violence Against Women: Does Italian Legislation Comply with the Istanbul Convention?", *European Criminal L. Rev.*, 12(3), 2022, pp. 314-341. See also D'AMICO, M.- NARDOCCI, C. (eds): *Gender-Based Violence between National & Supranational Responses, the Way Forward*, Napoli, Editoriale Scientifica, 2021.

standards on the rights, supports and protection of victims of crime, which has been in force in Italy since 2015) explicitly prohibit secondary victimization during the various stages of criminal proceedings, in view of the primary need to protect vulnerable subjects such as women.

At the national level, the Strasbourg judges also found that the Italian legal framework was adequate. Indeed, there are many 'shield laws' in criminal legislation that protect victims of gender-based violence<sup>28</sup>.

Here lies the crucial point: despite all these legal sources, there is still an enormous difference between passing and enforcing laws. The grammar of human rights and formal rules are not enough to curb the negative impact of stereotypes. The gap between law in books and law in action<sup>29</sup>, between normative propositions and operational rules persists because monstrous myths are deep-rooted in social discursive practices. According to the Court, gender stereotypes are cultural, societal and institutional issues that affect judicial perceptions and impartiality, therefore the fairness and coherence of the whole decision-making process. They arise from society as a whole; they convey cases of secondary victimization and, over and above criminal penalties, may cause civil damage that must be compensated.

Most importantly, the acceptance of rape myths in Italy involves both women and men. Even female judges belong to this society and may have internalized arcane and archaic prejudices. Critical studies have long attempted to promote diversity in the judiciary<sup>30</sup>. However, as the J.L. case has shown, the representation of women in courts does not eradicate the issue of wrongful judicial stereotyping, as women themselves accept the fairytale of the «eternal feminine» (*Das Ewig-Weibliche*), which in turn supports the traditional binary gender code and the ancestral model of hegemonic masculinity<sup>31</sup>.

28 See, for instance, Law No. 118 (the so-called law on femicide) of October 15, 2013; Law No. 69 of July 19, 2019, Amendments to the Penal Code, Code of Criminal Procedure and other Provisions on the Protection of Victims of Domestic and Gender Violence (known as the 'Red Code'). Furthermore, see *J.L. v. Italy*, ECHR, n 17 above, § 60-61.

29 POUND, R.: "Law in Books and Law in Action", 44 *Am. L. Rev.*, 1910, p. 12.

30 ESCOBAR-LEMMON, M.C.-HOEKSTRA, V.J.-KANG, A.J. and CAUL KITTILSON, M. (eds): *Reimagining the Judiciary: Women's Representation on High Courts Worldwide*, Oxford, Oxford University Press, 2021.

31 CONNELL, R.W. and MESSERSCHMIDT, J.W.: "Hegemonic Masculinity: Rethinking the Concept", *Gender & Society*, 19, 2005, p. 829. For a brilliant historical sketch of the Italian path, see Pozzo, B.: *Masculinity Italian Style*, in *Nevada Law Journal*, Vol. 13, Iss. 2, 2013, p. 585 ff. See also, VAN CLEAVE, R.A.: "Sex, Lies, and Honor in Italian Rape Law", 38 *Suffolk U. L. Rev.*, 2005, pp. 427 ff. (discussing the milestone case of 'jeans', that is 'Cass. Pen., sez. III, 6 novembre 1998, Cristiano, *Foro it.*, II 1999, CXXII, 163'). Indeed, the Corte di Cassazione subsequently made it clear that it is not a defense against the offense of sexual violence that the victim was wearing jeans and therefore must have consented (Cass. Pen., sez. III, 26 novembre 2001, *altalex.com*). For an updated comparison between the Italian legal system and that of the U.S. after the #MeToo social movement against sexual abuse, sexual harassment, and rape culture, see EAD.: "Sudden, Forced, and Unwanted Kisses in the #MeToo Era: Why a Kiss Is Not Just a Kiss under Italian Sexual Violence Law", *U. Det. Mercy L. Rev.*, 2018, p. 628 ff.

In short, the Florentine case fits fully into what the New York Times called, a few years ago, «a sexist storm over Italy's Courts with female judges in its center»<sup>32</sup>. Indeed, it is worth noting that the majority of the members of the Italian Court were women, and many other decisions poisoned by gender stereotyping, in cases of domestic violence and femicide, were and still are ruled by female judges<sup>33</sup>.

Further evidence comes from statistics. Following the empirical approach of the Strasbourg Court, it is possible to mention a series of data, i.e., indicators, for measuring the level of 'rape myths acceptance'<sup>34</sup> that still pervades the national context: from the seventh report on Italy by the United Nations Committee on the Elimination of Discrimination against Women, to the GREVIO<sup>35</sup> report (which is an institution with the function of monitoring the implementation of CEDAW in countries that have ratified the convention). Both reports prove the persistence of gender stereotypes in Italian society and point out the low rate of prosecutions and convictions for gender-based violence. All of this explains why victims do not trust the criminal justice system and often do not even report gender-based crimes.

National data similarly acknowledge this social and institutional *vulnus*. The Report on 'Stereotypes about gender roles and the social image of sexual violence', published by the Italian National Institute of Statistics in 2020<sup>36</sup>, demonstrates the acceptance of various monstrous myths among Italians. 39.3% of the population believe that a woman may well avoid sexual intercourse if she really does not wish to engage in it: that is, without violence, there is no real rape, as Susan Estrich<sup>37</sup> would say. The percentage of those who think that women can provoke sexual violence by how dress or they behave is also high (23.9%)<sup>38</sup>. Thus, 15.1% hold the opinion that a woman who undergoes sexual violence under the influence of drugs or alcohol is partially responsible. Such an assumption seems to turn the view upside down or, at least, make it incomplete: the victims 'altered' state,

32 PIANIGIANI, G.: *A Sexism Storm Over Italy's Courts, With Female Judges at Its Center*, The New York Times (18 March 2019), ([nytimes.com](https://www.nytimes.com)).

33 The storm is not over, as a recent Italian decision shows. The Public Prosecutor's Office of a small city in the South of Italy (Benevento) asked for the dismissal of a woman's complaint of sexual violence against her husband, arguing that a man must «overcome that little bit of resistance that every woman, in the course of a stable and lasting relationship, in the tiredness of daily tasks tends to exercise when a husband attempts a sexual approach» [SANNINO, C.: *Il mio ex mi stuprava. Uno choc che a negarlo sia stata una pm donna*, December 21, 2021 ([repubblica.it](https://www.repubblica.it))].

34 BURT, M.R.: *Cultural Myths and Supports for Rape*, in *Journal of Personality and Social Psychology*, 38, 1980, p. 217.

35 GREVIO is the Council of Europe Expert Group on Action against Violence against Women and Domestic Violence.

36 The document can be found at [www.istat.it](http://www.istat.it). The new agenda, following Law No. 53, 'Disposizioni in materia di statistiche in tema di violenza di genere' (May 5, 2022), aims to ensure an adequate information flow on gender-based violence against women in order to design effective policies to prevent and monitor the phenomenon.

37 ESTRICH, S.: *Rape: How the Legal System Victimized Women*, n 11 above.

38 KENNEDY, D.: *Sexual Abuse, Sexy Dressing*, n 7 above, p. 1309.

in fact, instead of being evaluated as a risk factor of exploitation of the woman's vulnerability, becomes a condition for discrediting her and her credibility and leading her back to the dominant and often paradoxical logic of consent.

The data on the judicial system are even less encouraging, as revealed by the Report of the 'Parliamentary Commission<sup>39</sup> of Inquiry into Femicide, as well as all forms of Gender-based Violence<sup>40</sup> on gender and domestic violence in the judicial realm. The document highlights the lack of regular and adequate judicial training on human rights and gender equality especially in cases involving violence against women. It demonstrates how judges have no specific expertise in this field and how the majority of judicial offices suffer dimensional and/or organizational gaps, except some good practices that are not widespread as they are not sufficiently known. Moreover, such inadequacy concerns the entire apparatus of professionals working on gender-based violence proceedings. Even lawyers and psychologists (in the case of third-party interventions and expert opinions) often have no suitable skills.

## V. FACTS VS. GENDER STEREOTYPES.

There is something more we can learn from Strasbourg. The narrative of the *J.L.* case shows how stereotypes in domestic legal reasoning and decision-making process can be harmful and violate human rights.

Actually, the ECHR has already addressed this issue on several occasions. The court rejected the gender stereotyping of women 'as primary caregivers to children' in *Konstantin Markin v. Russia*<sup>41</sup> that leads to discrimination even for men who need to obtain parental leave. The milestone case of *Carvalho Pinto de Sousa Morais v. Portugal*<sup>42</sup> is another attempt to expose the dangers of gender stereotyping since the Strasbourg court found that the compensation awarded to a 50-year-old woman who could not have sexual relations after a failed operation had been reduced by the national court partly because of the intersection of age and gender stereotypes.

39 This institutional body has been established with the task of monitoring the implementation of the Istanbul Convention in Italy.

40 Doc. XXII-bis n. 4, Report of June 17, 2021 (*senato.it*); and Doc. XXII-bis n. 15, Relazione finale sull'attività della Commissione Parlamentare di Inchiesta sul Femminicidio, nonché su ogni forma di violenza di genere, September 6, 2022 (*senato.it*). See also N. FIANO, *Le recenti novità in tema di protezione delle donne vittime di violenza: un'analisi alla luce del diritto costituzionale* (*federalismi.it*, January 25, 2023).

41 *Konstantin Markin v. Russia*, ECHR, judgment of 22 March 22, 2012, Application no. 30078/06 (*hudoc.echr.coe.int*).

42 *Carvalho Pinto de Sousa Morais v. Portugal*, ECHR, judgment of 25 June 2017, Application no. 17484/15 (*hudoc.echr.coe.int*). This decision was a case of intersectionality, even though the Court did not pay attention to the combination of sexism and ageism factors. For a detailed analysis of gender stereotypes bias from the lens of feminist judgments, see EVOLA, M.- KRSTI, I. and RABADAN, F.: "Feminist Judgments", in VUJADINOVIĆ, D.- FRÖHLICH, M. and GIEGERICH, T. (eds): *Gender-Competent Legal Education. Springer Textbooks in Law*, Springer, Cham, 2023, p. 143 ff., p. 158.

However, *J.L. v. Italy* goes further than those precedents for many reasons. It refers explicitly to the power of 'rape myths'<sup>43</sup> in domestic legal reasoning, arguing that these peculiar forms of gender stereotypes are not facts, i.e. legal arguments able to justify the decision-making process, for they merely reproduce social expectations.

Furthermore, according to the Strasbourg Court, rape myths can be harmful and breach art. 8 (the right to a private life) simply because of the sexist language used by national courts. Such wording has nothing to do with the assessment of the facts, nor does it support the evaluation of the victim's credibility. They are not, therefore, a suitable argument for judicial legal reasoning. They are not arguments to be used by the judiciary to justify their decisions. Thus, from a private law perspective<sup>44</sup>, besides the duty of the State to protect victims of gender-based violence, there is a judicial duty to respect the image, dignity, and privacy of victims.

A second valuable lesson from Strasbourg is that even if criminal proceedings and investigations are adequate (shield practices), and even if there are legal rules to protect victims of rape (shield laws), we need to analyze how sexist arguments and language affect domestic decision-making, to prevent harmful stereotyping from giving rise to secondary victimization.

This assumption is quite intense. It admits that judicial wording does count in assessing whether stereotypes could be wrongful. Indeed, judicial language is an institutional language that means responsibility for judges. It is also a performative language, as John Austin would say<sup>45</sup>, which does something in the world and in society because it is a way of constructing and/or deconstructing identities and subjectivities (including gender), be they individual or collective ones.

Hence, the judge is not only conveying their rights and liabilities to the parties within the context of particular disputes; the judge is also addressing the broader legal community – including other lawyers, judges, legal scholars, law students – and indeed the general public.

43 Implicit references to rape myths can be found in some rare ECHR decisions such as, for instance: *M.G.C. v. Romania*, ECHR judgment of 15 March 2016, Application no. 61495/11, where the domestic courts found that the applicant – eleven years old at the time – had 'provoked' the alleged perpetrators to have sex with her largely because she was «scantily dressed»; *I.P. v. the Republic of Moldova*, ECHR, judgment of 28 April 2015, Application no. 33708/12, where the national judges alluded to women's "immoral" behavior. But it is important to point out that in all these cases the Strasbourg Court underlined that the domestic legal system lacked adequate 'shield laws' and/or that the national authorities had failed to ensure that the investigation and trial proceedings (cross-examination and investigation) were being conducted in a manner compatible with the positive obligations under art. 8 of the Convention.

44 BLANDINO, A.-CARAPEZZA FIGLIA, G.- COPPO, L.- DABIĆ NIKIČEVIĆ, S. and DOLOVIĆ BOJIĆ, K., in VUJADINOVIĆ, D.- FRÖHLICH, M. and GIEGERICH, T. (eds), n 41 above, pp. 505-540.

45 AUSTIN, J.L.: *How to Do Things with Words*, Cambridge-MA, Harvard Univ. Press, 1962; and BUTLER, J.: *Gender Trouble: Feminism and the Subversion of Identity*, New York, Routledge, 1990.

## VI. FROM IDENTITY TO SOCIETAL DISCRIMINATION.

The judgment of the Strasbourg Court is embedded in a European legal discourse that is gradually moving toward taking stereotypes seriously, since they can be a means of breaching human rights, particularly in rape trials where, according to social psychology approaches, rape myths on the one hand and gender stereotypes on the other are overlapping concepts.

However, European courts have little familiarity with the meaning and effects of stereotypes. Looking at some overseas legal experiences where many discrimination issues have emerged at the societal level, one may note that an anti-stereotyping approach has been in use for some time now. Since the 1970s, the American legal system has applied the anti-stereotyping principle and developed criteria of definition and classification<sup>46</sup> (such as the distinction between descriptive and prescriptive or normative stereotypes beyond the generic negative assessment of false and/or prejudicial stereotypes) to name and identify the type of stereotype and make its impact on the judiciary and the decision-making process explicit. Furthermore, Canadian case law is also a good benchmark as it defines useful assessment standards by emphasizing the key role of contextualization and the real interests harmed in each case. All this background is still partially missing in the European legal discourse and, in particular, in the case law of the ECHR. So, a comparative approach can help build more correct and coherent legal reasoning to be pursued not only by domestic courts but also by the ECHR itself to take harmful stereotypes fully seriously.

The crucial point is that «the harm of stereotyping is that it justifies and reinforces discrimination: stereotypes anchor structural inequality». It is only by framing invidious stereotyping as a discrimination issue that courts «can transcend the level of the individual claimant and address the wider harmful implications of such stereotyping»<sup>47</sup>, i.e. the intangible societal harms arising from cultural constructs deeply rooted in the social fabric. However, the *J.L. v. Italy* judgment did not address the discrimination issue, since it merely questioned the violation of the right to respect for the applicant's private and family life.

Actually, art. 8 indeed helps to capture the violation of individual identity and moral integrity, but it does not reveal the Gordian knot of discrimination. Indeed, to argue «that it was not necessary to examine whether there had been a violation of Article 14 [prohibition of discrimination] of the Convention in this case» is highly

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46 See TIMMER, A.: "Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law", 63 *Am. J. Comp. L.*, 2015, p. 239; COOK, R. and CUSACK, S.: *Gender Stereotyping*, n 5 above; NARDOCCI, C.: "La generalizzazione irragionevolmente discriminatoria: lo stereotipo di genere tra diritto e corti", *GenIUS*, January 20, 2023, pp. 1-30.

47 TIMMER, A.: n 50 above, p. 251.

problematic because it stands as a legal and (bio)-political discursive practice that denies the social and hegemonic effect of rape myths<sup>48</sup>.

The truth is that wrongful stereotypes are not an individual, but a social experience. Enhancing the discriminatory effects can be a step toward recognizing and promoting individual and collective narratives beyond the dominant ones that discriminate/subjugate some individuals at the expense of others. This seems to be a feasible way of consciously addressing the «epistemic injustice» that lies behind practices that are still embedded in the collective imaginary<sup>49</sup>.

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48 Coupling on one hand, the cultural hegemony of Antonio Gramsci, as a conceptual tool (GOTTFRIED, H.: "Beyond Patriarchy? Theorising Gender and Class", *Sociology*, 32(3), 1998, pp. 451-468) and, on the other hand, the biopolitics of FOUCAULT, M.: *La volontà di sapere (La volonté de savoir)*, 1976), translated by P. Pasquino and G. Procacci, Milan, Feltrinelli, 1978.

49 FRICKER, M.: *Epistemic Injustice*, n 1 above.



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